U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7766137

Date: NOV. 27, 2020

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). This fifth preference (EB-5) classification makes immigrant visas available to foreign nationals who invest the requisite amount of qualifying capital in a new commercial enterprise (NCE) 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 Immigrant Petition by Alien Investor (Form I-526), because the record did not confirm that the Petitioner had invested the requisite amount of funds in [redacted] the NCE[1]; that his claimed investment derived from a lawful source; or that he was actively involved in the management of the NCE. *See* 8 C.F.R. § 204.6(e), (j) (2016). Specifically, the Chief explained in the denial that the evidence concerning the Petitioner's purported EB-5 investment related to another individual, [redacted] and that individual's investment in [redacted] not the NCE. We dismissed the Petitioner's appeal, affirming the Chief's decision.

The matter is now before us on combined motions to reconsider and reopen the proceeding. On motion, the Petitioner resubmits documents that he previously filed on appeal and claims that his prior counsel's assistance was ineffective. He further asserts that the record demonstrates his eligibility for the EB-5 classification. Upon review, we will dismiss the motions.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy, and a motion to reopen is based on documentary evidence of new facts. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

[1] The NCE is affiliated with [redacted] *See* 8 C.F.R. § 204.6(e) (defining "regional center"), (j)(4)(iii) (2016).

In addition, the regulation specifies motion filing requirements, providing that a petitioner must submit "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed."

Furthermore, the Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F. 2d 10 (1st Cir. 1988). Although *Lozada* involved the Board's review of an Immigration Judge's denial of a motion to reopen deportation proceedings and not U.S. Citizenship and Immigration Services (USCIS) adjudications, *Lozada* provides guidance in our assessment of ineffective assistance of counsel claims that are relevant to a petitioner's eligibility and the issues before us on appeal or motion.

First, the petitioner must file the following documents, which *Lozada* sets forth as 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.* 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. 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).

Second, if the petitioner satisfies these threshold documentary requirements, he or she must also show that former counsel's assistance was so deficient that he or she was prejudiced by the performance. Specifically, the petitioner must show that there is a reasonable probability that the outcome would have been different without former counsel's mistakes, *see Li v. United States*, 648 F. 3d 524, 527 (7th Cir. 2011); *Delhaye v. Holder*, 338 F. App'x 568, 570 (9th Cir. 2009), and that he or she had at least

a plausible ground for relief. *See Martinez-Hernandez v. Holder*, 778 F. 3d 1086, 1088 (9th Cir. 2015). There is no prejudice if the adverse decision would have been issued even without former counsel's errors. *See, e.g., Minhas v. Gonzales*, 236 F. App'x 981, 982-83 (5th Cir. 2007).

II. ANALYSIS

We will dismiss the Petitioner's combined motions because they do not satisfy the filing requirements under 8 C.F.R. § 103.5(a)(1)(iii)(C) and 8 C.F.R. § 103.5(a)(4). Specifically, the motion filing does not include "a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." *See* 8 C.F.R. § 103.5(a)(1)(iii)(C). In the alternative, we will dismiss the motions for the following reasons.

A. Motion to Reconsider

The Petitioner has not shown that our previous decision is based on an incorrect application of USCIS or Department of Homeland Security (DHS) law or policy, and that his motion filing has not demonstrated that our prior decision is incorrect based on the evidence then before us. *See* 8 C.F.R. § 103.5(a)(3).

As discussed in our previous decision, the Petitioner did not submit to the Chief evidence verifying his investment of the requisite amount of funds in the NCE, the lawful source of his purported investment funds, or his active involvement in the management of the NCE. While the Petitioner submitted for the first time on appeal documents regarding his alleged EB-5 investment, we did not consider them, because the Chief, in her request for evidence (RFE), had put him on notice of the required evidence and given him a reasonable opportunity to provide it. The Petitioner, however, failed to present the requested evidence to the Chief. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). As such, we adjudicated the appeal based on the record of proceeding before the Chief and concluded that the Petitioner did not demonstrate his eligibility for the classification. On motion, the Petitioner has not established that we erred in our previous decision based on the record then before us. We will therefore dismiss his motion to reconsider the matter.

B. Motion to Reopen

We will also dismiss the Petitioner's motion to reopen the proceeding based on an assertion that his former counsel was ineffective. *See* 8 C.F.R. § 103.5(a)(2). The Petitioner has not followed the *Lozada* documentary requirements. Specifically, he has not submitted evidence that he filed a complaint with the appropriate disciplinary authorities, stating his allegation of ineffective assistance of counsel. The record includes a number of Forms G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. When the Petitioner initially filed the petition, a Form G-28 indicated that [redacted] of the firm [redacted] was his counsel.[2] [redacted] prepared the petition and the initial supporting evidence. He also responded to the Chief's RFE, in which she requested the required evidence establishing the Petitioner's eligibility for the classification.

[2] The Form G-28 indicated that [redacted] is a member of the California State Bar.

On appeal, the Petitioner submitted another Form G-28, which listed [redacted] of [redacted], as his counsel. In an August 2018 letter that accompanied the appellate filing, [redacted] stated that [redacted] "remains the Attorney of Record."

On motion, the Petitioner does not present evidence that he filed a complaint with the appropriate disciplinary authorities against [redacted] who, according to the Petitioner, failed to submit evidence regarding his purported investment in the NCE – the basis of his alleged ineffective assistance of counsel claim. Instead, he offers a letter from [redacted] addressed to the State Bar of California, stating that "our office made an inadvertent mistake" and "a quality control breach occurred." The Petitioner claims that the letter constitutes his former counsel's self-reporting to the California State Bar. This letter is insufficient to satisfy the *Lozada* threshold documentary requirements, because it does not specifically name [redacted] as having provided the Petitioner with ineffective assistance. In addition, even if we were to accept [redacted]'s letter as the Petitioner's complaint, he has not shown that [redacted]'s letter was actually submitted to the California State Bar before this motion filing. *See Lozada*, 19 I&N Dec. at 639.

Moreover, we have concerns over the credibility of the Petitioner's August 2019 statement, in which he attempts to attest to the relevant facts in support of his ineffective assistance of counsel claim. *See Lozada*, 19 I&N Dec. at 639. In the statement, the Petitioner claims that he did not know his former counsel had submitted documents pertaining to another individual until he received the Chief's denial of his petition. The record does not support this assertion. Specifically, the Chief's RFE, in which she noted that the Petitioner's initial filing had included evidence relating to another individual, was mailed to his former counsel and to an [redacted] Iowa, address. The Petitioner indicated that the [redacted] Iowa, address was his then mailing address. The record also contains a number of documents, including Forms I-290B, Notice of Appeal or Motion, stating that the Petitioner "can read and understand English." The documentation in the record does not establish the veracity of the Petitioner's August 2019 statement, including his claim that he was unaware of the filing error until the Chief denied his petition. Based on these reasons, we find that the Petitioner has not followed the *Lozada* threshold documentary requirements, and thus has not established an ineffective assistance of counsel claim. We will therefore dismiss his motion to reopen this proceeding.

III. CONCLUSION

We will dismiss the Petitioner's combined motions under 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(4). In the alternative, we will dismiss his motion to reconsider the matter because his filing does not establish that we based our prior decision on an incorrect application of law or policy, or that the decision was incorrect based on the evidence then before us. In addition, we will dismiss the Petitioner's motion to reopen the proceeding because his filing does not state new facts to be provided in the reopened proceeding or be supported by affidavits or other documentary evidence.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to open is dismissed.