U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16217260

Date: DEC. 16, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a millinery artist, 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).

The Director of the Texas Service Center approved the initial petition but later revoked this petition, concluding that the Petitioner was not qualified for classification as a member of the professions holding an advanced degree and 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. We summarily dismissed the subsequent appeal because it did not identify specifically any erroneous conclusion of law or statement of fact in the unfavorable decision. The Petitioner now files a combined motion to reconsider and reopen the matter. On motion, she argues her appeal should be reopened due to ineffective assistance of counsel and maintains that she has established eligibility for the classification.

Upon *de novo* review, we will dismiss the motions.

I. LAW

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).

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 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). A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

II. ANALYSIS

The Petitioner filed her Form I-140, Immigrant Petition for Alien Workers, on November 14, 2016, as a foreign national applying for a National Interest Waiver who is a member of the professions holding an advanced degree or an individual of exceptional ability. The Director approved the petition in January 2018. On October 21, 2019, the Director issued a notice of intent to revoke the petition as the Petitioner appeared to have not met the eligibility requirements for her requested benefit at the time of filing her petition. After considering the Petitioner's response, the Director revoked the petition on February 11, 2020, finding the Petitioner had not shown she holds an advanced degree or is an individual of exceptional ability.

The Petitioner appealed the decision on February 28, 2020, indicating she would submit her legal brief and additional evidence within 30 calendar days of filing the appeal. We summarily dismissed the appeal on August 20, 2020, having never received the Petitioner's brief or additional evidence and the Petitioner had not otherwise identified specifically any erroneous conclusion of law or statement of fact in the Director's unfavorable decision. The Petitioner then filed an untimely combined motion to reopen and reconsider on November 6, 2020.

A. Motion to Reconsider

On motion, the Petitioner requests we reconsider the Director of the Texas Service Center's decision and argues the decision contained erroneous conclusions of law. However, a motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider. 8 C.F.R. § 103.5(a)(1)(i). Since the Petitioner has made a motion to reconsider over 30 days after our unfavorable decision, we will dismiss her motion to reconsider the matter.[1]

B. Motion to Reopen

On motion, the Petitioner requests we consider her untimely motion to reopen due to ineffective assistance of her prior counsel that, she argues, led to the unfavorable decision at issue.

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

First, the Board in *Lozada* set 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.

[1] The motion to reconsider was also filed outside of the 60 days allowed by USCIS COVID flexibilities. *See*, USCIS Extends Flexibility for Responding to Agency Requests, *available at*: https://www.uscis.gov/news/alerts/uscis-extends-flexibility-for-responding-to-agency-requests-4 (last accessed on July 28, 2021).

- 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.

Second, if the petitioner satisfies these threshold documentary requirements, she must then show that former counsel's assistance was so deficient that she was prejudiced by the performance. *Lozada*, 19 I&N Dec. at 632.[2] *See Flores v. Barr*, 930 F.3d 1082, 1087 (9th Cir. 2019) (requiring the foreign national to establish prejudice demonstrating that counsel's deficient performance may have affected the outcome by showing "plausible grounds for relief"); *Saakian v. INS*, 252 F.3d 21, 25 (1st Cir. 2001) (requiring the foreign national to establish ineffective assistance by showing at least a reasonable probability of prejudice where, as a result of counsel's actions or inaction, the proceeding was so fundamentally unfair that the foreign national was prevented from reasonably presenting his case). Harmless error is insufficient. *See Lozada*, 19 I&N Dec. at 639 (explaining that individuals are "generally bound by the conduct of their attorneys absent egregious circumstances"); *Matter of B-B-*, 22 I&N Dec. 309, 311 (BIA 1998) (finding no *prima facie* case of ineffective assistance where counsel's insistence on corroborating evidence discouraged respondents from seeking asylum but was consistent with legal precedent and not egregious.).

Additionally, an applicant who fails to comply substantially with the *Lozada* requirements forfeits their ineffective assistance of counsel claim in the Court of Appeals. *Jian Yun Zheng v. U.S. Dep't of Justice*, 409 F.3d 43, 46 (2d Cir. 2005).

We find that the Petitioner has not substantially complied with the *Lozada* requirements. Here, the Petitioner provided a written affidavit that she requested her former counsel file an appeal of the Director's unfavorable decision and then contacted her former counsel after receiving our summary dismissal on August 20, 2020. However, the Petitioner's affidavit does not indicate she informed her former counsel of the allegations of ineffective assistance or explain why the Petitioner did not file a complaint with her former counsel's disciplinary authorities. The affidavit presented does not indicate the Petitioner took adequate measures to document and explain her ineffective assistance claim and has not indicated any other equities we should consider in support of her claim. We will therefore

[2] In *Lozada*, the Board determined that Lozada was not prejudiced by counsel's failure to file an appeal brief (resulting in the summary dismissal of the appeal) because: he received a full and fair hearing at his deportation hearing, at which he was given every opportunity to present his case; he did not allege any inadequacy in the quality of prior counsel's representation at the hearing; the immigration judge considered and properly evaluated all the evidence presented; and the immigration judge's decision was supported by the record.

deny her motion to reopen the matter for failure to sufficiently assert a claim of ineffective assistance of counsel.

III. CONCLUSION

We will deny the Petitioner's motion to reconsider the matter because she did not file her motion within 30 days of the decision she seeks to reconsider. In addition, we will deny her motion to reopen the proceeding because her affidavit did not sufficiently support her claim of ineffective assistance of counsel.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.