

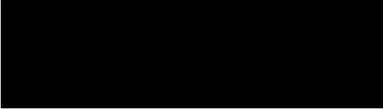


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U.S. Department of Justice
Immigration and Naturalization Service

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invasion of personal privacy**

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

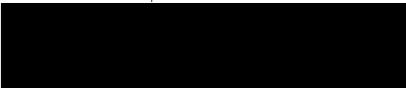


File: WAC 98 038 53996

Office: CALIFORNIA SERVICE CENTER

Date: **OCT 08 2002**

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF BENEFICIARY:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and the Associate Commissioner for Examinations dismissed a subsequent appeal. The petitioner had filed a motion to reopen the matter. While that motion was pending, the beneficiary submitted a second motion to reopen. The beneficiary's motion will be rejected.

The beneficiary seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. The director determined the beneficiary had not earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

8 C.F.R. 103.3(a)(1)(iii) states, in pertinent part:

(B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

8 C.F.R. 103.5(a)(1)(i) allows an affected party to file a motion to reopen, but there is no comparable provision for the beneficiary to file such a motion. 8 C.F.R. 103.5(a)(1)(iii)(A) requires that a motion must be "signed by the affected party or the attorney or representative of record" of the affected party.

Counsel for the beneficiary asks that the Service consider reopening *sua sponte*, but upon review of the record of proceeding and the beneficiary's latest submission, we see no grounds for reopening on our own motion. The petition was initiated not by the beneficiary, but by [REDACTED]

[REDACTED] The record indicates that the beneficiary left the employ of [REDACTED] no later than early 1998, and there is absolutely no evidence that the affected party, [REDACTED] has shown any interest in continuing to pursue this matter. Counsel for the beneficiary does not claim to represent [REDACTED] and in fact counsel has attempted to amend the petition (several years after the fact) to show the alien as petitioning on his own behalf. A beneficiary cannot declare himself to be the petitioner in this manner.

Counsel cites Matter of Lozada, 19 I&N 637 (BIA 1988), stating that the beneficiary is entitled to a reopening of the petition due to ineffective assistance of prior counsel. While counsel presents several instances of questionable conduct by the original attorney of record, there are nevertheless many material differences between Matter of Lozada and the matter at hand. Matter of Lozada concerned an alien in deportation proceedings (in which the burden of proof is on the government), seeking to have his case reopened before the Board of Immigration Appeals. In this instance, the proceeding is very different, an immigrant petition before the Administrative Appeals Unit, in which the burden of proof is on the petitioner. The alien in this instance, unlike the alien in Lozada, is not and has never been an affected party with standing to file appeals or motions. The argument that the alien would have filed the petition on his own behalf, but for the aforementioned ineffective

assistance of counsel, does not persuade us that the beneficiary should, at this late date, be considered the petitioner as well. A claim of ineffective assistance by counsel does not compel the Service in all instances to disregard its regulations and procedures regarding proper filing of petitions, appeals, and motions. The beneficiary's desire, in hindsight, to have filed his own petition does not negate the fact that he is not, in fact, the petitioner in this matter.

We note that the beneficiary has, in the meantime, filed a new petition on his own behalf.

This motion has not been filed by the petitioner, nor by any entity with legal standing in the proceeding, but rather by the beneficiary. Therefore, the motion has not been properly filed, and must be rejected.

ORDER: The motion is rejected.