



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 6483909

Date: APR. 6, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a retail business consultant, seeks classification as an alien 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 of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner meets the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3)(i) – (x). The Petitioner subsequently submitted a combined motion to reopen and reconsider, including new evidence in support of his asserted original contributions of major significance to the field of retail business. In his decision to dismiss the motion, the Director found that the requirements for filing a motion had not been met. He also concluded that the Petitioner had not established that the previous decision was incorrect based upon the evidence of record at the time of filing. On appeal, the Petitioner asserts that the Director improperly dismissed the motion based upon the requirements at 8 C.F.R. § 103.5(a)(1)(iii)(C), and that he failed to consider the new evidence submitted with the motion to reopen and reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the decision of the Director and remand for further action consistent with the foregoing opinion and for the entry of a new decision.

I. LAW

A motion to reconsider is based on an *incorrect application of law or policy*, and a motion to reopen is based on documentary evidence of *new facts*. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). A motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit may be granted.

In addition, general filing requirements for a motion are located at 8 C.F.R. § 103.5(a)(1)(iii), stating in pertinent part:

(iii) *Filing Requirements*—A motion shall be submitted on Form I-290B and may be accompanied by a brief. It must be:

(C) Accompanied 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;

II. ANALYSIS

The Director concluded in his denial decision that the Petitioner met two of the requisite three alternative criteria under 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to his authorship of scholarly articles and his leading or critical role for organizations having a distinguished reputation. On motion, the Petitioner submitted several reference letters and other evidence which he asserted showed his original contributions of major significance to the retail business field. He also asserted that evidence which had been submitted in support of other criteria demonstrated how he has been able to share his work with that of others in the field, thus expanding the scope and significance of his contributions.

The Director included the motion to reconsider requirements at 8 C.F.R. § 103.5(a)(3) in his decision to dismiss the combined motion; however, he did not include the motion to reopen requirements, or a citation to the section of the regulations including those requirements. More importantly, the Director acknowledged the submission of new evidence in support of the motion to reopen, but did not provide an analysis of whether it met the requirements of the criterion at 8 C.F.R. § 204.5(h)(3)(v). Rather, he concluded without analysis that the evidence did not show that the Petitioner met the overall requirements for an individual of extraordinary ability, despite not having first determined that the requisite three alternative evidentiary criteria had been met. *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).

Also, while the Director included a citation to 8 C.F.R. § 103.5(a)(1)(iii)(C) which refers to a required statement regarding judicial proceedings, he did not state whether this filing requirement had been met. As noted by the Petitioner on appeal, the required statement was included in the first paragraph of his motion brief.

Because the Director did not fully explain the reasons for his decision on the Petitioner's motion, the Petitioner was not provided an opportunity to contest the decision, nor can we conduct a meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i),(iii) (providing that the director's decision must explain the specific reasons for denial and notify the affected party of appeal rights); *Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that the reasons for denying a motion must be clear to allow the affected party a meaningful opportunity to challenge the determination on appeal). Accordingly, we are remanding for the Director to consider the new evidence submitted by the Petitioner with his motion to reopen, as well as the Petitioner's arguments concerning the relevance of other evidence in the

record to the criterion at 8 C.F.R. § 204.5(h)(3)(v), and for the issuance of a new decision including sufficient analysis to afford the Petitioner the opportunity to present a meaningful appeal.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.