U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37365315

Date: FEB. 27, 2025

Motion on Administrative Appeals Office Decision

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) (2016).[1] This fifth preference (EB-5) classification makes immigrant visas available to aliens 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.

The Chief of the Immigrant Investor Program Office denied the Petitioner's petition on multiple grounds. The Petitioner filed a Form I-290B, Notice of Appeal or Motion, indicating on the form that he would "submit [his] brief and/or additional evidence to [us] within 30 calendar days of filing the appeal." He then requested an extension of time to file his documents, which we granted. We permitted the Petitioner to file his materials by August 22, 2019, approximately 90 days after the initial filing deadline. The Petitioner did not file any additional documentation or an appellate brief explaining his base(s) for appeal by the August 2019 filing deadline. Instead, he claims that a day before the August 2019 filing deadline, he faxed a second request for extension of time. The record does not show that we granted his second request. Subsequently, over a month after the August 2019 filing deadline, in October 2019, the Petitioner submitted his appellate brief and additional documents. We summarily dismissed his appeal, concluding that he did not timely file documents or an appellate brief identifying specifically any erroneous conclusion of law or statement of fact for the appeal. *See* 8 C.F.R. § 103.3(a)(1)(v). The matter is now before us on 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 state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Because the scope of a motion is limited to the prior decision, we will only review the latest decision in these proceedings. 8 C.F.R. § 103.5(a)(1)(i), (ii). We may grant motions that satisfy

[1] On March 15, 2022, the EB-5 Reform and Integrity Act of 2022 was signed into law, revising general eligibility requirements, substantially reforming and codifying the Regional Center Program in Section 203(b)(5) of the Act, and adding significant new integrity provisions. *See* Section 203(b)(5) of the Act, 8 U.S.C. § 1153(b)(5) (2022).

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).

On motion, the Petitioner, through counsel, submits a statement, indicating that the "delay in filing [his appellate brief and materials] was due to an extraordinary circumstance beyond [his] control: the ineffective assistance of his attorney" and that the "delay of filing is a direct result of the negligence of [the counsel's firm], an extraordinary circumstance beyond [his] control." In support of the motion, the Petitioner's counsel provides a statement, declaring that "missing a filing deadline is a form of negligence and incompetence," that "[her] mistake resulted in the summary dismissal" of the appeal, and that she "will self-report to the State Bar of Minnesota in case the instant Motion to Reopen should be denied."[2] The counsel's statement further provides that the Petitioner "decided to give [her firm] a chance to rectify . . . the mistake" and has not retained new counsel.

Although the Petitioner has made an ineffective assistance of counsel claim, he has not satisfied the threshold documentary requirements under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Under *Matter of Lozad*a, an ineffective assistance of counsel claim must be supported by: (1) an affidavit from the aggrieved individual setting forth the agreement entered into with counsel; (2) evidence that counsel was informed of the allegations and given a chance to respond; and (3) evidence that a complaint has been filed with appropriate disciplinary authorities regarding the alleged ineffective representation, and if not, why not. *Id*. at 639. *Matter of Lozada* explains that "[t]he requirement that disciplinary authorities be notified of breaches of professional conduct not only serves to deter meritless claims of ineffective representation but also highlights the standards which should be expected of attorneys who represent persons in immigration proceedings, the outcome of which may, and often does, have enormous significance for the person." *Id*. at 639-40.

In this case, the Petitioner has not submitted sufficient documents confirming that he has substantially complied with the *Matter of Lozada* threshold documentary requirements. *See Tamang v. Holder*, 598 F.3d 1083, 1090 (9th Cir. 2010) (noting that *Matter of Lozada* "is intended to ensure both that an adequate factual basis exists in the record for an ineffectiveness complaint and that the complaint is a legitimate and substantial one"); *see also 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*"). Specifically, the record lacks an affidavit from the Petitioner setting forth the agreement he had with counsel concerning actions to be taken on appeal, or evidence verifying that a complaint against the counsel has been filed with the appropriate disciplinary authorities or an explanation on the failure to file such a complaint. Without additional evidence, including evidence confirming that he has substantially complied with the threshold documentary requirements, the Petitioner has not sufficiently established an ineffective assistance of counsel claim or demonstrated that we should grant his motion to reopen our decision to summarily dismiss his appeal. *See* 8 C.F.R. § 103.3(a)(1)(v); 8 C.F.R. § 103.5(a)(2).

[2] An earlier statement, which the Petitioner's counsel provided in support of the appeal, states that she would "self-report to the State Bar of Minnesota in case the instant appeal should be denied as a result of failure to timely submit the supporting appellate brief." The record does not include evidence confirming the referenced self-reporting to the appropriate disciplinary authorities.

In conclusion, although the Petitioner has submitted additional evidence in support of his motion to reopen, the new facts and evidence he has presented on motion are insufficient to warrant reopening in this matter. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.