U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In re: 5335698

Date: JUNE 2, 2020

Motion on Administrative Appeals Office Decision

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

The Applicant seeks to become a lawful permanent resident (LPR) under section 245(m), 8 U.S.C. § 1255(m), of the Immigration and Nationality Act (the Act), based on her "U" nonimmigrant status as a victim of domestic violence. The Director of the Vermont Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status (U adjustment application). We dismissed the Applicant's appeal and two subsequent motions to reopen and to reconsider. The matter is before us again on a third motion to reopen, and in the alternative, motion to reconsider. Upon review, we will dismiss the motions.

I. LAW

U nonimmigrants may adjust status to that of a lawful permanent resident at the discretion of U.S. Citizenship and Immigration Services (USCIS). Section 245(m) of the Act; 8 C.F.R. § 245.24(f). U adjustment applicants bear the burden of proof and persuasion to establish that they are eligible for and merit adjustment of status. 8 C.F.R. § 245.24(b), (d)(10). They must demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). An individual subject to an order of voluntary departure is ineligible for adjustment of status for 10 years if he or she "voluntarily fails to depart the United States within the time period specified" in the order. Section 240B(d)(1)(B) of the Act, 8 U.S.C. § 1229c(d). An individual has not "voluntarily" failed to depart the United States under section 240B(d)(1) of the Act when, through no fault of his or her own, he or she was unaware of the voluntary departure order or was physically unable to depart within the time granted. *Matter of Zmijewska*, 24 I&N Dec. 87, 94 (BIA 2007).

A motion to reopen must state the new facts to be proved and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy considering the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). An applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.

The Applicant's submission on motion asserts legal error in our prior decision concerning her second motion but does not include new evidence or state new facts. The Applicant does not ultimately establish her eligibility.

II. ANALYSIS

As discussed in our prior decisions, the Director concluded that the Applicant was ineligible for adjustment of status for 10 years because she did not comply with a voluntary departure order. In our prior decisions, incorporated here by reference, we considered the Applicant's claim that she did not depart the United States pursuant to her voluntary departure order because of the ineffective assistance of her former counsel, and found that although the Applicant met the threshold requirements for demonstrating a claim of ineffective assistance of counsel, she did not establish that her former counsel's actions were so deficient that she was prejudiced by his performance. *See Matter of Lozada*, 19 I&N Dec. 637, 638, 640 (BIA 1988) (outlining requirements for establishing ineffective assistance of counsel, including showing prejudice). Specifically, we determined that the dismissal by the disciplinary authorities in Nebraska of the Applicant's first complaint against her former counsel in November 2016 weighed against a finding that her former counsel engaged in ineffective assistance which prejudiced the Applicant. We also determined that the dismissal of her complaint undermined a showing that the Applicant's failure to depart was due to her lack of awareness of the voluntary departure order, or otherwise through no fault of her own. We noted that because the Applicant's April 2018 complaint against her former counsel remained pending before the disciplinary authorities, the Applicant's submission on motion did not overcome our prior determination that she did not establish her eligibility for adjustment of status.

In the instant motion, the Applicant argues that we erred as a matter of law in our prior decision because we found "that in order to show prejudice by [her former counsel]'s deficient representation, that the disciplinary authorities . . . must make a formal finding and discipline [her former counsel]." The Applicant notes that she filed the first complaint against previous counsel *pro se*, and because she has filed a new complaint with specific allegations of violations of the rules of professional conduct, there is a reasonable possibility that the disciplinary authorities will issue a favorable decision in her case. The Applicant further argues that, pursuant to *Matter of Zmijewska*, she is not required to show that her former counsel was disciplined to establish that her failure to depart the country during the requisite voluntary departure period was not voluntary. She contends that by complying with the *Lozada* factors, and "asserting facts that, if accepted as true, would establish prejudice," she has established that her failure to depart was not voluntary.

The Applicant's arguments do not demonstrate any error of law or policy because they misconstrue the basis for dismissing the motion. We did not require or conclude that disciplinary authorities "must make a formal finding and discipline" her former counsel in order for the Applicant to establish prejudice or that her failure to depart was not voluntary. Rather, as noted above, we determined that the dismissal of her complaint by the disciplinary authorities weighed against a finding that her former counsel engaged in ineffective assistance which prejudiced the Applicant and that her failure to depart was due to lack of awareness or through no fault of her own. The remainder of the evidence in the record did not sufficiently overcome that determination.

The Applicant further argues that we committed legal error by relying on the disciplinary authorities' dismissal of her complaint "as the sole reason" to dismiss her appeal and subsequent motions and by dismissing her motion because a decision had not been issued on the 2018 complaint against her former counsel. The Applicant contends that by complying with the *Lozada* factors, and "asserting facts that,

if accepted as true, would establish prejudice," she has established that her failure to depart was not voluntary. Again, the Applicant has not demonstrated any error of law or policy because her arguments misconstrue the basis of our decisions. As outlined above, the dismissal of the Applicant's complaint by disciplinary authorities was not the "sole reason" we dismissed her appeal and subsequent motions; it was one factor that, when considered with other evidence in the record, weighed against a finding that the Applicant was prejudiced and that her failure to depart was not voluntary or through no fault of her own. We also properly considered that she had not submitted evidence that her renewed complaint against her former counsel had been ruled upon by disciplinary authorities in Nebraska, and concluded, without such evidence, the Applicant had not established that she was prejudiced by her former counsel's assistance. In the instant motion, the Applicant's counsel provides that she would supplement the record with the decision of the disciplinary authorities once it is received. We have not received any supplemental filing, and there is no evidence in the record indicating the disciplinary authorities have ruled on the April 2018 complaint.

As we have previously determined, the Applicant has not established that she , through no fault of her own, was unaware of the voluntary departure order or was physically unable to depart. *See Matter of Zmijewska*, 24 I&N Dec. at 94. In a June 2017 affidavit, the Applicant affirms that an Immigration Judge discussed with her voluntary departure, that her former counsel advised her to take voluntary departure, and that she gave her former counsel the money to post the voluntary departure bond. Such evidence demonstrates that the Applicant was initially aware of the voluntary departure order. The remainder of the record, including statements made by the Applicant and her former counsel as they relate to the Applicant's disciplinary complaint, does not establish by a preponderance of the evidence that the Applicant did not receive further information about her removal proceedings such that she subsequently became unaware of the voluntary departure order or was physically unable to depart the United States.

Accordingly, the Applicant has not established that our decision was based on an incorrect application of law or policy, considering the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). Therefore, the motion to reconsider is dismissed. Because the Applicant has not provided new facts to be proved or submitted new documentary evidence, the motion to reopen is dismissed. 8 C.F.R. § 103.5(a)(2).

III. CONCLUSION

The Applicant's submission does not establish any error in our prior decision and does not establish her eligibility. Accordingly, her motion is dismissed and her U adjustment application remains denied.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.