U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-L-

DATE: MAR. 8, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an entrepreneur in real estate development, 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 Form I-140, Immigrant Petition for Alien Worker, concluding that the Petitioner previously submitted altered documentation and is therefore inadmissible to the United States. The Petitioner argues that his former attorney provided the documentation resulting in effective counsel.

Upon *de novo* review, we will withdraw the decision and remand the matter to the Director.

I. LAW

Section 203(b)(1)(A) of the Act makes visas available to immigrants with extraordinary ability if:

> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

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 two options for satisfying this classification's initial evidence requirements. First, a petitioner can demonstrate 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 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). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if he or she is able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the individual's occupation.

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether 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. *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). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "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." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

The Director approved the Petitioner's first extraordinary ability petition in 2013. Three years later, the Director issued a notice of intent to revoke the approval of the petition, finding that the Petitioner submitted altered documentation relating to his receipt of awards and questioned his eligibility for membership in associations. In response, the petition was withdrawn, and the Director formally revoked the approval of the petition.

After the filing of a second petition, the Director issued a notice of intent to deny referencing section 212(a)(6)(C)(i) of the Act, finding that the Petitioner "is ineligible for a visa or admission into the United States" based on the prior revocation for "fraud and misrepresentation." Moreover, the Director found that the Petitioner "acknowledge[d] that fraudulent documents were submitted, but blame[d] his previous attorney." In addition, the Director concluded that "[t]his does not negate the fact that he was previously found to have committed fraud, thus the [Petitioner] is ineligible for the benefit sought pursuant to INA 212(a)(6)(C)(i)."

On appeal, the Petitioner claims to be "the victim of ineffective assistance of counsel and fraud that was perpetrated by Attorney [redacted] of Pennsylvania, whom [the Petitioner] has unknowingly retained due to misrepresentation by a [redacted]" Further, the Petitioner asserts that "he submitted original documentation that attest to his extraordinary ability for Form I-140 EB1A petition that was subsequently fraudulently altered by [redacted] and Attorney [redacted] without [his] knowledge." In addition, the Petitioner indicates that he had no knowledge that [redacted] withdrew his first petition and filed a new one.

The Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

First, *Lozada* sets forth the following threshold documentary requirements for asserting a claim of ineffective assistance:

- A written affidavit of the petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel (i.e., the specific actions that counsel agreed to take), the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions.

- Evidence that the petitioner informed former counsel of the allegation of ineffective assistance and was given an opportunity to respond. Any response by prior counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim.

- If the petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the petitioner filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why the petitioner did not file a complaint.

Id. at 639. These documentary requirements are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claim and to deter meritless claims. *Id.* Allowing former counsel to present his or her version of events discourages baseless allegations, and the requirement of a complaint to the appropriate disciplinary authorities is intended to eliminate any incentive for counsel to collude with his or her client in disparaging the quality of the representation. We may deny a claim of ineffective assistance if any of the *Lozada* threshold documentary requirements are not met. *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000).

Second, if the petitioner satisfies these threshold documentary requirements, he must also show that former counsel's assistance was so deficient that he was prejudiced by the performance.[1] Specifically, the petitioner must show that there is a reasonable probability that the outcome would have been different without former counsel's mistakes,[2] and that he had at least a plausible ground

[1] *Lozada* at 632. In *Lozada*, the Board determined that Lozada was not prejudiced by counsel's failure to file an appeal brief (resulting in the summary dismissal of the appeal) because: he received a full and fair hearing at his deportation hearing, at which he was given every opportunity to present his case; he did not allege any inadequacy in the quality of prior counsel's representation at the hearing; the immigration judge considered and properly evaluated all the evidence presented; and the immigration judge's decision was supported by the record.

[2] *Yu Tian Li v. United States*, 648 F.3d 524, 527 (7th Cir. 2011); *Delhaye v. Holder*, 338 Fed. Appx. 568, 570 (9th Cir. 2009).

for relief.[3] There is no prejudice if the adverse decision would have been issued even without former counsel's errors. *See, e.g., Minhas v. Gonzales*, 236 Fed. Appx. 981 (5th Cir. 2007).

Here, the Petitioner has not met the threshold documentary requirements to assert a claim of ineffective assistance of counsel. While the Petitioner has submitted an affidavit which indicates that his new attorney has attempted to call the statement does not contain sufficient detail to determine that the prior attorney has been informed of the allegation of ineffective assistance of counsel and been provided an opportunity to respond. Furthermore, the record does not demonstrate that the Petitioner has filed a complaint with the appropriate disciplinary authorities or contain an explanation for why such a complaint has not been filed. Thus, the Petitioner has not provided sufficient information for us to evaluate a claim for ineffective assistance of counsel.

For the reasons set forth, we will remand the matter to the Director. Because the Petitioner maintains that he never filed the current petition, the Director must first determine whether the petition was properly filed. *See* 8 C.F.R. § 103.2(a). If so, he must then evaluate whether the record shows that: (1) the Petitioner has extraordinary ability in the sciences, arts, education, business, or athletics, (2) he seeks to enter the United States to continue his work in his area of extraordinary ability, and (3) he will substantially benefit prospectively the United States. *See* section 203(b)(2)(B) of the Act; *see also Kazarian v. USCIS*, 596 F.3d at 1115. Here, the Director found that the previous submission of altered documents deemed the Petitioner inadmissible for fraud or willful misrepresentation for the current benefit. A visa petition proceeding, however, is not the appropriate forum for finding the Petitioner inadmissible to the United States. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, he may be found inadmissible at a later date when he subsequently applies for admission into the United States or applies for adjustment of status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a).

III. CONCLUSION

The Director did not make a determination as to whether the Petitioner properly filed the petition and, if so, is an individual of extraordinary ability. Accordingly, we will remand the matter for further consideration of the record, including documentation submitted on appeal, and entry of a new decision.[4] In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012).

[3] *See Martinez-Hernandez v. Holder*, 778 F.3d 1086, 1088 (9th Cir. 2015).

[4] We have the authority to withdraw a decision and remand the case for further action, with an order that it be certified back to us if the new decision is adverse to the affected party. USCIS Policy Memorandum PM-602-0087, *Certification of Decisions to the Administrative Appeals Office* (AAO) 4 (July 2, 2013), https://www.uscis.gov/laws/policy-memoranda, Adjudicator's Field Manual 3.5(c), 10.18(a)(3), https://www.uscis.gov/ilink. This order is not meant to compel approval of the remanded case, but is designed to preserve the affected party's ability to seek appellate review without payment of a second appeal fee. *Id.*

ORDER: The decision of the Director, Texas Service Center, is withdrawn. The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of B-L-*, ID# 2342638 (AAO Mar. 8, 2019)