U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-D-O-

DATE: MAR. 12, 2019

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an epidemiologist, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

The Petitioner appealed the matter to us, and we dismissed the appeal.[1] The matter is now before us on combined motions to reopen and reconsider. With the motions, the Petitioner submits further evidence relating to her eligibility for a national interest waiver under the *Dhanasar* framework and a statement and other documents claiming that her first attorney provided ineffective assistance.[2] She asks that we grant her motions and approve her request for a national interest waiver. For the reasons discussed below, we will deny the motions.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are

[1] *See Matter of T-D-O-*, ID# 1422412 (AAO Aug. 3, 2018).

[2] The Petitioner was initially represented in these proceedings by attorney [redacted] On appeal, the Petitioner was represented by attorney [redacted] With respect to the current motions, the Petitioner is not represented by counsel.

located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

The Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

First, *Lozada* sets forth the following threshold documentary requirements for asserting a claim of ineffective assistance:

- A written affidavit of the petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel (i.e., the specific actions that counsel agreed to take), the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions.

- Evidence that the petitioner informed former counsel of the allegation of ineffective assistance and was given an opportunity to respond. Any response by prior counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim.

- If the petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the petitioner filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why the petitioner did not file a complaint.

Id. at 639. These documentary requirements are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claim and to deter meritless claims. *Id.* Allowing former counsel to present his or her version of events discourages baseless allegations, and the requirement of a complaint to the appropriate disciplinary authorities is intended to eliminate any incentive for counsel to collude with his or her client in disparaging the quality of the representation.

We may deny a claim of ineffective assistance if any of the *Lozada* threshold documentary requirements are not met. *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000). Second, if the petitioner satisfies these threshold documentary requirements, she must also show that former counsel's assistance was so deficient that she was prejudiced by the performance. Specifically, the petitioner must show that there is a reasonable probability that the outcome would have been different without former counsel's mistakes,[3] and that she had at least a plausible ground for relief.[4] There is no prejudice if the adverse decision would have been issued even without former counsel's errors. *See, e.g., Minhas v. Gonzales*, 236 Fed. Appx. 981 (5th Cir. 2007).

[3] *Yu Tian Li v. United States*, 648 F.3d 524, 527 (7th Cir. 2011); *Delhaye v. Holder*, 338 Fed. Appx. 568, 570 (9th Cir. 2009).
[4] *See Martinez-Hernandez v. Holder*, 778 F.3d 1086, 1088 (9th Cir. 2015).

II. ANALYSIS

The Petitioner indicates that she intends "to continue working in biomedical research in the field of patient safety in Healthcare Associated Infections (HAI) and Antimicrobial Resistance on Center for Disease Control and Prevention (CDC) initiatives." In our prior decision, we determined that the Petitioner's proposed research has both substantial merit and national importance, but found that she had not sufficiently demonstrated that she is well positioned to advance her proposed endeavor. Accordingly, the Petitioner did not meet the second prong of the *Dhanasar* analytical framework.[5]

A. Motion to Reconsider

On motion, the Petitioner contends that "[t]here are many letters and proof and evidences in my file already," but she does contest our findings relating to any specific documentation or offer further arguments demonstrating that our analysis under *Dhanasar*'s second prong was in error. The Petitioner has not met the requirements for a motion to reconsider as she has not shown that we erred in our previous analysis based on the record before us on appeal. Further, the motion to reconsider does not establish that our previous findings were based on an incorrect application of the law, regulation, or USCIS policy.

B. Motion to Reopen

1. Well Positioned to Advance the Proposed Endeavor

In support of the motion to reopen, the Petitioner presents an August 2018 email from the editor-in-chief of *New England Journal of Medicine* indicating that she coauthored an article recently accepted for publication.[6] In addition, she provides an August 2018 email from the *African Journal of Emergency Medicine* acknowledging that her article, entitled [redacted] has been submitted for publication. Her evidence also includes an article she coauthored in *Prehospital Emergency Care* in [redacted] 2018. This evidence post-dates the filing of the petition and therefore does not show her eligibility under the second prong of the *Dhanasar* framework at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). Regardless, the record does not show that that aforementioned research findings render her well positioned to advance her proposed endeavor.

In further support of the motion, the Petitioner provides the [redacted] Manual for Administration (August 2015) in which its authors thank the Petitioner and two others in the

[5] We noted that, as the Petitioner had not met the second prong, discussion of the third prong would serve no meaningful purpose

[6] This article, entitled [redacted] had more than thirty coauthors.

"Acknowledgements" section for contributing "to the revisions of the [redacted] instruments and the information in this manual." Additionally, the Petitioner offers a Google Scholar citation report indicating that her body of published work has been cited by others a total of four times. The record, however, does not include comparative statistics indicating how often other epidemiology researchers are cited, nor has she otherwise demonstrated that her published and presented research constitutes a record of success or a level of interest in her work from relevant parties sufficient to meet *Dhanasar*'s second prong.

The Petitioner resubmits letters from [redacted] and [redacted] but the information in their letters was addressed in our appellate decision. We previously explained that the information they provided was not sufficient to demonstrate that the Petitioner's work has served as an impetus for progress or generated positive discourse in the field, or otherwise represents a record of success or progress rendering her well positioned to advance her proposed research. Furthermore, the Petitioner offers various articles discussing projected shortages of physicians and physician-scientists in the United States.[7] This information about U.S. worker shortages, however, does not relate to her eligibility under *Dhanasar*'s second prong. As the Petitioner has not established that she is well positioned to advance her proposed endeavor, she has not met the second prong of the *Dhanasar* analytical framework.

In addition, the Petitioner presents documentation relating to her involvement as a victim in a [redacted] 2018 car accident, the injuries she suffered, and her medical treatment. She also submits an email indicating that her laptop computer broke in September 2017 and a receipt showing that she purchased a new laptop in November 2017. Finally, she offers documents to support her claim that USCIS' January 2018 decision regarding her Form I-485, Application to Register Permanent Residence or Adjust Status, was mailed to the wrong address. These issues, however, are not relevant to determining whether the Petitioner satisfies the requirements set forth in the *Dhanasar* analytical framework, and thus that a national interest waiver is warranted.

2. Ineffective Assistance of Counsel Claim

The motion includes a statement from the Petitioner asserting that she "suffered significantly" because of the actions of her initial attorney, [redacted] She states: "He hardly communicated with me, and I had little information of what is going on. It was an abusive relationship . . . ." Furthermore, the Petitioner offers email communications with her former attorneys relating to preparation of the Form I-140, her response to the Director's request for evidence, and the appeal. The Petitioner, however, has not provided documents meeting the three evidentiary requirements set forth in *Lozada*. Moreover, she has not shown that her initial attorney's actions prejudiced the outcome of the proceedings. Specifically, the record does not show that the outcome of this matter would have been different if he had been more responsive to the Petitioner's communications, as the

[7] We note that the U.S. Department of Labor addresses shortages of qualified workers through the labor certification process. Accordingly, a shortage alone does not demonstrate that waiving the requirement of a labor certification would benefit the United States.

submitted documentation, including that provided on appeal and on motion, does not demonstrate eligibility.[8]

III. CONCLUSION

The Petitioner's motion does not show that our previous decision was based on an incorrect application of law or policy and does not include new information or evidence that overcomes the grounds underlying our previous decision. As the Petitioner has not met the second prong set forth in the *Dhanasar* analytical framework, we find that she has not established she is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of T-D-O-*, ID# 2288335 (AAO Mar. 12, 2019)

[8] We note that a different attorney, [redacted], represented the Petitioner on appeal. The Petitioner's current motion does not allege that [redacted] provided ineffective assistance. Thus, the Petitioner has had opportunities on appeal and motion to remedy or address any deficiencies in the information and evidence that [redacted] provided to USCIS.