U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R-Y-

DATE: NOV. 23, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an opera singer, seeks classification as an individual of extraordinary ability in the arts. This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not satisfied any of the initial evidentiary criteria, of which he must meet at least three. The Petitioner appealed the matter to us and we dismissed the appeal, finding that he met only one criterion. We then denied the Petitioner's subsequent motion to reopen and reaffirmed our decision. The matter is now before us on a second motion to reopen and motion to reconsider. We will deny the motions.

I. LAW

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). A petitioner can demonstrate sustained acclaim and the recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles). Where a petitioner submits qualifying evidence under at least three criteria, we will then determine whether the totality of the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor.[1]

[1] *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011), *aff'd*, 683 F.3d. 1030 (9th Cir. 2012); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality" and that U.S. Citizenship and Immigration Services (USCIS) examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true").

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 USCIS policy. 8 C.F.R. § 103.5(a)(3).

II. ANALYSIS

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that "[a] motion that does not meet applicable requirements shall be dismissed." In this case, the Petitioner did not submit a statement indicating whether the validity of the decision has been, or is, subject of any judicial proceeding.

Notwithstanding the above, in dismissing the Petitioner's appeal, we concluded that he met the artistic display criterion under 8 C.F.R. § 204.5(h)(3)(vii) but did not satisfy any other claimed criteria, including the awards criterion under 8 C.F.R. § 204.5(h)(3)(i), the published material criterion under 8 C.F.R.§ 204.5(h)(3)(iii), and leading or critical role criterion under 8 C.F.R. § 204.5(h)(3)(viii). In our most recent decision denying his motion to reopen, we found that although the Petitioner did not state new facts or submit affidavits, he did offer two testimonial letters addressing his work in the field of operatic performance. We thoroughly discussed the letters and determined that they did not satisfy any of the regulatory criteria, nor did they reflect evidence related to those criteria. For the reasons discussed below, we find the Petitioner has not met the requirements of a motion to reconsider or a motion to reopen in this proceeding.

A. Motion to Reconsider

On motion, the Petitioner submits a sworn statement describing his immigration history and problems with people who assisted him in filing his petition, including two attorneys and an immigration consultant. Specifically: (1) he indicates that his first attorney and immigration consultant did not properly complete his petition, causing its initial rejection and resulting in delays in filing his adjustment of status application; (2) he contends that they never explained to the Director how his "accomplishments actually measured up to national or international [acclaim]"; (3) he states that his second attorney did not submit a brief and additional documentation at the time of the filing of the motion to reopen; rather they were submitted approximately a month later; and (4) he discusses problems encountered with his other applications, such as his employment authorization, advance parole, and adjustment of status, which are beyond the scope of this proceeding.

The Petitioner does not contend that our previous decision was made in error in accordance with an incorrect application of law or USCIS policy. The motion to reconsider does not allege that the

issues, as raised on the prior motion, involved the application of precedent to a novel situation, or that there is new precedent or a change in law that affects the denial of the previous motion. As noted above, a motion to reconsider must include specific allegations as to how we erred as a matter of fact or law in its prior decision, and it must be supported by pertinent legal authority. Because the Petitioner did not raise such allegations of error, we will deny the motion to reconsider.

B. Motion to Reopen

Regarding the motion to reopen, the Petitioner does not offer new evidence satisfying at least two additional regulatory criteria under 8 C.F.R. § 204.5(h)(3). Instead, the Petitioner presents copies of correspondence, applications and petitions, and decisions for his prior immigration filings. In addition, the Petitioner requests consideration of his prior attorney's supplemental brief that was filed for his previous motion to reopen. Further, while the Petitioner submitted a program from the [redacted] showing his current performance of [redacted] we previously determined that he met the artistic display criterion. Accordingly, as the Petitioner has not offered new evidence to overcome the grounds of our prior decision, the motion does not meet the applicable requirements for a motion to reopen under 8 C.F.R. § 103.5(a)(2).

Moreover, when a motion to reopen is based on a claim of ineffective assistance of counsel, the individual claiming such ineffectiveness must comply with the requirements set forth by the Board of Immigration Appeals in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The Petitioner has not met these requirements. Further, even if the ineffective representation claim was established, it is not clear that the outcome of the instant matter was affected by prior counsels' alleged misconduct. In this case, we thoroughly reviewed the record of proceedings before us and determined that the Petitioner's documentary evidence did not meet at least three of the ten categories listed under 8 C.F.R. § 204.5(h)(3). For the reasons discussed above, we find that the Petitioner has not established a claim for ineffective assistance of counsel or demonstrated prejudice based upon the actions of former counsels in support of the motion to reopen.

III. CONCLUSION

The Petitioner has not stated new facts and the evidence does not overcome the grounds of denial from our latest decision. The Petitioner has not met his burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.

Cite as *Matter of R-Y-*, ID# 115711 (AAO Nov. 23, 2016)