U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7723069

Date: APR. 23, 2020

Appeal of Texas Service Center Decision

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

The Petitioner, a business executive, 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 approved the petition, but later revoked that approval on notice, under the provisions of section 205 of the Act, 8 U.S.C. § 1155, and 8 C.F.R. § 205.2. The Director concluded that the petition had been approved in error, and that the Petitioner had provided conflicting information to U.S. Citizenship and Immigration Services (USCIS). The Director determined that the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. The matter is now before us on appeal.

The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Estime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). Upon *de novo* review, we will dismiss the appeal.

I. LAW

A. The Classification Sought

Section 203(b)(1)(A) of the Act makes immigrant visas available to aliens 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 a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of their 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 they 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 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).

B. Revocation of an Approved Petition

Section 205 of the Act states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition."

Regarding the revocation of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime* . . . , this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (quoting *Matter of Estime*, 19 I&N Dec. at 452).

II. ANALYSIS

Prior to her 2015 entry into the United States as an F-1 nonimmigrant student, the Petitioner was deputy general manager and board secretary of [redacted] The Petitioner does not claim any subsequent employment in the United States. At the time of filing, the Petitioner was studying for a master's degree in accounting, and she indicated that she was on a leave of absence from [redacted] The Petitioner indicates that she plans to work as a consultant to the [redacted] industry.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that she has received a major, internationally recognized award, she must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). The Petitioner initially claimed to have met six criteria, summarized below:

- (i), Lesser nationally or internationally recognized prizes or awards;
- (ii), Membership in associations that require outstanding achievements;
- (iv), Participation as a judge of the work of others;
- (vi), Authorship of scholarly articles;
- (viii), Leading or critical role for distinguished organizations or establishments; and
- (ix), High remuneration for services.

The Director found that the Petitioner met only two of the evidentiary criteria, numbered (iv) and (vi). On appeal, the Petitioner asserts that she also meets the evidentiary criteria numbered (i), (viii), and (ix). After reviewing all of the evidence in the record, we find that the Petitioner has met the two criteria granted by the Director, and a third criterion.

The criterion at 8 C.F.R. § 204.5(h)(3)(viii) calls for evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. The record establishes that [redacted] has a distinguished reputation as a major company in its field, and that the Petitioner performed in a leading or critical role for the company as a member of its board of directors.

As the Petitioner has demonstrated that she satisfies three criteria, we need not individually discuss the additional claimed criteria. We will evaluate the totality of the evidence in the context of the final merits determination below.

B. Final Merits Determination

As the Petitioner submitted the requisite initial evidence, we will evaluate whether she has demonstrated, by a preponderance of the evidence, her sustained national or international acclaim and that she is one of the small percentage at the very top of the field of endeavor, and that her achievements have been recognized in the field through extensive documentation. In a final merits

determination, we analyze a petitioner's accomplishments and weigh the totality of the evidence to determine if their successes are sufficient to demonstrate that they have extraordinary ability in the field of endeavor. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2), (3); *see also Kazarian*, 596 F.3d at 1119-20.[1] In this matter, we determine that the Petitioner has not shown her eligibility.

Complicating our consideration of the record, the Petitioner, through her current attorney of record, does not fully endorse the evidence submitted prior to the appeal. As we will further discuss below, present counsel contends that the evidence was prepared without the Petitioner's full participation and awareness, and that the Petitioner signed documents that she did not understand because of her limited comprehension of English. (As one example, the petition form shows a residential address in [redacted] Delaware. On appeal, present counsel asserts that the Petitioner has never lived in Delaware.) A petitioner's signature on the petition form is an attestation, under penalty of perjury, that the submitted evidence is true and correct. Present counsel's attempts to qualify this attestation necessarily reduce our confidence in the evidence submitted.

This vague, partial disavowal of prior submissions is of particular concern with regard to certain claims that are supported only by English-language letters written specifically to support the petition, rather than objective documentation.

The Petitioner held a high-ranking position at a major company, but her title and responsibility do not necessarily translate into acclaim or place her at the top of her field. [redacted]'s chairman states that the Petitioner "was a super star among board secretaries, especially in [redacted] Province." The statute requires sustained national or international acclaim. Recognition at the provincial level does not meet this threshold.

Shanghai Securities News gave the Petitioner a "[redacted] Award" as one of 25 "Outstanding [redacted] of Listed Companies" in 2009.[2] Later, the Petitioner served on the selection committee for another award from that publication in 2012. Shanghai is outside [redacted] Province, and thus honors from a Shanghai newspaper can indicate recognition beyond the provincial level, but the record does not show the significance of the [redacted] Award. As noted, the paper named 25 winners of the same award, and a printout from the paper shows dozens of recipients of other awards such as the "Investor Relations Award" and the "Information Disclosure Award." Information about the reputation and circulation of *Shanghai Securities News* does not directly establish the significance of awards from that publication.

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[1] *See also* USCIS Policy Memorandum PM 602-0005.1, Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14 4 (Dec. 22, 2010), https://www.uscis.gov/legal-resources/policy-memoranda (stating that USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established, by a preponderance of the evidence, the required high level of expertise for the immigrant classification).

[2] Questions arise from background information submitted with the petition, indicating that a board secretary is not eligible for the award if "his/her employment with the company is less than 2 years." The Petitioner's employment with [redacted] began in 2009, the same year for which she won the award.

The record indicates that the Petitioner served in important positions at [redacted] and at other companies, and was compensated accordingly, but it does not show that this work translated to sustained national or international acclaim. High-ranking corporate positions are a favorable factor but are not presumptive evidence that the Petitioner is among the small percentage at the very top of the field.

The Petitioner has written published scholarly articles in journals relating to business management, but the record does not establish that these articles have had a significant impact (for instance, by widely influencing and improving management practices). The Petitioner served on a journal's editorial board, but the record does not show that this position either resulted from, or contributed to, acclaim in the field.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). By the same logic, a high-ranking position at a large company does not result in a presumption of eligibility. Here, the Petitioner has not shown the required sustained national or international acclaim or established a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and that she is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2). The record indicates that the Petitioner had a successful career in business in Hunan Province, but the evidence is not sufficient to place her among the small percentage at the very top of her field.

Furthermore, the Petitioner's apparent unemployment since 2015 diminishes her claim that she has sustained whatever acclaim she may have previously earned in business.

C. Derogatory Information

In addition to issues regarding the regulatory criteria at 8 C.F.R. § 204.5(h)(3), the Director found that the Petitioner provided conflicting information to USCIS and the U.S. Department of State regarding her experience and salary. The Director did not make a finding that the Petitioner committed fraud or willfully misrepresented material facts. Rather, the Director found that the Petitioner's conflicting assertions undermined her credibility. *See Ho*, 19 I&N Dec. at 591.

Because we have already concluded that the Petitioner has not established sustained national or international acclaim, as required, detailed discussion of this additional issue cannot change the outcome of this appeal. Therefore, we reserve this issue and need not discuss the details here.

We will note, however, that the Petitioner attributes any apparent discrepancies to "negligence and inadequate representation by previous counsel," as well as "misrepresentation and fraud by an individual" who "posed as a US attorney."

The Board of Immigration Appeals 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 their 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 their 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).

In this instance, the Petitioner has not met any of the above conditions (and the appeal includes no explicit reference to *Lozada*). The appeal includes a statement from the Petitioner's new attorney, but no affidavit from the Petitioner herself. New counsel states his intention to file a complaint, but the record does not show that any complaint has been filed. New counsel does not say whether or not he has advised prior counsel of the allegations of misconduct.

Absent the required elements of a *Lozada* claim, we are left with new counsel's unsubstantiated claims about the conduct of prior counsel and his associate. Unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)).

III. CONCLUSION

The revocation of the previously approved petition is affirmed for the above stated reasons. The burden of proof to establish eligibility for the benefit sought remains with the petitioner in revocation

proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968); and *Matter of Estime*, 19 I&N Dec. at 452, n.1 (BIA 1987). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.