U.S. Citizenship and Immigration Services

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

In Re: 35997432

Date: FEB. 13, 2025

Motion on Administrative Appeals Office Decision

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

The Petitioner seeks employment-based second preference (EB-2) immigrant classification as either a member of the professions holding an advanced degree or an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this 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 denied the petition, concluding that the Petitioner did not establish eligibility for the requested national interest waiver. We dismissed a subsequent appeal. The matter is now before us on a motion to reopen.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon review, we will dismiss the motion.

A motion to reopen must be filed within 33 days of the adverse decision. 8 C.F.R. §§ 103.5(a)(1)(i), 103.8(b). We may accept an untimely motion to reopen in our discretion when it is demonstrated that the delay was reasonable and beyond the control of the Petitioner. 8 C.F.R. § 103.5(a)(1)(i). Additionally, a motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit. *See Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992) (requiring that new evidence have the potential to change the outcome).

We dismissed the Petitioner's appeal on June 25, 2024 and notified the Petitioner of her ability to file a motion to reopen and/or reconsider within 33 days of the decision. We received this motion to reopen on October 21, 2024, 118 days after our decision was issued. The Petitioner acknowledges her motion to reopen is untimely, but requests that we nonetheless accept it in our discretion due to the ineffective assistance of her prior counsel, which she asserts led to both the unfavorable decision at issue, and her delay in filing the motion to reopen. In support of her motion, the Petitioner submits a brief, as well as evidence relating to her claim of ineffective assistance of counsel and new evidence which she claims establishes the national importance of her endeavor.

A. Ineffective Assistance of Counsel Claim

As acknowledged in her brief, in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 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.

- 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.*

Second, if a petitioner satisfies these threshold documentary requirements, they must then show that their counsel's assistance was so deficient that they were prejudiced by the performance. *Id.* at 640.[1] *See also Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005) ("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.")

1. Substantial Compliance with *Lozada* Threshold Requirements

For the reasons discussed herein, we conclude that the Petitioner has not substantially complied with *Lozada's* threshold documentary requirements.

The Petitioner provides an affidavit detailing her engagement with her prior counsel, the actions they agreed to take on her behalf, as well as her communication with them following the dismissal of her appeal. The affidavit does not include a detailed description of the agreements with her former counsel, but she does provide the agreement for the preparation of a Form I-140, Immigrant Petition for Alien Workers and a supplemental agreement for the preparation of a Form I-290B Notice of Appeal or Motion. Additionally, the Petitioner submits evidence that she filed two complaints with

[1] 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.

the appropriate disciplinary authorities. Upon review, while we acknowledge the Petitioner informed her former counsel of her allegations of ineffective assistance, she did not provide an opportunity for counsel to respond to her claim of ineffective assistance, and therefore did not substantially comply with *Lozada*'s threshold requirements.

In *Lozada,* the Board explained that providing an opportunity for counsel to respond avoids "the potential for abuse" by allowing former counsel "to present [their] version of events if [they] so choose[], thereby discouraging baseless allegations." *Lozada* at 639. Here, the record does not support the Petitioner's claim that she "informed her prior counsel of the ineffectiveness allegations and provided counsel an opportunity to respond." Evidence shows that copies of the complaints filed with the appropriate disciplinary authorities were delivered to her former counsel via Federal Express on Friday, October 18, 2024. Yet, the record indicates that she also sent her motion to reopen via Federal Express on October 18, 2024. The Petitioner, therefore, has not established that she afforded her former counsel an opportunity to respond to the allegations, and "present [their] version of events." *Id.* Accordingly, she has not substantially complied with *Lozada*'s threshold requirements.

2. Prejudice

The Petitioner has also not established that she was prejudiced by her former counsel's actions.

As a preliminary matter, we reiterate that our review on motion is limited to reviewing the latest decision, which is our June 2024 dismissal of the Petitioner's appeal. Accordingly, the Petitioner's claims that her former counsel failed to advise her to maintain nonimmigrant status after filing her adjustment of status application are outside the scope of our adjudication of this motion. We will only consider the Petitioner's statements relevant to both the timeliness of this motion and our dismissal of her appeal.

In her affidavit, the Petitioner acknowledges that our decision dismissing her appeal indicated that a motion to reopen or motion to reconsider must be filed within 33 days. And she states that when her former counsel's office first informed her of the dismissal on July 1, 2024, she indicated that she wanted to challenge the dismissal. She also states that when she met with her former counsel via Zoom on July 12, 2024 she again reiterated her interest in challenging the dismissal, but instead of advising her to file the motion to reopen, her former counsel suggested refiling her petition or pursuing alternative options rather than a national interest waiver. Subsequently, she contacted her former counsel three more times via email[2] requesting assistance with challenging the dismissal of her appeal, with her last communication on July 29, 2024, in which she noted that the deadline to file a motion contesting the decision had already passed. Her former counsel did not respond to her emails until July 30, 2024, at which time they acknowledged that the deadline for filing a motion had passed, and informed her that they were terminating their relationship as they could not offer her further representation.

In *Lozada,* the Board concluded that the Petitioner had not succeeded in their claim in part because "the respondent has not alleged, let alone established, that former counsel ever agreed to prepare a

[2] While not a basis for our decision, we note that in her affidavit the Petitioner quotes several emails between her and her former counsel but has not provided copies of these emails in the record.

brief on appeal or was engaged to undertake that task." *Lozada* at 640. Here, the Petitioner contends that she was prejudiced by her former counsel's actions because "prior counsel ignored direct request from [her] to challenge the AAO decision and timely file a motion." However, the Petitioner has not shown that her former counsel agreed to prepare or file a motion to reopen, nor has the Petitioner provided evidence that her former counsel was obligated to file a motion to reopen on her behalf. And, as discussed herein, the Petitioner's motion to reopen does not meet the requirements of a motion to reopen or establish her eligibility for the requested national interest waiver.[3] Accordingly, she has not shown that her former counsel's actions were "so inadequate that there is a reasonable probability that but for [their actions], the outcome of these proceedings would have been different." *Dakane v. U.S. Att'y Gen.*, 399 F.3d at 1274.

B. Motion Does Not Meet Regulatory Requirements

A motion that does not satisfy the applicable requirements must be dismissed. 8 C.F.R. § 103.5(a)(4). Setting aside the timeliness of the Petitioner's motion to reopen, we nonetheless must dismiss the motion as it does not meet the requirements for a motion to reopen.

In our prior decision, we agreed with the Director's conclusion that the Petitioner's proposed endeavor of operating a grocery store to provide fresh healthy food staples, cooked meals, and packaged, prepared meals did not meet the first prong of the analytical framework set forth in *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016). We evaluated the Petitioner's claims and evidence establishing the importance of the grocery store industry as well as initiatives aimed at reducing food insecurity and obesity and explained that, although they established the importance of her industry, they did not show that the prospective impact of her endeavor would rise to the level of national importance as contemplated in *Dhanasar*. *See id.* (explaining the determination of national importance "focuses on the specific endeavor that the foreign national proposes to undertake"). And, while we acknowledged the Petitioner's extensive experience within her field, we explained that her past accomplishments did not establish the broader implications or national importance of her proposed endeavor, as her prior experience related to the second prong of the *Dhanasar* framework. We also determined that, like the petitioner's teaching activities in *Dhanasar*, the prospective impact of the Petitioner's endeavor did not extend beyond her customers and employees to impact the field more broadly at a level commensurate with national importance.

We also agreed with the Director that the record did not establish the Petitioner's endeavor would result in substantial positive economic effects commensurate with national importance. *See Dhanasar* at 890. We addressed the Petitioner's financial and employment projections in her business plan, but concluded that the record did not provide sufficient support for these projections, nor did she establish that these projections would result in substantial positive economic benefits as contemplated in *Dhanasar*. *Id.*

On motion, the Petitioner submits two letters from non-profit organizations that intend to collaborate with the Petitioner, as well as government publications relating to the Biden-Haris administration's priorities in improving health outcomes, nutrition, and addressing food insecurity across the United States. Although we have reviewed this new evidence, considered together, it does not establish new

[3] *See Matter of Coelho*, 20 I&N Dec. at 473 (requiring that new evidence have the potential to change the outcome).

facts that support the reopening of these proceedings. As stated in our prior decision, while such evidence demonstrates the substantial merit of her endeavor, it does not establish the prospective impact of her specific endeavor.

And, while the letters from the nonprofits establish interest in the Petitioner's initiatives and support for her intention to address food insecurity in her community, the letters do not establish that her endeavor will lead to broader implications beyond her immediate customers. For example, the letter from a representative of the [redacted] indicates the organization's interest in working with the Petitioner to both improve access to nutritious food and provide training and employment opportunities to individuals facing challenges in the workforce, but the letter does not explain how even if these collaborations are achieved, the Petitioner's endeavor will lead to broader implications. Instead, the letter focuses on importance of addressing food insecurity and asserts that the Petitioner's work "addressing these challenges [will allow her to] contribut[e] to larger national goals of promoting food security, public health and economic development." However, neither the author of this letter, nor the Petitioner sufficiently explain and support with evidence how the Petitioner's *specific* endeavor would meaningfully impact these broad national initiatives on a level commensurate with national importance, beyond the direct benefits of her customers.

The Petitioner contends that the impact of her proposed endeavor will extend beyond her customers and ultimately impact "the nation as a whole" because her "ultimate goal is for the proposed endeavor to expand and serve as a model that can be adopted and implemented state and nationwide." However, the record does not support the Petitioner's assertion that her business will serve as a model, or would otherwise result in improvements to the field analogous to the "improved manufacturing processes or medical advances" contemplated in *Dhanasar*. *Dhanasar* at 889. A petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. While we acknowledge the new evidence submitted on motion establishes the importance of the industry as well as the interest of prospective partners, the new evidence does not establish that the Petitioner's specific endeavor will lead to broader implications at a level commensurate with national importance.

Additionally, the Petitioner reiterates her claims previously made before the Director and on appeal regarding her endeavor's economic impact, but does not address our determinations made in our decision dismissing the appeal. For example, while she repeats the employment projections from her business plan, she does not acknowledge or address our determination that she did not support these projections, or otherwise establish how her prospective employment projections would impact the area of operations.

For the reasons discussed, we conclude that the Petitioner has not established new facts relevant to our appellate decision that would warrant reopening of the proceedings. Our prior decision properly analyzed the Petitioner's assertions, which she again makes on motion. Consequently, we have no basis for reopening our decision, and the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

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