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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

D14

Date: NOV 0 3 2011 Office: VERMONT SERVICE CENTER [redacted]

IN RE: [redacted]

PETITION: Petition for U Nonimmigrant Classification for a Qualifying Family Member of a U-1 Recipient Pursuant to Section 101(a)(15)(U)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)(ii)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), approved the petitioner's U-1 nonimmigrant status petition (Form I-918) but denied the Petition for Qualifying Family Member of a U-1 Recipient (Form I-918 Supplement A) submitted by the petitioner on behalf of the beneficiary. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The Form I-918 Supplement A will remain denied.

The petitioner seeks nonimmigrant classification of the beneficiary under section 101(a)(15)(U)(ii) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(U)(ii), as a qualifying family member of a U-1 nonimmigrant.

The director denied the Form I-918 Supplement A because the beneficiary was over the age of 21 when he was granted interim relief.[1] On appeal, counsel submits a brief and an unpublished AAO decision.

Applicable Law

Section 101(a)(15)(U) of the Act, provides for U nonimmigrant classification to alien victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity, as well as the victims' qualifying family members. For an alien victim of certain criminal activity who is at least 21 years old, section 101(a)(15)(U)(ii) of the Act defines a qualifying family member as the victim's spouse and children. Section 101(b)(1) of the Act defines a child, in part, as "an unmarried person under twenty-one years of age . . . ."

Regarding the admission of a qualifying family member, the regulation at 8 C.F.R. § 214.14(f) states, in pertinent part:

> (1) *Eligibility*. . . . To be eligible for . . . U-3 [(child)] . . . nonimmigrant status, it must be demonstrated that:
>
> (i) The alien for whom . . . U-3 . . . status is being sought is a qualifying family member, as defined in paragraph (a)(10) of this section; and
>
> (ii) The qualifying family member is admissible to the United States.
>
> * * *
>
> (4) *Relationship.* Except as set forth in paragraphs (f)(4)(i) and (ii) of this section, the relationship between the U-1 principal alien and the qualifying family member must exist at the time Form I-918 was filed, and the relationship must continue to exist at the time Form I-

[1] The term "interim relief" refers to the interim benefits that were provided by U.S. Citizenship and Immigration Services (USCIS) to petitioners for U nonimmigrant status, who requested such benefits and who were deemed prima facie eligible for U nonimmigrant status prior to the publication of the implementing regulations. 8 C.F.R. § 214.14(a)(13).

918, Supplement A is adjudicated, and at the time of the qualifying family member's subsequent admission to the United States.

Factual and Procedural History

The petitioner filed a request for U nonimmigrant status and interim relief pending the publication of regulations implementing the U classification. On December 29, 2005, U.S. Citizenship and Immigration Services (USCIS) granted the petitioner interim relief in the form of deferred action. The beneficiary, who was born on January 28, 1986, was 19 years old at the time the petitioner was granted interim relief; however, the petitioner had not requested interim relief for the beneficiary when she filed her own request and did not request interim relief for the beneficiary until July 2007, when he was 21 years old. The beneficiary was granted interim relief on September 5, 2007 when he no longer met the definition of a child at section 101(b)(1) of the Act.

In April 2008, the petitioner filed a Form I-918, Petition for U Nonimmigrant Status, and at the same time filed the instant Form I-918 Supplement A. The petitioner's Form I-918 U petition was subsequently approved, granting her U-1 nonimmigrant status. The director denied the Form I-918 Supplement A because the beneficiary was over the age of 21 at the time he was granted interim relief and he therefore did not meet the definition of a qualifying family member at section 101(a)(15)(U)(ii) of the Act because he was not a child as defined at section 101(b)(1) of the Act. The petitioner filed a motion seeking the director's reconsideration of his decision; however, the director affirmed his determinations. On appeal, counsel states that "*it is the principal's U interim relief filing date that determines a family member's eligibility for U Nonimmigrant status not the derivative's interim relief filing date.*" (Emphasis in the original). Counsel cites a USCIS policy memorandum[2] in support of his assertions and submits an unpublished AAO decision. Counsel also asserts that the petitioner and the beneficiary's due process rights were violated when they were the victims of ineffective assistance of the petitioner's prior counsel.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Based on the evidence in the record, we find no error in the director's decision to deny U-3 nonimmigrant status to the beneficiary.

Analysis

At the time his interim relief was approved, the beneficiary was no longer a child as defined at section 101(b)(1) of the Act because he was over the age of 21. The director has acknowledged his error in approving interim relief to the beneficiary. The AAO is not required to approve the instant petition merely because of a prior determination that was erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither USCIS nor any other agency must treat acknowledged errors as binding precedent. *See Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the regulation at 8 C.F.R. §214.14(c)(4) specifies that "USCIS will not be bound by its previous factual

[2] *New Classification for Victims of Criminal Activity – Eligibility for "U" Nonimmigrant Status*, USCIS Memorandum, (March 27, 2008).

determinations" when adjudicating petitions for U nonimmigrant classification.

Counsel states that the beneficiary's date of interim relief should be the same as the petitioner's, and cites a USCIS memorandum to support his claim. This memorandum states, in part, at page one: "This guidance provides that with regard to qualifying family members who were granted interim relief, the family member's age on the date of the U interim relief filing shall be controlling for the age eligibility requirement . . . ." As used in the memorandum, the term "on the date of the U interim relief filing" clearly refers to the date of the family member's interim relief filing, not the date that the principal filed for interim relief. To interpret the language otherwise would lead to the absurd result of a family member being able to qualify for derivative U-3 nonimmigrant status even though the family member no longer met the definition of a child at section 101(b)(1) of the Act.

Counsel also states that USICS's failure to promulgate the U nonimmigrant visa regulations, which provided for derivative U nonimmigrant status through the filing of a Form I-918 Supplement A, prejudiced the beneficiary because the petitioner had no mechanism to file for interim relief on the beneficiary's behalf "on any official USCIS form." Counsel's statements on this issue are disingenuous. Despite the lack of official USCIS forms to implement the U nonimmigrant visa statute at section 101(a)(15)(U) of the Act, the petitioner requested interim relief for herself and the beneficiary prior to the promulgation of the regulations on September 17, 2007, and USCIS approved their requests. Thus, counsel cannot now claim that any delay in promulgating the U nonimmigrant visa regulations made the petitioner unaware of the opportunity to file for interim relief for herself or the beneficiary due to the lack of any official USCIS forms.

Counsel also asserts that the petitioner and the beneficiary's due process rights were violated when they were the victims of ineffective assistance of the petitioner's prior counsel. Counsel submits a declaration from her supervisory attorney outlining the agreement and representations allegedly made between the petitioner and her prior counsel.

An appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The Ninth Circuit Court of Appeals, within whose jurisdiction this petition arose, has held that strict adherence to *Lozada* is not required when the record clearly shows the ineffective assistance of counsel. *See Castillo-Perez v. I.N.S.*, 212 F.3d 518, 525-27 (9th Cir. 2000); *Escobar-Grijalva v. I.N.S.*, 206 F.3d 1331, 1335 (9th Cir. 2000). In this case, counsel's supervisory attorney's declaration fails to meet all of the *Lozada* requirements and the record does not show a clear and obvious case of ineffective

assistance of counsel that would merit a waiver of those requirements. In his August 13, 2010 declaration, counsel states:

> In reviewing [the petitioner's] file, it appears that the agreement and representations made by [her] previous attorney (attorney R-F-[3]) included legal representation in her removal proceedings and filing of her Early U Visa/Interim Relief application, although the retainer signed by the client contains no specific mention of the precise legal services to be provided.

Counsel does not provide a copy of the retainer and his own description of the petitioner's agreement with her prior attorney is not supported by an affidavit from the petitioner herself. Accordingly, counsel's declaration does not meet the first [redacted] requirement. Although counsel states that he informed the petitioner's prior counsel of this ineffective assistance claim by electronic mail, the record contains no copy of that correspondence or any further evidence that prior counsel was informed of the allegations against her and was given a chance to respond. Hence, the second [redacted] requirement has also not been met.

The present record does not present such a clear and obvious case of ineffective assistance of counsel such that the [redacted] requirements may be relaxed or waived. As the court noted in [redacted] 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." Here, there is no question that the beneficiary was harmed by the failure to timely file a request for interim relief. However, the record contains no evidence that the harm was caused by the petitioner's prior counsel. As present counsel admits, the agreement between the petitioner and her prior attorney did not appear to include filing a request for interim relief for the beneficiary and the retainer did not specify the services to be performed by her prior attorney. The facts of this case are simply not comparable to those in [redacted] where, "[t]he record [was] undisputed that [redacted] lawyer failed, without any reason, to timely file the application in spite of having told [redacted] that he did file it . . . ." 212 F.3d at 526. The petitioner's case is also not analogous to that of [redacted] where an immigration judge allowed an attorney to represent the alien at her asylum hearing when she had never met the attorney and did not consent to his representation. 206 F.3d at 1335. Accordingly, the petitioner has failed to establish the ineffective assistance of her prior counsel, R-F-.

Finally, counsel's citation to an unpublished AAO decision has no effect on these proceedings, as only those AAO decisions approved by the Attorney General and published by the Director, Executive Office for Immigration Review, are binding on USCIS officers in their administration of the Act. 8 C.F.R. § 103.3(c).

Conclusion

The regulation at 8 C.F.R. 214.14(f)(4) requires the relationship between the petitioner and the qualifying family member to have existed at the time the Form I-918 U petition was filed, and continuing through the adjudication of the Form I-918 Supplement A and the qualifying family

[3] Name withheld to protect individual's identity.

member's subsequent admission to the United States. Here, when the petitioner simultaneously filed her Form I-918 U petition and the beneficiary's Form I-918 Supplement A in April 2008, a qualifying relationship did not exist because the beneficiary was over the age of 21 and no longer met the definition of a child at section 101(b)(1) of the Act. As noted earlier, the director made an error when granting interim relief to the beneficiary when he was over the age of 21 and not a child as defined at section 101(b)(1) of the Act. USCIS is not required to approve petitions based upon prior determinations that were erroneous. *See, e.g. Matter of Church Scientology International, supra*. Accordingly, the beneficiary may not be classified as a qualifying family member pursuant to section 101(a)(15)(U)(ii) of the Act.

In these proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4), (f)(5). Here, that burden has not been met as to the petitioner's son's eligibility for U-3 nonimmigrant status as a qualifying family member.

ORDER: The appeal is dismissed. The Form I-918 Supplement A remains denied.