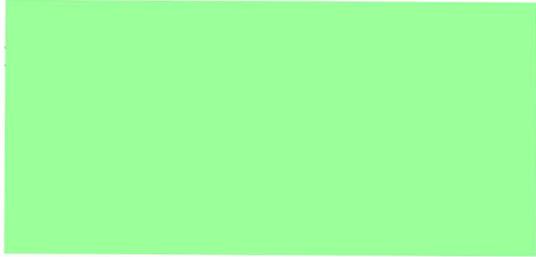


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **MAY 13 2013**

Office:

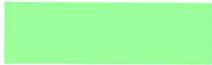
VERMONT SERVICE CENTER

FILE:



IN RE:

PETITIONER:



APPLICATION:

Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630, or a request for a fee waiver. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition. An appeal was rejected by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reopen or reconsider. The motion will be granted and the underlying petition will remain denied.

The record in this case provides the following pertinent facts and procedural history. The petitioner is a native and citizen of South Korea who entered the United States on January 18, 1996, on a B-2 nonimmigrant visa. The petitioner filed the instant I-918, Petition for U Nonimmigrant Status (Form I-918 U petition) with an accompanying U Nonimmigrant Status Certification (Form I-918 Supplement B) on July 20, 2010. On January 26, 2012, the director denied the petition because the petitioner did not establish that she suffered substantial physical or mental abuse as the result of having been a victim of qualifying criminal activity, and she is inadmissible to the United States. On February 29, 2012, the applicant appealed the director's decision to the AAO. On October 18, 2012, the AAO rejected the petitioner's appeal as untimely filed. On November 19, 2012, the petitioner, through counsel, filed a motion to reopen or reconsider the AAO's decision.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be proved and be supported by affidavits or other documentary evidence. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The record in support of the petitioner's motion includes, but is not limited to, counsel's brief, banking documents, and medical and psychological documents for the petitioner. The entire record was reviewed and all relevant evidence considered in rendering this decision. As the petitioner has submitted new documentary evidence to support her claim, the motion to reopen will be granted.

Ineffective Assistance of Counsel

In its October 18, 2012 decision, the AAO rejected the petitioner's appeal because it was untimely filed. On motion, the applicant, through counsel, asserts that the petitioner was the victim of ineffective assistance of the petitioner's prior counsel.

An 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 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 his November 16, 2012 brief, counsel states that prior counsel requested that the

petitioner submit \$585 for the appeal filing fee instead of \$630. When the petitioner's appeal was rejected for improper fee, prior counsel sent the proper fee, but it arrived late to the Vermont Service Center. Counsel submits copies of the checks sent by the petitioner to prior counsel; however, this evidence does not show a clear and obvious case of ineffective assistance of counsel that would merit a waiver of the *Lozada* requirements.

The petitioner did not file a complaint with the State Bar of New York against her prior attorney for ineffective assistance of counsel. Additionally, the petitioner's claim for relief in this proceeding for ineffective assistance of counsel is not supported by a copy of the retainer or an affidavit from the petitioner describing her agreement with prior counsel. Nor does the record establish that the petitioner's prior counsel has been informed of the allegations against him and has been given a chance to respond. As such, the petitioner has not demonstrated that her failure to timely file her appeal was due to ineffective assistance of counsel.¹

Conclusion

As the petitioner has not established an ineffective assistance of counsel claim, the AAO affirms its previous decision of October 18, 2012, and her petition remains denied.

As in all visa petition proceedings, the petitioner bears the burden of proving eligibility for U nonimmigrant status. Section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 214.14(c)(4). Here, that burden has not been met. Accordingly, the AAO's dismissal of the appeal is upheld and the underlying petition is denied.

ORDER: The motion is granted and the previous decisions of the Director and the AAO are affirmed. The petition remains denied.

¹ Even if the petitioner had established ineffective assistance of counsel, the appeal would have been summarily dismissed as the petitioner fails to identify any specific, erroneous conclusion of law or statement of fact in the director's decision. On appeal, prior counsel indicated that a brief and other evidence would be submitted within 30 days; however, the record does not show prior counsel filed a brief. Additionally, current counsel does not address the director's inadmissibility findings.