U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12093133

Date: JAN. 29, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, a business executive, 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 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 as the record did not establish that the Petitioner had satisfied the initial evidence requirements for the requested classification. The Director further determined that the Petitioner had provided conflicting information to USCIS that was not resolved by her response to the notice of intent to revoke (NOIR). We affirmed the revocation of the previously approved petition and dismissed the Petitioner's appeal. The matter is now before us on a combined motion to reopen and motion to reconsider.

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 review, we will dismiss the combined motions.

II. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause

for granting the motion. We cannot grant a motion that does not meet applicable requirements. See 8 C.F.R. § 103.5(a)(4).

II. LAW

A. The Classification Sought

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals with 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. 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).

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).

III. ANALYSIS

The issue in this matter is whether the Petitioner has submitted new facts supported by documentary evidence sufficient to warrant reopening her appeal and/or established that our decision to dismiss the appeal was based on an incorrect application of law or USCIS policy.

A. Prior AAO Decision

We dismissed the Petitioner's appeal determining that although she established that she meets three of the initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), the totality of the evidence did not demonstrate her sustained national or international acclaim and that she is among the small percentage at the very top of her field of endeavor. In evaluating the evidence in the final merits determination, we weighed evidence related to the Petitioner's industry award, her leading position with the board of directors of [redacted] and evidence of other high-ranking corporate positions she held, the compensation she received for these positions, her published articles in journals related to business management, and her position on a journal's editorial board. We determined that the record established that she enjoyed a successful career in business in China's [redacted] province. However, we concluded that she did not establish by a preponderance of the evidence that she achieved sustained national or international acclaim in her field as required by section 203(b)(1)(A) of the Act, and was therefore not eligible for classification as an individual of extraordinary ability.

In addition, we acknowledged that the Director had also revoked the approval of the petition, in part, based on a conclusion that the Petitioner had provided conflicting information to USCIS and the U.S. Department of State regarding her employment experience and salary which had not been fully resolved by her response to the NOIR. Because our determination that the Petitioner did not establish her eligibility for the requested classification was dispositive of the appeal, we reserved this separate issue and did not discuss it in detail. We did, however, acknowledge a claim by Petitioner's new counsel that any apparent discrepancies in the record were attributable to "negligence and inadequate representation by previous counsel" and "misrepresentation and fraud by an individual" who "posed as a US attorney." We observed that the allegations of ineffective assistance made on appeal were limited to new counsel's unsubstantiated claims about the conduct of prior counsel and his unlicensed associate.

B. Motion to Reconsider

The Petitioner's motion to reconsider is based on two allegations that USCIS misapplied the law to the facts of this case. First, the Petitioner asserts that the Director erred in determining that the record established that she met only two of the ten initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) and thus erred in revoking the approval of the petition. Specifically, the Petitioner contends that, since the Director determined in both the NOIR and the notice of revocation that the Petitioner met only two of these initial criteria, a "final merit[s] determination was not in the scope of the NOIR" and under Matter of Arias, 19 I&N Dec. 568 (BIA 1988), "the revocation could not have been made under a final merit[s] determination." The Petitioner requests that the Director "reconsider the revocation."

The basis for the Director's revocation of the approved petition, and our decision to affirm that revocation, was that the Petitioner did not meet the statutory and regulatory eligibility requirements

for this classification at section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2) and (3). As discussed above, the final merits determination is the second stage of the multi-part analysis set forth in Kazarian and involves a review of the totality of the evidence submitted in support the petition; it does not have separate evidentiary requirements.

Here, the NOIR listed all ten evidentiary criteria at 8 C.F.R. § 204.5(h)(3), explained the multi-part analysis and final merits determination that must be conducted if a petitioner meets at least three criteria, and advised that, under Kazarian, meeting the initial evidence requirement does not, in and of itself, establish that the individual has sustained national or international acclaim and is one of the small percentage who have risen to the very top of the field. The NOIR provided notice of this multi-part analysis and did not erroneously advise the Petitioner that she would overcome the intended revocation simply by meeting one additional evidentiary criterion.

Further, although we concluded upon de novo review of the record, including additional evidence and clarifications submitted on appeal, that the Petitioner met the criterion at 8 C.F.R. § 204.5(h)(3)(viii), we did not conclude that the Director's determination was in error based on the evidence before him at the time of the revocation decision.

Based on the foregoing, our decision to affirm the revocation was not grounded upon factors that were outside the scope of the NOIR or the notice of revocation. The Petitioner's implied request that we remand the matter to the Director for further consideration will not be granted.

The second argument that the Petitioner makes in support of her motion to reconsider is that the "AAO erred in the application of the final merits determination." The Petitioner specifically highlights our statement that "the Petitioner's apparent unemployment since 2015 diminishes her claim that she has sustained whatever acclaim she may have previously earned in business." However, the Petitioner has not explained how we misapplied the law or policy in considering the Petitioner's recent activities in the field in our evaluation of whether she has sustained acclaim at a level that places her among those at the very top of the field.[1] The quoted language from our decision immediately followed a detailed discussion explaining why the totality of the evidence related to her industry award, corporate positions and compensation, published journal articles and other evidence from 2015 and years prior did not demonstrate that she had achieved national or international acclaim; the lack of recent evidence of her activities was not the deciding factor in our final merits determination.

Rather than presenting a legal argument detailing how we misapplied law or policy in analyzing the final merits of her case, the Petitioner asks that we review a new affidavit in which she explains her recent activities in the United States and personal reasons for not pursuing full-time employment since 2015. She also explains her financial situation, noting that she has considerable resources based on her position as "a highly successful businesswoman in the top of her field" who "was compensated accordingly." However, a motion to reconsider must establish that our decision was incorrect based

[1] See 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 14 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html (providing that "[i]f an alien was recognized for a particular achievement, [USCIS] should determine whether the alien continues to maintain a comparable level of acclaim in the field of expertise . . . . An alien may have achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter."

on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider.

The Petitioner has not established that our decision to dismiss her appeal was based on an incorrect application of law or policy and that it was incorrect based on the evidence before us on appeal. Accordingly, the motion to reconsider will be dismissed.

C. Motion to Reopen

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Here, the Petitioner states that she is seeking to reopen the matter based on the ineffective assistance she received from her former counsel, [redacted] and his associate, [redacted] who is not a licensed attorney.

As a preliminary matter, we note that the Petitioner acknowledges that she retained the services of an individual [redacted] who is not an attorney or accredited representative, albeit she states that she did so unknowingly. The Petitioner's ineffective assistance claim is primarily focused on actions taken by this individual. However, there is no remedy available for a petitioner who assumes the risk of authorizing an unlicensed attorney or unaccredited representative to undertake representations on its behalf. See 8 C.F.R. § 292.1; see also Hernandez v. Mukasey, 524 F.3d 1014 (9th Cir. 2008) ("nonattorney immigration consultants simply lack the expertise and legal and professional duties to their clients that are the necessary preconditions for ineffective assistance of counsel claims").

However, as the record shows that the Petitioner was represented by an attorney who filed a Form G-28, Notice of Entry of Appearance as Attorney, with the Form I-140, we will consider her ineffective assistance claim. In a newly submitted affidavit, the Petitioner states that she met the named attorney, [redacted] on one occasion in September 2015 and had no further communication with him since that time.[2] She nevertheless maintains that former counsel's representation was clearly deficient and prejudiced her case, emphasizing that "because of the unorganized, falsified and confusing evidence submitted by prior counsel," her credibility was in question in the notice of intent to revoke, the notice of revocation, and the AAO's decision.

As we already discussed, we affirmed the Director's revocation of the approval and dismissed the appeal based solely on the merits of the Petitioner's extraordinary ability claim and a determination that the Petitioner did not establish that she has sustained national and international acclaim and that she is among the small percentage at the very top of the field. We reserved and did not discuss the issue of whether the record contained derogatory information or unresolved inconsistencies that would independently warrant revocation of the petition's approval.

The specific discrepancies discussed in the "Derogatory information" section of the Director's decision focused on the Petitioner's employment history, specifically her exact job titles, dates and locations of employment with [redacted] and the sources of her income as reflected in her

[2] We note that [redacted]' is named along with [redacted]' on the representation agreement the Petitioner signed in September 2015. The provided copy of the agreement does not include his signature and the Petitioner does not claim that she paid [redacted] or his firm; she states that she directly paid [redacted] of [redacted]

Chinese tax documentation. The Petitioner states in her affidavit that the NOIR response included an "inaccurate description of [her] work and income" as a result of ineffective assistance that prejudiced her case. However, a review of our decision reflects that these factors did not prejudice her case at the appeal stage. If we doubted the credibility of the evidence relating to her prior employment and salary, we would not have determined that she served in a leading role with [redacted] or that she received compensation commensurate with her "important positions at [redacted] and other companies."

We did express a concern with current counsel's contention that certain evidence was prepared by the Petitioner's previous representative without her full participation and awareness, and that she may have signed documents she did not fully understand based on her limited English language comprehension. For example, we noted that she signed the Form I-140 and attested to the accuracy of the information provided, although the petition indicated her residential address was in Delaware when in fact she resided in California. This was not a substantive issue that influenced our evaluation of her eligibility for this classification, as we concluded that she provided sufficient credible, probative evidence to establish that she met at least three of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). Accordingly, the Petitioner has not established that the outcome of her appeal was impacted by the claimed ineffective assistance of former counsel.

Finally, the Petitioner has not stated the new facts to be provided in a reopened proceeding that would overcome our determination that she did not establish her eligibility as an individual of extraordinary ability pursuant to section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2) and (3). The only new facts provided on motion that directly address the basis for dismissal of the appeal, as noted above, relate to her activities subsequent to her arrival to the United States in 2015. As noted, the Petitioner provides new information explaining why she has not been employed full-time since leaving her last position abroad. However, the information provided in her affidavit does not overcome our determination that she did not establish that she achieved sustained national or international acclaim in the years prior to 2015 or provide sufficient grounds for reopening the appeal. Accordingly, the motion to reopen will be dismissed.

IV. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration of our previous decision or otherwise established eligibility for the immigration benefit sought.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.