

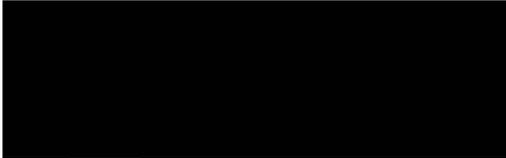
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE:

Office: CHICAGO

Date: JUN 16 2009

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Chicago, Illinois. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be dismissed and the prior decision of the AAO affirmed.

The applicant is a native and citizen of Mexico. She was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured a nonimmigrant visa and entry to the United States by fraud or willful misrepresentation. The applicant sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her lawful permanent resident spouse and two U.S. citizen children.

The district director concluded that the applicant had failed to establish that the bar to admission would impose extreme hardship on a qualifying relative and denied the waiver application accordingly. *Decision of the District Director*, dated July 22, 2004. The AAO affirmed the district director's decision on appeal. *Decision of AAO*, dated September 20, 2007.

In the present motion to reopen, counsel contends that the applicant is requesting that her case be reopened based on the ineffective assistance of her former counsel in submitting the waiver application. *Brief in Support of Motion to Reopen* at 1, dated March 24, 2008. Counsel states that former counsel's brief was "inadequate, in that it [did] not address the issues of 245(i) and materialness." *Id.* at 3. She further asserts that "[d]ocumentation concerning certain issues of extreme hardship were not addressed initially or in the appeal." *Id.*

Counsel contends that ineffective assistance of counsel amounts to a violation of due process protected by the Constitution such that, pursuant to decision by the Board of Immigration Appeals (BIA) in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), the AAO can reopen the matter even though the present motion was not timely filed. *Id.* Counsel asserts that a "letter was sent to prior counsel requesting information regarding any additional evidence that might have been submitted," but that there was no response to this letter, although former counsel did respond to a letter requesting a copy of the brief she submitted. *Id.* at 4. Counsel states that this brief "did seem adequate, but it was inadequate in that it did not address 245(i) and the lack of materiality of the representation." *Id.* Counsel further indicates that former counsel "did not submit additional evidence which might have led the adjudicator to find in the applicant's favor." *Id.* Counsel asserts that the applicant was thus prejudiced. *Id.* Counsel indicates that the applicant is not filing a bar complaint "as the documents submitted substantially depict hardship although not enough to find extreme hardship" and because prior counsel has made efforts to expand her knowledge of immigration matters by joining the American Immigration Lawyers Association. *Id.*

Counsel contends that the applicant's misrepresentation—the concealment of her marriage to a lawful permanent resident when seeking a nonimmigrant visa—was not material as it did not "cover up an inadmissibility issue and lead the Service to grant a visa to an inadmissible person." *Id.* at 5.

Counsel summarizes the evidence of hardship and asserts that it demonstrates that failure to grant a waiver of inadmissibility would result in extreme hardship to the applicant's spouse. *Id.* at 5-9. The regulation at 8 C.F.R. § 103.5(a) states in pertinent part:

(a) Motions to reopen or reconsider

(1) (i) . . . Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. . . .

(2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

(3) Requirements for motion to reconsider. 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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

(4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

Any appeal or motion 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 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, 639 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The AAO notes that the present motion is dated March 24, 2008, approximately six months after the AAO's September 20, 2007 decision, and is thus untimely. The applicant has not submitted evidence to show that the delay was reasonable and beyond her control, but counsel has asserted, citing *Matter of Lozada*, that a claim of ineffective assistance of counsel is a due process claim that

overcomes untimely filing. The AAO notes that this is not an explicit holding of *Matter of Lozada*, but that the BIA did consider the merits of a motion to reopen based on a claim of ineffective assistance of counsel filed some six months after its prior decision. *See* 19 I&N Dec. at 637.

The record in the present matter shows, however, that the applicant has not made a *prima facie* case for ineffective assistance of counsel. The record contains no affidavit or evidence of an affidavit from the applicant setting forth in detail the agreement that was entered into with her former counsel with respect to the actions to be taken and what representations former counsel did or did not make to the applicant in this regard. The record also does not contain evidence that the applicant's former counsel was informed of the allegations leveled against her and given an opportunity to respond, but only that she was asked for copies of documents she had submitted and for information concerning other evidence she could have submitted. The record contains two letters from counsel to applicant's former counsel, each dated March 24, 2008, in which counsel requests a copy of the brief previously submitted.

Therefore, as the applicant failed to file the present motion within 30 days of the AAO's prior decision, and has also failed to demonstrate that the delay was reasonable and beyond her control, the motion must be dismissed.

ORDER: The motion is dismissed and the previous decision of the AAO is affirmed.