U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF C-O-C-

DATE: DEC. 7, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-526, IMMIGRANT PETITION BY ALIEN ENTREPRENEUR

The Petitioner seeks classification as an immigrant investor pursuant to the Immigration and Nationality Act (the Act) section 203(b)(5), 8 U.S.C. § 1153(b)(5). This fifth preference classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise that will benefit the United States economy and create at least 10 full-time positions for qualifying employees. Foreign nationals may invest in a project associated with a United States Citizenship and Immigration Services (USCIS) designated regional center.[1] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, section 610, as amended.

The Chief of the Immigrant Investor Program Office initially approved the petition, but subsequently revoked the approval, concluding that the record did not establish, as required, that the Petitioner's investment remained affiliated with a regional center. We dismissed the appeal and subsequently denied a combined motion to reopen and reconsider.

The Petitioner now files a second joint motion to reopen and reconsider. On motion, she submits additional evidence and continues to maintain that she did not receive effective assistance from the regional center attorney, that her investment satisfied all legal requirements when she filed the petition, and that we should take into account her severe hardship.

Upon review, we will deny the motions.

## I. LAW

A foreign national may be classified as an immigrant investor if he or she invests the requisite amount of qualifying capital in a new commercial enterprise (NCE). The commercial enterprise can be any lawful business that engages in for-profit activities. An immigrant investor may invest the required funds directly in a new commercial enterprise, or invest through a regional center.

[1] A regional center is an economic unit involved with the promotion of economic growth through "improved regional productivity, job creation, and increased domestic capital investment." *See* 8 C.F.R. § 204.6(e) (defining "regional center").

Regional centers apply for designation as such with USCIS. Designated regional centers identify and work with new commercial enterprises, which in turn are associated with a specific project, known as the job creating entity (JCE). Regional centers can pool immigrant (and other) investor funds for qualifying projects that create jobs directly or indirectly. 8 C.F.R. § 204.6(j)(4)(iii).

An individual seeking classification as an immigrant investor files a Form I-526, Immigrant Petition by Alien Entrepreneur. Under certain circumstances, the Chief may revoke an approved petition after first issuing a notice of intent to revoke the approval. These types of revocations must be justified by "good and sufficient cause." *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). The approval of a petition vests no rights in the beneficiary of the petition, as approval of a petition is but a preliminary step in obtaining an immigrant visa. *Id.* at 589.

## II. ANALYSIS

At the time she filed the petition, the Petitioner was actively in the process of investing $500,000[2] in (the NCE), which was affiliated with the (the Regional Center). The Chief initially approved the petition. When USCIS subsequently terminated the Regional Center's designation, however, the Chief revoked that approval.

On appeal and through the current filing, the Petitioner attests that the acting president and managing partner of the Regional Center and her former attorney for a separate application, misappropriated millions of dollars from several foreign investors, including the Petitioner, and had been detained and sentenced in South Korea.[3] He also faces disciplinary action by the State Bar of California. She has pointed out that the notice of intent to terminate the Regional Center's designation (NOIT) was sent to office, which had closed, and was never served on her. Based on the above, she argues for relief, asserting ineffective assistance by that imposed a severe hardship on her for actions beyond her control. Further, she has affirmed that her investment was qualifying at the time she filed the petition. Finally, in both the previous combined motion and the current one, she contends that a delay in the processing of her Form I-485, Application to Register Permanent Residence or Adjust Status, filed subsequent to the approval of the Form I-526 Petition, resulted in the revocation because the termination of the Regional Center occurred after the normal processing time for adjustment applications.

In both our previous decisions, we found that the Chief was not required to serve the NOIT on the Petitioner or her counsel and that she had offered no legal authority holding otherwise. We have also explained that she must not only establish eligibility at the time of filing, but also remain eligible through the adjudication of the Form I-485 Application.. Thus, any intervening malfeasance

[2] As the NCE is located in a targeted employment area, the required amount of capital is downwardly adjusted from $1,000,000 to $500,000. *See* 8 C.F.R. § 204.6(f).

[3] According to materials the Petitioner filed with the previous motion, the United States District Court for the District of California entered a final judgment against for misappropriating investor funds.

by the Regional Center resulting in termination of its designation is not a basis to overturn the Chief's revocation of the approved petition.

Further, we determined that an additional investment at this stage would constitute an impermissible material change. In our most recent decision, we noted that the case law pertaining to ineffective assistance of counsel does not require us to approve a benefit for which a petitioner is ineligible. Finally, we noted that the delay in the adjudication of the Form I-485 Application was, in part, due to the investigation into the Regional Center.

The Petitioner no longer maintains that the Chief erred by not serving the NOIT on her and her attorney. We reiterate that there is no provision that required the Chief to do so. For the reasons discussed below, while we are sympathetic to the Petitioner's position, her current motion reiterates previous facts and assertions and does not meet the requirements of a successful motion to reopen or motion to reconsider.

A. Motion to Reopen

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). The regulation at 8 C.F.R. § 103.5(a)(2) does not define what constitutes a "new" fact, nor does it mirror the Board of Immigration Appeals' (the Board) definition of "new" at 8 C.F.R. § 1003.23(b)(3) (stating that a motion to reopen will not be granted unless the evidence "was not available and could not have been discovered or presented at the former hearing"). Unlike the Board regulation, we do not require the evidence of a "new fact" to have been previously unavailable or undiscoverable. Instead, we interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

The documents the Petitioner offers pertaining to [redacted] on motion are not new relevant facts. She submits a 2007 Regional Center notice USCIS addressed to the attention of [redacted] as the president and chief executive officer, a 2006 letter [redacted] authored on behalf of the Regional Center to USCIS, and her letter describing her contract with [redacted] and the hardship she has endured because of his malfeasance. She maintains that he failed his fiduciary duty and contractual obligations to her by failing to file the Form I-924A, Annual Certification of Regional Center, or respond to the USCIS NOIT.

In our previous decision, we acknowledged that [redacted] was the contact person for the Regional Center and that [redacted] was the Petitioner's counsel for the Form I-485 Application. Moreover, even accepting that [redacted] provided ineffective assistance as counsel, we expressly stated in our last decision that the case law relating to that issue, which we will discuss below, does not require us to approve a petition without demonstrated continued eligibility. Accordingly, these items do not require a reevaluation of the facts.

The Petitioner also offers the denial notice for her Form I-485 Application based on the revocation of the underlying petition, which is not a new fact. She points out that the denial notice did not reference an investigation and, instead, "just stated a terse procedural reasoning for the denial based on the revocation of the underlying [petition]." She contends that the application "should have been adjudicated based on the eligibility requirements of the Form I-485 itself." According to the Petitioner, any issues pertaining to the Regional Center project should have been left for the removal of conditions stage.

The record already contained a copy of the denial and we do not find its failure to reference the investigation into the Regional Center a persuasive reason to reinstate the approval of the petition. The denial of her Form I-485 Application occurred after the revocation of her visa and does not relate to any matter before us on appeal. As the Petitioner does not identify any new facts or present new evidence in the current motion regarding our denial of her first motion, the filing does not meet the requirements for a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2).

B. Motion to Reconsider

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of USCIS or Department of Homeland Security policy. The current motion and brief does not cite a single precedent, federal case, other legal authority, or policy memorandum.

Regarding representation of the Petitioner, we acknowledged in our previous decision that *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) *aff'd*, 857 F.2d 10 (1st Cir. 1988), allows for some relief, such as affording another opportunity to supplement the record, for foreign nationals who received ineffective assistance of counsel.[4] That decision, however, does not imply that USCIS must

[4] *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

approve a benefit for an individual who is otherwise ineligible based solely on the failings of his or her attorney. We have already afforded comparable relief for those who received poor assistance because we have considered all evidence on appeal and with the previous motion. She does not provide any legal authority to rebut our interpretation of the relevant case law in support of the current motion. The Petitioner also cites no legal authority or policy memorandum for the proposition that the delay in the adjudication mandates our reinstatement of the approval of the petition or her request that we take into account the hardships resulting from the revocation of the petition. For all of the reasons discussed above, she has not supported her motion to reconsider with legal authorities showing that our previous decision was in error.

## III. CONCLUSION

The new evidence the Petitioner presents on motion does not demonstrate that she remained eligible for the classification at the time the Chief revoked the approved petition, as required for a motion to reopen. In addition, she has not cited any legal authority to support her assertion that our prior decision was incorrect, as required for a motion to reconsider.

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of C-O-C-*, ID# 698646 (AAO Dec. 7, 2017)

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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. While the Petitioner has addressed the above factors, the grievances she describes relate to his responsibilities to the Regional Center, and not as her representative.