U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30792104

Date: APR. 16, 2024

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner seeks classification under the employment-based, second-preference (EB-2) immigrant visa category and a waiver of the category's job-offer requirement. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(B)(i), 8 U.S.C. § 1153(b)(1)(B)(i). U.S. Citizenship and Immigration Services (USCIS) has discretion to excuse job offers in this category – and thus related requirements for certifications from the U.S. Department of Labor (DOL) – if noncitizens demonstrate that waivers of these U.S.-worker protections would be "in the national interest." *Id.*

The Director of the Texas Service Center denied the petition, and we dismissed the Petitioner's following appeal. *See In Re: 28467050* (AAO Sep. 20, 2023). We affirmed the Director's decision that the Petitioner did not demonstrate the merits of a national interest waiver. *Id.* Specifically, we agreed with the Director that the Petitioner did not establish that her proposed U.S. work has "national importance." *Id.*

The matter returns to us on the Petitioner's motion to reopen. Claiming ineffective assistance of counsel, the Petitioner contends that her prior lawyer misrepresented her proposed work's nature and did not present supporting evidence "in a cohesive manner."

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we conclude that she has not "substantially" complied with procedural requirements for motions involving claims of ineffective assistance of counsel nor established that prior counsel's performance prejudiced her. We will therefore dismiss the motion.

I. LAW

A motion to reopen must state new facts, supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We review only our latest decision and grant a motion that satisfies these requirements and demonstrates eligibility for the requested benefit. 8 C.F.R. § 103.5(a)(1)(i); *see also Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring new evidence that potentially changes the decision's outcome).

II. ANALYSIS

Noncitizens alleging ineffective assistance of counsel must "substantially" comply with the requirements described in *Matter of Lozada*, 19 I&N Dec. 637, 639 (BIA 1988). *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005) (requiring "substantial, if not exact, compliance with the procedural requirements of *Lozada*"); *see also Matter of Melgar*, 28 I&N Dec. 169, 171 (BIA 2020). Under *Lozada*, a motion alleging ineffective assistance of counsel must:

- Include a noncitizen's affidavit detailing their agreement with the allegedly ineffective counsel regarding actions to be taken and any representations by counsel;
- Demonstrate that the noncitizen informed counsel of the ineffectiveness allegations and provided the lawyer an opportunity to respond; and
- Indicate whether a complaint was filed with appropriate disciplinary authorities regarding any violation of counsel's ethical or legal responsibilities, and if not, why not.

Dakane, 399 F.3d at 1274 (quoting *Matter of Lozada*, 19 I&N Dec. at 639).

A. Affidavit

Consistent with *Lozada*, the Petitioner provided an affidavit stating that she hired prior counsel to represent her in these immigrant visa proceedings. The affidavit does not detail the terms of her agreement with prior counsel. But she submitted a copy of her written retainer agreement with the lawyer containing the pact's terms. The Petitioner also stated that, on the Internet, prior counsel claimed to be an "expert" in preparing and filing requests for national interest waivers. The Petitioner has therefore substantially complied with *Lozada*'s first requirement.

B. Notice to Prior Counsel

The Petitioner claims that she notified prior counsel of the ineffectiveness allegations against the attorney. The Petitioner's written brief on motion states:

> [T]he attorney was informed of the claim of ineffective assistance of counsel. The Petitioner only informed her today [October 21, 2023] since the former counsel was trying to convince her to file a [] Motion[,] but after the Petitioner came across other [Internet] reviews where she feels people were in the same situation [as her], being told that this [petition denial] is a new trend and that the Attorney would be able to reverse the outcome, she decided to seek a new opinion.

The record, however, lacks evidence corroborating the Petitioner's claimed notice to prior counsel. The Petitioner submitted materials suggesting that, before the motion's submission, current counsel attempted to communicate with prior counsel on an Internet site for posting attorney reviews. But the copies of the site's pages do not contain a posting from current counsel or indicate that prior counsel responded to such a posting. Also, our later review of the site does not show postings from current or prior counsel. Further, even if the Petitioner notified prior counsel as she states, she has not demonstrated that she gave the lawyer an opportunity to respond.

The Petitioner submitted a copy of an email message that she sent to prior counsel's firm after the petition's appellate denial, criticizing the filing's preparation. But the message does not state the Petitioner's intent to claim ineffective assistance of counsel in these proceedings or provide prior counsel with an opportunity to respond to the allegation. The Petitioner claims that she previously tried to contact the law firm multiple times without success. The record, however, lacks corroborating evidence to support this claim. Thus, contrary to *Lozada*'s requirements, the Petitioner has not demonstrated that she notified prior counsel of the ineffectiveness allegations and provided the lawyer with an opportunity to respond to them.

C. Filing of a Complaint

The Petitioner states that she did not file a complaint with disciplinary authorities against prior counsel. But, contrary to *Lozada*'s requirement, she does not explain why she did not file a complaint.

The Petitioner argues that "on its face, *Lozada* does not require filing a bar complaint." She states that, under *Lozada*, she need only file a complaint "if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities." *See Matter of Lozada*, 19 I&N Dec. at 639. She also states that "several [U.S.] circuit courts [of appeal] determined that a Bar complaint is not necessary to move forward with a Motion to Reopen based on ineffective assistance of Counsel."

As previously indicated, however, the United States Court of Appeals for the Eleventh Circuit, which has jurisdiction over the Petitioner's residence, requires "substantial" compliance with *Lozada*. The Petitioner asserts that prior counsel misrepresented the Petitioner's proposed endeavor and neglected to submit "critical" evidence with the petition. Lawyers in the Petitioner's home state must not knowingly make false statements of fact or law to tribunals or offer evidence that the attorneys know to be false. *See* The Florida Bar, Rules of Professional Conduct, Rule 4-3.3(1), (4), www.floridabar.org/rules/rrtfb. Thus, the Petitioner does not explain how her ineffectiveness allegations do not involve purported violations of prior counsel's ethical responsibilities. We therefore find that, by not explaining the omission of a disciplinary complaint against prior counsel, the Petitioner did not substantially comply with the third *Lozada* requirement.

The Petitioner has not substantially complied with two of the three *Lozada* requirements: 1) providing prior counsel with notice of the ineffectiveness allegations and an opportunity to respond to them; and 2) explaining why a disciplinary complaint was not filed against prior counsel. Thus, under Eleventh Circuit case law, she has not substantially complied with *Lozada*. *See Gbaya v. U.S. Att'y Gen.*, 342 F.3d 1219, 1222 & n.2 (11th Cir. 2003) (ruling that a noncitizen did not substantially comply with *Lozada* where he submitted neither an affidavit regarding his agreement with prior counsel nor evidence that he provided prior counsel with notice and an opportunity to respond to his ineffectiveness allegations).

D. Prejudice

A noncitizen claiming ineffective assistance of counsel must also show prejudice. *Dakane*, 399 F.3d at 1274. "Prejudice exists when the performance of counsel is so inadequate that there is a reasonable probability that but for the attorney's error, the outcome of the proceedings would have been different." *Id.*

The Petitioner accuses prior counsel of mispresenting the Petitioner's proposed U.S. work. The Petitioner states that, before the petition's filing, she: told prior counsel of her experience as an organizational psychologist; provided the attorney with evidence of her experience; and explained that, in the United States, her work would focus on organizational psychology. But she states that prior counsel prepared the petition stating her proposed U.S. work as a "corporate human resources counselor" who, through her own company, would help small- and medium-sized businesses increase efficiency and profitability by promoting healthy work environments.

The Petitioner states: "The case was missing critical evidence, [and] the evidence that was submitted[,] such as my research publications[,] were not presented in a cohesive manner so that USCIS could understand the relevance of said documents." She also states that prior counsel submitted summaries of two different standard occupational classifications (SOCs) for her proposed job: one for human resource specialists; and the other for industrial organizational psychologists.[1] The Petitioner claims that the differing SOCs "weakened the entire [petition]." She states:

> The SOC code provides a common language for USCIS and the Petitioner to clearly define and understand the nature of the work to be performed. The goal is to eliminate ambiguity and ensure the consistent application of the requirements are being met with regards to the proposed endeavor. . . . The proposed endeavor is directly related to the SOC code, and it is one of the most important elements for a successful National Interest Waiver [petition].

The Petitioner states that the two SOC codes "clearly created confusion," as the Director's request for evidence (RFE) questions the nature of her proposed work. The RFE states that "it appears the petitioner has several proposed endeavors rather than a specific proposed endeavor." The Petitioner states that USCIS "could not understand my proposed endeavor since [prior counsel] did not take the time to organize the file and include all the evidence which I submitted [to prior counsel]. But for the errors, I would have been approved."

The record, however, does not sufficiently demonstrate that prior counsel's actions prejudiced the Petitioner. Contrary to the Petitioner's arguments, the Director did not deny the petition because of uncertainty about her proposed endeavor. Rather, the Director concluded that the Petitioner did not demonstrate that her proposed work has national importance. The Director found insufficient evidence that the venture's benefits would reach beyond her business, employees, and customers to have national implications. *See Matter of Dhanasar*, 26 I&N Dec. 884, 889-90 (AAO 2016) (explaining that a proposed endeavor may have national importance if it has: national implications within a particular field; significant potential to employ U.S. workers; or other substantial positive economic benefits). The Petitioner has not explained why, if her petition described her proposed work as an organizational psychologist, the Director would have found the endeavor nationally important and approved the filing.

Also, the Petitioner overestimates the importance of a proposed endeavor's SOC. When reviewing a proposed venture, USCIS primarily considers statements from a petitioner, information in a business plan, and support letters. *See generally* 6 *USCIS Policy Manual* F.(D)(1), www.uscis.gov/policy-

[1] A SOC is a statistical standard that federal agencies use to classify workers into job-related categories. *See* U.S. Bureau of Labor Statistics, "Standard Occupational Classification," https://www.bls.gov/soc/.

manual. Thus, the record does not indicate that prior counsel's submission of two SOCs for the proposed occupation caused or contributed to the petition's denial.

Further, if prior counsel misrepresented the Petitioner's proposed U.S. endeavor, the Petitioner appears to have approved. She signed the Form I-140, Petition for Alien Workers, attesting that she reviewed the filing and that all the information on the form and its supporting evidence was true and correct. Her signature on the petition creates a presumption that she knew the filing's content and approved of it. *See Matters of Valdez*, 27 I&N Dec. 496, 499 (BIA 2018). In response to the Director's RFE, she also submitted a "personal statement" supporting the proposed endeavor listed in the petition. The Petitioner has not explained why she signed the petition and statement if she did not agree with the filing's contents.

III. CONCLUSION

The Petitioner's motion does not substantially comply with the procedural requirements for a claim of ineffective assistance of counsel. She also has not demonstrated that prior counsel's actions prejudiced her.

ORDER: The motion to reopen is dismissed.