U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28963111

Date: DEC. 11, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (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 individuals 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 the Petitioner did not meet the initial evidentiary requirements for this classification by documenting his receipt of a major internationally recognized award, or in the alternative, by submitting evidence that satisfies at least three of the ten evidentiary criteria at 8 C.F.R. § 204.5(h)(3). The Director further concluded that the Petitioner had willfully mispresented material facts related to his past employment and professional accomplishments. The Petitioner subsequently filed combined motions to reopen and reconsider, in which he contested the Director's finding of willful misrepresentation. The Director dismissed the motions. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to noncitizens who (1) have 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; (2) seek to enter the United States to continue work in the area of extraordinary ability, and (3) will substantially benefit the United States upon their entry.

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 may demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). Absent such an achievement, the petitioner must provide sufficient qualifying documentation demonstrating that they meet at least three of the ten criteria 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).

II. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

The Director denied the petition, in part, based on a conclusion that the Petitioner had willfully misrepresented material facts with respect to several criteria at 8 C.F.R. § 204.5(h)(3)(i)-(v).

A finding of willful misrepresentation of a material fact against a petitioner requires the following elements:[1]

- The petitioner procured, or sought to procure, a benefit under U.S. immigration laws;
- The petitioner made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official.

Prior to denying the petition, the Director issued a notice of intent to deny (NOID) in accordance with 8 C.F.R. § 103.2(b)(8) and 8 C.F.R. § 103.2(b)(16)(i) (stating that if a decision will be adverse to a petitioner and is based on derogatory information considered by USCIS and of which the petitioner is unaware, they shall be advised of this fact and offered an opportunity to rebut the information and present information on their own behalf before the decision is rendered). The Director advised that the derogatory information pertaining to the Petitioner's eligibility under the criteria at 8 C.F.R. § 204.5(h)(3)(vi), (viii) and (ix) had been obtained by USCIS through "extensive research" conducted to validate his book publications, "open source queries" made in an effort to confirm his stated employment history with a publicly traded Chinese company, and review of a nonimmigrant visa

[1] *See generally* 8 *USCIS Policy Manual* J.2(B), https://www.uscis.gov/policy-manual. As outlined by the Board of Immigration Appeals, a material misrepresentation requires that one willfully makes a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. at 288, 289-90 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Tijam*, 22 I&N Dec. 408,425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

application (Form DS-160) the Petitioner had submitted to the U.S. Department of State in January 2015, on which he had provided information regarding the salary he received from his former Chinese employer.

The record reflects that the Petitioner's response to the NOID included a brief from former counsel, a 29-page personal statement from the Petitioner addressing the issues raised by the Director; and additional evidence intended to rebut the Director's determination that he had misrepresented material facts relating to the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(vi), (viii) and (ix).

The Director did not address the NOID or the Petitioner's response but concluded that the Petitioner willfully misrepresented material facts. Further, the Director referenced a criterion not previously mentioned in the NOID. Specifically, the Director stated that "[b]y claiming the [petitioner] held certain positions, *original contributions of major significance*, earned a certain salary and authored certain scholarly articles, the petitioner willfully made a false representation, and it is material to whether the beneficiary is eligible for the requested benefit." No further explanation is provided for the Director's conclusion that the Petitioner misrepresented material facts related to his original contributions under the criterion at 8 C.F.R. § 204.5(h)(3)(v).

In addressing the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), the Director acknowledged that the Petitioner submitted a statement and additional evidence in response to the NOID. However, the decision does not discuss the contents of the Petitioner's detailed statement or the evidence he submitted to corroborate his statement. Counsel correctly asserts on appeal that "the denial did not provide any detailed analysis of Appellant's rebuttal arguments; the denial largely tracks the original language from the NOID."[2]

While the Director provided the Petitioner an opportunity to rebut derogatory information obtained from outside the record of proceeding in accordance with 8 C.F.R. § 103.2(b)(16)(i), the Director erred by failing to give due consideration to the evidence and arguments the Petitioner submitted in rebuttal to the NOID. Because the Director did not explain why this evidence was insufficient to overcome the derogatory information, the decision provides insufficient support for a finding of willful misrepresentation. When denying a petition, the Director must explain in writing the specific reasons for denial. 8 C.F.R. § 103.3(a)(1)(i). This explanation should be sufficient to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See, e.g., Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

As written, the Director's denial notice did not explain why the Petitioner's rebuttal to the NOID was deficient and did not afford the Petitioner a reasonable opportunity to provide specific responses on appeal or motion to potentially overcome the Director's determination that he had willfully misrepresented facts that are material to his eligibility for the benefit sought. Accordingly, the

[2] In addition, counsel states that the Petitioner, through former counsel, provided "copious amounts of evidence and legal briefing on each of USCIS's findings" in support of his motion to reopen and reconsider, emphasizing that the decision dismissing the motion similarly "contained no substantive discussion on why the Appellant's rebuttal evidence insufficiently addressed USCIS's concerns."

Director's decisions denying the underlying petition and subsequent motion are withdrawn and the matter will be remanded to the Director for further consideration and issuance of a new decision with respect to the underlying petition.

In that new decision, the Director must consider and address the evidence submitted in rebuttal to the NOID. The Director should also consider the evidence and arguments submitted in support of the Petitioner's motion and appeal and may request any additional evidence considered pertinent to the new willful misrepresentation determination and any other issue. Finally, the Director must inform the Petitioner and allow him an opportunity for a rebuttal if the decision will be based on any derogatory information from outside the record of proceedings that has not yet been disclosed to him.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.