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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 16 2009

WAC 03 244 52162

IN RE: Petitioner:
Beneficiary: [redacted]

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center.[1] On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action and consideration. The director again denied the petition and certified the matter to the AAO. The AAO affirmed the director's denial of the petition. The matter is now before the AAO on a motion to reopen. The motion will be dismissed. However, because the petitioner's motion is based on a claim of ineffective assistance of counsel, we will consider the petitioner's assertions regarding this claim.

The petitioner 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. The director and the AAO determined that the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. More specifically, the director and the AAO found that the petitioner had failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

On motion, counsel does not challenge the grounds for denial as discussed in the AAO's September 26, 2008 decision. Rather, based on the petitioner's ineffective assistance of counsel claim, present counsel requests that the matter be reopened and remanded to the California Service Center in order to afford the petitioner the opportunity to submit additional evidence. However, as the AAO made the last decision in this proceeding, jurisdiction shall remain with our office. 8 C.F.R. § 103.5(a)(1)(ii). The petitioner's motion does not present arguments or evidence to overcome the AAO's findings regarding his failure to meet the statutory and regulatory requirements for classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph 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

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[1] The petitioner was initially represented by [redacted]. On June 13, 2007, [redacted] resigned from the State Bar of California with charges pending and is now prohibited from practicing law in California. In this decision, the term "previous counsel" shall refer to [redacted].

> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3).

As discussed, the AAO found that the petitioner had failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

On motion, counsel argues that previous counsel provided ineffective legal assistance to the petitioner stating:

> Although [redacted]s was the attorney on record for petitioner's case, petitioner has never met [redacted]. . . . All the communication about the case was made through [redacted] . . . Because of lack of communication, most of documents submitted by [redacted] on behalf of [the petitioner] did not meet the legal requirement for a petition for a person of extraordinary ability. One of the outrageous conducts by [redacted] is that the foreign documents were not submitted with certified translation. . . . Petitioner really made significant achievement in folk arts. However, little valuable evidence was submitted to prove that. As a proximate cause of [redacted] fault, petitioner's case was denied by USCIS and AAO.

The petitioner's motion was accompanied by the following documents:

1. An October 20, 2008 brief prepared and signed by counsel.
2. An October 4, 2008 declaration signed by the petitioner "under the penalty of perjury under the laws of California" and an accompanying certified English language translation.
3. A December 6, 2005 statement from the [redacted] reflecting a payment received by [redacted] $1,200.
4. A November 7, 2007 receipt (number [redacted]) for $2,000.
5. An "Immigration Retainer Agreement" between the petitioner and previous counsel dated April 4, 2003.
6. An undated, incomplete copy of an "Immigration Retainer Agreement" between the petitioner and previous counsel consisting of only pages 1 and 2.
7. An October 7, 2008 letter from counsel to previous counsel informing him of the petitioner's allegations and an accompanying certified mail receipt.

8. An October 9, 2008 State Bar of California, California Attorney Complaint Form prepared by counsel and an accompanying certified mail receipt.
9. Information from the State Bar of California reflecting that previous counsel resigned from the State Bar of California with charges pending on June 13, 2007 and is now prohibited from practicing law in California.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

First, pursuant to *Matter of Lozada*, the claim must be supported by an affidavit of the allegedly aggrieved petitioner setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the petitioner in this regard. *Id.* at 639. Rather than submitting an affidavit, the petitioner submits a signed declaration dated October 4, 2008.[2] Therefore, the first requirement of *Matter of Lozada* has not been met.

Second, pursuant to *Matter of Lozada*, the petitioner's former counsel must be informed of the allegations leveled against him and be given an opportunity to respond. *Matter of Lozada,* 19 I&N Dec. at 639. On motion, the petitioner submits an October 7, 2008 letter from counsel to previous counsel informing him of the petitioner's allegations and an accompanying certified mail receipt. Thus, the second requirement of *Matter of Lozada* has been met.

Third, pursuant to *Matter of Lozada*, the motion must reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of former counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada,* 19 I&N Dec. at 639. On motion, the petitioner submits a copy of his complaint filed with the California State Bar against previous counsel. Thus, the third requirement of *Matter of Lozada* has been met.

In conclusion, the petitioner has not established that his ineffective assistance of counsel claim meets all of the required elements of *Matter of Lozada*.

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[2] The October 4, 2008 statement of the petitioner submitted on motion is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). An unsworn statement made in support of a motion is not evidence and thus, as is the case with the arguments of counsel, is not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel's submission also fails to meet the regulatory requirements for a motion to reopen based on the merits of the petition. The regulation at 8 C.F.R. § 103.5(a)(2) prescribes: "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." Counsel's brief states no new facts and is accompanied by no affidavits or documentation of the petitioner's eligibility for immigrant classification as an alien with extraordinary ability. Counsel asserts that the petitioner "really made significant achievement in folk arts. However, little valuable evidence was submitted to prove that." In his declaration, the petitioner claims that his achievements "can be google-searched by going to www.google.cn," but the petitioner does not submit printouts of such a search, any underlying sources resulting from such a search or other documentation of his achievements. Neither counsel nor the petitioner cite any evidence that would overcome the AAO's findings on certification that the petitioner failed to meet the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), and (ix). Accordingly, the petitioner has not met the requirements for a motion to reopen this case for another evaluation of his eligibility for immigrant classification under section 203(b)(1)(A) of the Act.

The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) also requires that a motion be "[a]ccompanied 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." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C).

The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. The petitioner's submission does not meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(1)(iii)(C), (a)(2). Accordingly, the motion will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is dismissed. The petition remains denied.