U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-V-

DATE: FEB. 17, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an options market consultant and educator, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). 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, Texas Service Center, denied the petition, concluding that the Petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R. § 204.5(h)(3), which requires documentation of a one-time achievement or exhibits that meet at least three of the ten regulatory criteria. We upheld that decision on appeal.

The matter is now before us on a motion to reopen. On motion, the Petitioner offers new evidence, and maintains that he is eligible for the benefit sought. He states that the motion should be approved because "the case law and regulatory guidelines provide framework to assist in arriving at decisions which are consistent and fair, regardless of where the case is adjudicated or by whom."

Upon review, we will deny the motion.

I. LAW

Section 203(b) of the Act makes visas available to foreign nationals with extraordinary ability in the sciences, arts, education, business, or athletics as demonstrated by sustained national or international acclaim and achievements that have been recognized in the field through extensive documentation. 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).

The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can show 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 the petitioner does not submit this evidence, then he or she must provide sufficient qualifying items that meet 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). Satisfaction of at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[1]

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentation.[2] As explained further below, however, the new facts must demonstrate eligibility as of the date of filing; a petition cannot be approved at a future date after a petitioner becomes eligible under a new set of facts.[3] Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence.[4] A party seeking to reopen a proceeding bears a "heavy burden."[5]

II. ANALYSIS

The Petitioner claims he is eligible as an individual of extraordinary ability based on his association memberships, original contributions, leading or critical role, judge of the work of others, evidence of commercial success in performing arts, and high salary. The Director found that the Petitioner had not submitted evidence of either a one-time achievement or documents that meet at least three of the ten criteria listed at 8 C.F.R. §§ 204.5(h)(3)(i)-(x). We affirmed the Director's decision, considering, in depth, the Petitioner's evidence relating to each criterion.

The Petitioner offers additional evidence on motion. Specifically, the Petitioner submits a job offer and proposed compensation plan dated September 8, 2015, from his personal earnings statements dated June, July, and August of 2016, and his personal income tax return for 2015. Additionally, the Petitioner submits evidence that he passed the December 2015 the May 2015 the October 2015 and the of December 2015 and of March 2016. The Petitioner also provides copies of his July 2015 email correspondence with a job recruiter. None of the evidence submitted on motion pertains to the Petitioner's accomplishments prior to the date of filing, April 4, 2014. The regulation at 8 C.F.R. § 103.2(b)(1) states: "An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request." *See*

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[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); *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 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").

[2] 8 C.F.R. § 103.5(a)(2).

[3] 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971); *see also Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) adopting the holding in *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

[4] *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)).

[5] *Id.* at 110.

also 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). As we are governed by the above regulations and precedent, we do not have the discretion to consider the Petitioner's evidence of post-filing accomplishments as evidence of his eligibility.

We also note that, 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." The Petitioner does not submit the required statement on motion.

III. CONCLUSION

The motion does not contain evidence of new facts that support eligibility at the time of filing. Accordingly, the motion will be denied.

ORDER: The motion to reopen is denied.

Cite as *Matter of N-V-* ID# 149451 (AAO Feb. 17, 2017)