



U.S. Citizenship  
and Immigration  
Services

Non-Precedent Decision of the  
Administrative Appeals Office

In Re: 21084168

Date: APRIL 18, 2022

Appeal of Vermont Service Center Decision

Form I-918, Petition for U Nonimmigrant Status

The Petitioner seeks “U-1” nonimmigrant classification under sections 101(a)(15)(U) and 214(p) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p). In February 2019, the Director of the Vermont Service Center denied the Form I-918, Petition for U Nonimmigrant Status (U petition). In November 2019, the Petitioner filed a motion to reopen which the Director denied as untimely, concluding that the Petitioner’s delay in filing the motion was not reasonable or beyond her control. This appeal followed. On appeal, the Petitioner submits a brief and additional evidence. We review the questions in this matter de novo. *Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will remand the matter to the Director.

## I. LAW

Petitioners bear the burden of establishing eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). A motion must be filed within 33 calendar days of the date that the unfavorable decision was served by mail. 8 C.F.R. §§ 103.5(a)(1)(i), 103.8(b). U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, excuse a petitioner’s failure to file a motion to reopen before the filing period expires if the petitioner demonstrates that the delay was reasonable and beyond his or her control. 8 C.F.R. § 103.5(a)(1)(i).

## II. ANALYSIS

The record reflects that the Petitioner filed her U petition in 2015. In February 2019, the Director denied the petition as abandoned pursuant to 8 C.F.R. § 103.2(b)(13) because the Petitioner did not respond to a request for evidence (RFE) within the allowable period of time. In her November 2019 motion to reopen, the Petitioner asserted that the delay in the filing the motion was due to the ineffective assistance of her former counsel, and thus, the delay was both reasonable and beyond her control. In the decision denying the motion, the Director determined that the Petitioner did not demonstrate that she merited a favorable exercise of discretion to excuse the untimely filing of the motion because, following the denial of her petition, she declined her former attorney’s offer to start a new petition as she was tired of fighting her case and wanted it closed. The Director also noted that the Petitioner indicated that subsequent to being placed in removal proceedings, she was advised to retain a new attorney from her state of residency.

On appeal, the Petitioner asserts that the Director did not consider her arguments that she was prevented from timely filing a motion due to her prior counsel's ineffective assistance. She notes that with her motion, she provided all of the evidence required to demonstrate that she was prevented from timely filing her motion due to prior counsel's ineffectiveness pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).<sup>1</sup> She also argues that USCIS should have applied the doctrine of equitable tolling and deemed the motion to reopen timely filed pursuant to *Singh v. Holder*, 658 F.3d 879 (9th Cir. 2011).<sup>2</sup> Lastly, she argues that the Director based the denial on an excerpt from her affidavit and did not consider the complete affidavit, including her statements relating to the incorrect information that her former attorney told her regarding the immigration consequences of closing her case.<sup>3</sup>

Upon review, the record reflects that the Director did not sufficiently address the Petitioner's claim of ineffective assistance of counsel, which was the basis for her motion to reopen. As a result, we will remand this case to the Director to consider that claim in the first instance.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

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<sup>1</sup> A claim of ineffective assistance of counsel must ordinarily be supported by (1) an affidavit setting out the agreement entered into with counsel, (2) proof that notice of the allegations and an opportunity to respond has been provided to counsel whose representation was allegedly ineffective, and (3) the filing of a complaint with appropriate disciplinary authorities or an explanation for the failure to file a complaint. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

<sup>2</sup> In *Singh v. Holder*, the Ninth Circuit Court of Appeals held that a filing deadline may be tolled if the petitioner is prevented from timely filing her motion to reopen due to counsel's ineffectiveness.

<sup>3</sup> In her affidavit, the Petitioner states, "After one month of returning from California, [name omitted] called me and told me that my case was denied. She told me the case was denied because we didn't send the documents in time. I was so confused because I had traveled all the way to California to do the affidavit and take her the documents, all within the time frames she gave me. . . . [Name omitted] told me that we could start another case from the beginning again. At this point, I was so tired of dealing with her that I told her I didn't want to work with her anymore and I planned on finding another immigration attorney. She told me that only she could help me that no other attorney could help me with my case. At this point I was so mad I told her that I didn't want to keep going with the case if I could only work with her. I also asked what will happen if I didn't want to keep going with my case. [Name omitted] advised me that it was fine that if I didn't want to keep going with my case the case would just close, she never warned me that I would be put into proceedings or anything."