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MAY 04 2009

FILE:



Office: SEATTLE

Date:

MSC 04 315 10084
MSC 07 214 14669, *appeal*

IN RE:

Applicant:



APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, and *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the Director, Seattle. The decision is now before the Administrative Appeals Office on appeal. The appeal will be rejected.

The director denied the application because the applicant was found to have abandoned the application. Specifically, the applicant failed to appear on March 1, 2007 for an interview with a United States Citizenship and Immigration Services officer (USCIS).

Counsel acknowledges that his client knew of his March 1, 2007 interview appointment and was prepared to attend. Counsel asserts that on February 28, 2007, the applicant's former counsel told him not to appear at the interview because counsel had requested a continuance and it would not be a problem. Counsel argues that the applicant did not abandon his application, but merely relied on the bad advice of his attorney and only failed to appear at the March 1, 2007 interview because his attorney inappropriately instructed him not to appear.

In the *Matter of Compean, Bangaly and J-E-C-, et al.*, 24 I&N Dec. 710 (A.G. 2009), the Attorney General held that the Constitution affords no right to counsel or effective assistance of counsel to aliens in immigration proceedings under the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *Id.* at 711-27. Although the Immigration and Nationality Act and accompanying regulations do not afford aliens a right to effective assistance of counsel, United States Citizenship and Immigration Services may, in its discretion, reopen proceedings based on the deficient performance of an alien's prior attorney. *Id.* at 727. Although *Compean* addresses deficient performance of counsel claims in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review. *Id.* at 728 n.6.

For claims pending prior to January 7, 2009, as in this case, the alien is not required to meet the six new documentary requirements expressed in *Compean*. However, he must still comply with requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *Lozada* requires an alien to submit: 1) an affidavit attesting to the relevant facts, detailing the agreement that was entered into, what actions were supposed to be taken and what the attorney did or did not do; 2) evidence that former counsel was informed of the allegations, given an opportunity to respond and former counsel's response, if any; and 3) evidence that a complaint has been filed with the appropriate disciplinary authorities regarding such representation or an explanation of why such a complaint was not filed. *Id.* at 638-39.

The applicant has submitted an affidavit in support of his claim. However, he has not submitted evidence confirming that former counsel has been notified of the incompetence claim, or evidence demonstrating that a complaint, based upon the allegations, has been filed with the appropriate disciplinary authorities. To the extent that the applicant has failed to produce evidence sufficient to substantiate an ineffective assistance of counsel claim, the AAO will

review the record applying standard statutory and regulatory eligibility requirements and burdens of proof.

Since the denial in this case was based on the abandonment of the application, it may not be appealed. Therefore, the appeal will be rejected.

ORDER: The appeal is rejected.