U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32554617

Date: JULY 24, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a nurse, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability in the sciences, arts, or business. See Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. See section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i).

The Director of the Nebraska Service Center denied the petition, concluding the Petitioner did not establish that a waiver of the required job offer and thus of the labor certification, would be in the national interest. We dismissed the subsequent appeal agreeing with the Director that the Petitioner did not demonstrate her eligibility for the requested national interest waiver. The matter is now before us again 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.

I. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret "new facts" to mean those that are relevant to the issues raised on motion and that have not been previously submitted in the proceeding, which includes within the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts." See id.

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 this motion is limited to whether the Petitioner presents a new fact, supported by evidence, that shows proper cause to reopen our appeal decision. 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 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." INS v. Abudu, 485 U.S. at 110.

II. ANALYSIS

The Petitioner proposes to work in the United States as a nurse. As noted above, the Director denied the approval of this petition. The Director determined that the Petitioner qualifies for the underlying EB-2 classification as a member of the professions holding an advanced degree; however, she did not establish eligibility for the national interest waiver under the analytical framework set forth in Matter of Dhanasar, 26 I&N Dec. 884, 889 (AAO 2016). We limited our review of the appeal to the Petitioner's eligibility for the national interest waiver.

For the national interest waiver, the Director determined that the Petitioner had not met the three prongs of the Dhanasar framework. We dismissed the appeal affirming the Director's determination that the Petitioner did not meet *Dhansar's* first prong and reserving arguments on the second and third prongs. See INS v. Bagamasbad, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make "purely advisory findings" and decisions unnecessary to the ultimate decision). We incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Petitioner's claims on motion.

On motion to reopen, the Petitioner submits her brief with new evidence, including a business plan dated July 2023; news articles relating to proposed U.S. legislation for nursing home care and starting a home health agency; recommendation letters; a business bank statement; and a foreign language bank statement. The motion also includes evidence previously submitted with her appeal, including news articles relating to the shortage of nurses in the United States.

The Petitioner requests we reanalyze her petition claiming her prior counsel made misrepresentations about her eligibility for the national interest waiver. She claims ineffective assistance of counsel, citing Matter of Lozada, 19 I&N Dec. 637, 639 (BIA 1988), *aff'd*, 857 F.2d l0 (1st Cir. 1988).

To the extent the Petitioner is making an ineffective assistance of counsel claim, she has not met the threshold requirements found in precedent case law, Lozada. In that case, the Board established a framework for noncitizens alleging ineffective assistance of counsel and set forth the following threshold documentary requirements:

- A written affidavit from the noncitizen 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 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 the noncitizen did not file a complaint.

Id.

These documentary requirements are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claims and to deter meritless claims. 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]

Here, the Petitioner's ineffective assistance of counsel claim does not meet any of Lozada's documentary requirements. The Petitioner did not submit an affidavit, instead submitting an unsigned letter which indicates that her previous counsel made certain representations about the sufficiency of the evidence supporting her petition for the national interest waiver. Specifically, the Petitioner indicates her counsel advised her that that her proposed endeavor to work as a nurse for a health care facility would meet the eligibility requirements for the national interest waiver based on the shortage of workers in her field. After receiving the denial decision, she reviewed "USCIS guidelines and realized that [she] was misrepresented," and that her counsel made promises about the approval of her petition that were not in accordance with the guidelines.

However, although she places blame on her former counsel for the legal sufficiency of her petition, she does not provide an affidavit attesting to the nature of her agreement with counsel regarding actions to be taken for her petition, including the agreement of the legal arguments or evidence to support her petition. Moreover, the Petitioner has not indicated whether she informed counsel of the ineffectiveness allegations or provided counsel with an opportunity to respond, or that she filed a complaint with the appropriate disciplinary authorities or provided an explanation for why such a complaint has not been filed. Thus, the Petitioner has not provided sufficient information for us to evaluate a claim for ineffective assistance of counsel under Lozada.

Next, the Petitioner indicates that she now proposes to establish a home care business in the United States and provides arguments how she meets the three Dhanasar prongs based on her new endeavor. To support her claims, she submits a business plan detailing her new business; news articles about home health care; letters of recommendation; and her Brazil bank statement and her spouse's business' bank statement to show financial support of her business.

The record initially depicted the Petitioner's endeavor as a nurse for a health care facility. After receiving the dismissal of her appeal, she now indicates she intends to establish a home health care

[1] If a noncitizen 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 noncitizen 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 noncitizen 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"); Matter of B-B-, 22 I&N Dec. 309, 311 (BIA 1998) (finding no prima facie case of ineffective assistance where counsel's insistence on corroborating evidence discouraged respondents from seeking asylum but was consistent with legal precedent and not egregious).

business. Instead of introducing new evidence, or a new fact supported by documentary evidence to establish proper cause to reopen the appeal decision which relate to the issues of her initial petition, the Petitioner has changed her proposed endeavor and submitted new evidence to support her new endeavor.

The Petitioner's proposed endeavor is material to whether she meets the three Dhanasar prongs for her eligibility of the national interest waiver. See Matter of Michelin Tire Corp., 17 I&N Dec. 248 (Reg'l Comm'r 1978); see also Matter of Dhanasar, 26 I&N Dec. at 889-90. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit sought at the time the petition is filed. 8 C.F.R. § 103.2(b)(1). In general, material changes made after the filing of a petition need not be considered. See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). In Izummi, the petitioner submitted numerous revisions to a partnership agreement following the director's denial, some of which were made specifically to address the "objected-to" provisions and were intended to "render the instant petition approvable." Id. at 175. We concluded that those amendments would not be considered in adjudicating the petition, because "a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements." Id. at 176. Here, the Petitioner's indicated new proposed endeavor of establishing a home health care business is a material change from the initial proposed endeavor of being a nurse for a health care facility, which amounts to an attempt to correct a deficient petition after filing. If significant material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. As such, the new facts revising her endeavor on motion cannot retroactively establish eligibility and do not meet the requirements for a motion to reopen.

We will therefore dismiss the motion to reopen.

III. CONCLUSION

The Petitioner has not established that a new fact, supported by evidence, shows proper cause to reopen our appeal decision. We affirm our previous determination that the Petitioner has not established eligibility under the first prong of the Dhanasar analytical framework and is thus not eligible for and does not merit a national interest waiver. While she also asserts on motion that he meets the second and third Dhanasar prongs, we will continue to reserve that issue. See INS v. Bagamasbad, 429 U.S. at 25-26.

ORDER: The motion to reopen is dismissed.