U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 36921308

Date: FEB. 20, 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 a member of the professions holding an advanced degree, 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 the Petitioner did not establish he merits a discretionary waiver of the job offer requirement in the national interest. We dismissed the Petitioner's subsequent appeal, a motion to reconsider, and a combined motion to reopen and reconsider. The matter is now before us again on a third combined motions to reopen and reconsider. 8 C.F.R. § 103.5.

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.

## I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

A motion to reconsider must establish that our prior 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).

The scope of any motion is limited to "the prior decision" and "the latest decision in the proceeding." 8 C.F.R. § 103.5(a)(1)(i), (ii). Thus, our analysis for these combined motions is limited to the following: (1) whether the Petitioner establishes that the dismissal of the previous combined motions was based on an incorrect application of law or policy; or (2) whether the Petitioner presents a new fact, supported by evidence, that shows proper cause to reopen our decision on the previous combined motions. 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). Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See INS v. Doherty, 502 U.S. 314, 323 (1992) (citing INS v. Abudu, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." See INS v. Abudu, 485 U.S. at 110.

## II. ANALYSIS

### A. Motion to Reopen

The Petitioner has not stated any new facts or submitted additional evidence to establish that we erred in dismissing the prior combined motion. The Petitioner, instead, submits a brief stating our previous combined motion decision was "based on an incorrect interpretation of the applicable law and policy." In support of his claims, the Petitioner references evidence already in the record and does not state any new facts supported by new documentary evidence. The deficiencies in the already submitted evidence have been identified and discussed in our prior decision.

Because the Petitioner has not established new facts that would warrant the reopening of the proceeding, we have no basis to reopen our prior decision. The motion to reopen will be dismissed. 8 C.F.R. § 103.5(a)(4).

### B. Motion to Reconsider

The purpose of a motion to reconsider is to show error in the most recent prior decision. Here, the Petitioner's current motion to reconsider does not establish that our prior 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, as discussed below.

In our prior decision, we determined the Petitioner did not establish the claimed ineffective assistance of counsel for his case because he did not comply with the requirements described in Matter of Lozada, 19 I&N Dec. 637, 639 (BIA 1988), or show that his former counsel's assistance was so deficient that he was prejudiced by the counsel's performance. See Matter of Melgar, 28 I&N Dec. 169, 171 (BIA 2020). On motion, the Petitioner argues that he presented a clear case of ineffective counsel and he "qualifies for excusal under the Lozada standard based on the substantial compliance test." The Petitioner explains that he contracted an immigration services firm to assist with his request for evidence reply and his subsequent appeal and motion to reconsider. With his prior combined motion, he submitted copies of his three contracts with the immigration services firm, which he claims provided ineffective representation leading to the denial of his petition and subsequent dismissals of his appeal and motion to reconsider. He contends the immigration services firm and his former counsel did not properly document the national importance of his proposed endeavor which directly contributed to the denial of his petition.

Under Lozada, a motion alleging ineffective assistance of counsel must:

- Include an alien's affidavit detailing their agreement with the allegedly ineffective counsel regarding actions to be taken and any representations by counsel;
- Demonstrate that the alien informed counsel of the ineffectiveness allegations and provided counsel 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.

See Dakane v. U.S. *Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005) (quoting Matter of Lozada, 19 I&N Dec. at 639).

On motion, the Petitioner does not contest our prior determination that he did not meet any of the Lozada requirements. Instead, the Petitioner argues that according to the USCIS Policy Manual, USCIS is not required to adhere to the strict rules of evidence, thereby having more flexibility in the types of evidence considered to establish eligibility for a benefit. He alleges "the absence of a bar complaint or a detailed affidavit does not necessarily preclude USCIS from considering [the Petitioner's] case if other credible evidence can support his claims and establish his eligibility for the immigration benefit." In addition, he maintains a detailed affidavit and bar complaint need not be filed in every case, citing to cases that have excused the Lozada requirements.

We disagree with the Petitioner's assertions. Aliens alleging ineffective assistance of counsel must "substantially" comply with the requirements described in Lozada. See Dakane v. U.S. *Att'y Gen.*, 399 F.3d at 1273-74 (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). The documentary requirements under Lozada are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claims and to deter meritless claims. See Matter of Lozada, 19 I&N Dec. at 639. When essential information is lacking, we are unable to evaluate the substance of the ineffective assistance claims. See id. Allowing former counsel to present their 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 their 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).[1]

To support his arguments, the Petitioner relies on ineffective counsel cases where one or more of the Lozada requirements were excused. In such cases, however, at least one or more of the Lozada requirements were met, and most of the cases included a reasonable explanation for the alien not

[1] If an alien satisfies these threshold documentary requirements, they must then show that former counsel's assistance was so deficient that they were prejudiced by the performance. Matter of Lozada, 19 I&N Dec. at 632; see also Flores v. Barr, 930 F.3d 1082, 1087 (9th Cir. 2019) (requiring the alien 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 alien 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 noncitizen was prevented from reasonably presenting their case). Harmless error is insufficient. See Matter of Lozada, 19 I&N Dec. at 639 (explaining that individuals are "generally bound by the conduct of their attorneys absent egregious circumstances").

having met a requirement. For instance, the Petitioner claims that Lozada does not require the filing a complaint with the bar in all cases, relying on Piranej v. Mukasey, 516 F.3d 137 (2d Cir. 2008). However, in this case, two of the Lozada requirements were met, and the third requirement of an affidavit was presented outlining the attorney-client relationship with the court remanding for further fact finding to understand the details of the attorney's agreement. Id. at 143-44. Similarly, in Rranci v. Atty. Gen. of U.S., 540 F3d 165, 173-74 (3d Cir. 2008), the court determined that although the alien did not provide an adequate explanation for not having filed a complaint with the bar, two of the Lozada requirements had been met. Likewise, in Ontiveros-Lopez v. INS, 213 F3d 1121, 1124-25 (9th Cir. 2000), even though the alien did not comply with the Lozada requirements before an initial motion hearing, he later complied with the requirements after explaining that he could not complete the requirements prior to a motion filing deadline because he had not received the full record.

Here, the Petitioner stresses his not filing a complaint with the bar should be excused because he was "subjected to misleading practices by [the immigration services firm], which was not only ineffective but also engaged in deceptive conduct by having non-lawyers handle critical aspects of his petition." He claims that "[g]iven the complexity of U.S. immigration law and the reliance placed on professionals for guidance, it would be unjust to hold [him] strictly accountable for not filing a bar complaint against the firm." However, similar to the Petitioner's referenced case, Rranci, difficulties with the English language and legal standards are irrelevant because his new counsel, rather than the Petitioner, could have appropriately pursued disciplinary action on behalf of the Petitioner. Rranci v. Atty. Gen. of U.S., 540 F3d at 173. While he claims the process of filing a bar complaint is intimidating and involves additional costs, which would be an additional financial strain to him, he has not explained in detail the additional costs and financial strain.

Although he places blame on his former counsel for the legal sufficiency of his petition, the Petitioner does not provide an affidavit attesting to the nature of his agreement with his former counsel regarding actions to be taken for his petition, including the agreement of the legal arguments or evidence to support his petition. Moreover, the Petitioner has not indicated whether he informed counsel of the ineffectiveness allegations or provided counsel with an opportunity to respond, or that he filed a complaint with the appropriate disciplinary authorities or provided an explanation for why such a complaint has not been filed. Instead, he provides broad assertions that his former counsel's "failure to properly present and document the national importance and merits of [his] proposed endeavor directly contributed to the denial of his petition and subsequent appeal." Thus, the Petitioner has not provided sufficient information for us to evaluate a claim for ineffective assistance of counsel under Lozada.

In addition to meeting the Lozada threshold requirements, a claim of ineffective assistance of counsel must also show prejudice. See Dakane v. U.S. *Att'y Gen.*, 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. Here, the Petitioner has not demonstrated he was prejudiced by his former counsel's performance.

The Petitioner claims his former counsel did not properly document the national importance of his proposed endeavor which directly contributed to the denial of his petition. He, however, does not describe in detail which documentation was not proper or what documentation should have been submitted on his behalf. The Petitioner claims that his former counsel represented him for his appeal,

and therefore, we should consider his new legal strategies and arguments provided by his current counsel. While the Petitioner generally claims to have strategies different from his former counsel, he essentially restates assertions in his petition and the subsequent appeal and motions, relying on evidence in the record.

He argues that Dhanasar "acknowledges that rigid interpretations of eligibility requirements are often ill-suited for self-petitioning individuals, such as entrepreneurs and others whose contributions may not fit traditional labor certification frameworks." Therefore, he contends that we should have a more flexible approach for a fair adjudication, particularly when an endeavor has potential societal and economic benefits which may not be quantifiable. The Petitioner, however, has not explained or provided evidence relating to his innovative methodologies and how they may impact the field of soccer training. He mainly reargues that his endeavor would provide economic and public health benefits, which have been analyzed in our prior decisions. The Petitioner's arguments are similar to those in his petition, and the subsequent appeal and motions. Moreover, the Petitioner relies on evidence in the record, which has been considered and found to be insufficient to demonstrating national importance.

## III. CONCLUSION

The Petitioner has not provided new facts to establish that we erred in dismissing the prior motion. Because the Petitioner has not established new facts that would warrant reopening of the proceeding, we have no basis to reopen our prior decision. In addition, the Petitioner has not established that our previous decision was based on an incorrect application of law or policy at the time we issued our decision. Therefore, we will dismiss the motion. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.