U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26379071

Date: JUN. 15, 2023

Motion on Administrative Appeals Office Decision

Form I-485, Application for Adjustment of Status of U Nonimmigrant

The Applicant seeks to become a lawful permanent resident (LPR) based on his "U" nonimmigrant status. *See* Immigration and Nationality Act (the Act) section 245(m), 8 U.S.C. § 1255(m). The U classification affords nonimmigrant status to crime victims, who assist authorities investigating or prosecuting the criminal activity, and their qualifying family members. Section 101(a)(15)(U) of the Act. The U nonimmigrant may later apply for lawful permanent residency. Section 245(m) of the Act.

The Director of the Vermont Service Center denied the Form I-485, Application for Adjustment of Status of U Nonimmigrant (U adjustment application), as a matter of discretion, concluding that there was insufficient evidence to show that the positive and mitigating equities outweigh the negative factors in the case. We summarily dismissed the Petitioner's appeal, and dismissed a subsequent motion to reopen. The matter is now before us on a combined motion to reopen and motion to reconsider. On motion, the Applicant resubmits his appeal brief and claims that his counsel's assistance was ineffective. Upon review, we will dismiss the motions.

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. 8 C.F.R. § 103.5(a)(3). The motion to reconsider must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

The Applicant filed his U adjustment application in September 2015. The Director denied the application, concluding that the Applicant had not established that a favorable exercise of discretion was warranted on humanitarian grounds, to ensure family unity, or was otherwise in the public interest as required under section 245(m) of the Act. In March 2022, we summarily dismissed the Applicant's appeal because it did not identify specifically any erroneous conclusion of law or statement of fact in the unfavorable decision, as 8 C.F.R. § 103.3(a)(1)(v) requires. In our decision, incorporated here by reference, we advised the Applicant that although he indicated on his Form I-290B, Notice of Appeal or Motion (Form I-290B), that he would submit a brief and additional evidence to the AAO within 30

days, we had not received his brief or evidence. In November 2022, we dismissed the Applicant's motion to reopen because he did not provide new facts or evidence that would overcome our decision to summarily dismiss his appeal. In our decision, also incorporated here by reference, we noted that the Applicant did not demonstrate he followed form instructions and mailed his brief and additional evidence to the correct mailing address.

On motion to reopen, the Applicant claims that his failure to properly submit a brief and additional evidence to the AAO within 30 days of filing his appeal was due to ineffective assistance of counsel. Through the motion submission, the Applicant's attorney acknowledges that, after timely submitting the appeal, she erroneously mailed the appeal brief to the wrong address. The Applicant's attorney states that, but for this error, the appeal brief would have been timely filed and considered.

In *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988), the Board of Immigration Appeals (Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. The Board set forth the following documentary requirements for asserting a claim of ineffective assistance:

- A written affidavit of the noncitizen 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 noncitizen 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 noncitizen asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the noncitizen filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why the noncitizen 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. *Id.* Counsel's acceptance of responsibility for error does not satisfy the requirement to file a complaint with the appropriate disciplinary authority, particularly where the ineffective assistance allegation is provided by the same attorney. *Matter of Melgar*, 28 I&N Dec. 169, 170 (BIA 2020).

The Applicant has not followed the *Lozada* documentary requirements. In the present case, the attorney who allegedly provided ineffective assistance continues to represent the Applicant on this combined motion to reopen and reconsider. The record does not contain any evidence that the Applicant filed a complaint with the appropriate disciplinary authorities regarding the filing of his appeal brief to the incorrect address resulting in a summary dismissal. Instead, the Applicant submits a statement on motion indicating that he did not file a complaint with the state bar because his attorney "self-reported." In the brief, the Applicant's attorney states that she "erroneously mailed the brief to the wrong address" and "it was [her] mistake." The attorney further states that she "self-reported to

the Colorado bar" and provides a complaint number. This statement is insufficient to satisfy the *Lozada* threshold documentary requirements, because neither the Applicant, nor his attorney, explain the meaning of "self-reporting" or provide any evidence demonstrating that a complaint was actually filed with the Colorado State Bar before this motion filing. *See Lozada*, 19 I&N Dec. at 639.

While some courts have been flexible in enforcing the *Lozada* documentation requirements, they have done so when the record establishes that the policy goals of *Lozada* have been met. *See Lo v. Ashcroft*, 341 F.3d 934, 937 (9th Cir. 2003). The goals of *Lozada* include holding attorneys to appropriate standards of performance and assessing the merits of claims of ineffective assistance of counsel. As stated by the Board in *Melgar*:

> Requiring notification of disciplinary authorities is important because this is the most effective way of informing disciplinary authorities of allegations of potential violations of ethical or legal responsibilities. While a single instance of malpractice may not be sufficient for disciplinary authorities to act, the notification requirement allows disciplinary authorities to assess whether there is a pattern of misconduct that should be addressed.

Melgar, 28 I&N at 170. Further, requiring a complaint be made to the appropriate authorities is meant to ensure that counsel and clients cannot collude to use claims of ineffective assistance to achieve delay. *Id.* (*citing Matter of Rivera*, 21 I&N Dec. 599, 604 (BIA 1996)); *Lo*, 341 F.3d at 938 (citation omitted).

In this instance, the Applicant neither filed a complaint about his attorney with the appropriate disciplinary authorities nor gave a satisfactory reason as to why he did not do so. As stated above, although the Applicant's attorney indicated that she "self-reported," she does not further explain what this entails or submit documentation of her having done so. This does not meet the goals of holding attorneys to appropriate standards of performance or discouraging meritless claims of ineffective assistance. As stated by the Board in *Melgar*, "the obligation of the complaint cannot be so easily discharged, otherwise the purpose of the requirement is rendered inconsequential. This is particularly true . . . where the ineffective assistance allegation is rendered by the same attorney against himself." *Melgar*, 28 I&N at 170. Therefore, the Applicant has not satisfied the procedural requirements of an ineffective assistance claim under *Lozada*.

On motion to reconsider, the Applicant does not cite any error in our application of law or USCIS policy in our previous decision, nor has he established our prior decision was in error based on the record at the time. *See* 8 C.F.R. § 103.5(a)(3). As discussed in our previous decision, although the Applicant provided evidence that he attempted to file his brief and additional evidence in support of his appeal, the documentation submitted indicated that he did not send those documents directly to the AAO's mailing address, as required. As such, we adjudicated the previous motion to reopen based on the record then before us and the Applicant has not established that we erred in our previous decision based on said record.

Here, the Applicant has not submitted new evidence or established legal error in our prior decision, and has not overcome our previous determinations on motion. As such, the Applicant has not demonstrated on motion that he followed form instructions and mailed his brief and additional

evidence to the correct mailing address. Consequently, the Applicant has not established that his adjustment of status to that of an LPR under section 245(m)(3) of the Act is warranted.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.