



U.S. Citizenship
and Immigration
Services

B2

[REDACTED]

DATE: Office: TEXAS SERVICE CENTER [REDACTED]
DEC 07 2012

IN RE: [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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Texas Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition on March 10, 2011. The petitioner filed a motion to reopen, which the director dismissed on May 13, 2011. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal on March 22, 2012. The matter is now before the AAO on motion to reopen. The motion will be dismissed pursuant to 8 C.F.R. §§ 103.5(a)(1)(iii)(C), 103.5(a)(2), and 103.5(a)(4).

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 as a ship modeler.¹ Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). 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* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). 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. *Id.* and 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. In the director's notice of revocation dated March 10, 2011, the director determined the petitioner had failed to establish: that he meets at least three of the regulatory categories of evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(3), that he has sustained national or international acclaim, that he is among that small percentage who have risen to the very top of the field, and that he submitted clear evidence that he will continue to work in his area of expertise in the United States as required by the regulation at 8 C.F.R. § 204.5(h)(5).

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that 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."

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

¹ According to Form I-94, Arrival-Departure Record, the petitioner was last admitted to the United States on September 26, 2002 as a B-2 nonimmigrant visitor for pleasure.

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 un rebutted, 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) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director’s realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

In its March 22, 2012 decision dismissing the petitioner’s appeal, the AAO determined that the petitioner had failed to identify specifically any erroneous conclusion of law or statement of fact in the director’s decision. Accordingly, the petitioner’s appeal was summarily dismissed pursuant to the regulation at 8 C.F.R. § 103.3(a)(1)(v).

On motion, counsel alleges that the petitioner received ineffective assistance from his previous attorney.² Counsel asserts that because the petitioner received ineffective assistance from previous counsel, the matter should be reopened, the appeal should be sustained, and the director’s decision revoking the approval of the petition should be withdrawn.

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).

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314,

² The petitioner was initially represented by attorney [REDACTED] and subsequently represented by [REDACTED]. In this decision, the term “previous counsel” shall refer to [REDACTED].

323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a “heavy burden.” *INS v. Abudu*, 485 U.S. at 110.

In order to properly file a motion, the regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that the motion must 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.” Furthermore, the regulation at 8 C.F.R. § 103.5(a)(4) requires that “[a] motion that does not meet applicable requirements shall be dismissed.” In the present matter, the petitioner failed to submit a statement regarding if the validity of the decision of the AAO has been or is the subject of any judicial proceeding.

Notwithstanding the above, in support of the instant motion, the petitioner submits a signed declaration, dated April 23, 2012, stating:

* * *

6. I first consulted with [previous counsel] about my options in light of the I-140 revocation at his office in the afternoon on March 15, 2011. He was referred by a friend.
7. Upon reviewing the revocation decision, [previous counsel] indicated that my case was complicated but he could solve it for me. He also quoted \$5,000 for his services of filing “appeals” with both Texas Service Center and Administrative Appeals Office (“AAO”) and additional \$5,000 contingent upon the approval of my green card should the appeal prevail.
8. What drove me to retain his services was the comment he made: “unlike some attorneys out there, I would do my work once being paid.” I signed the Retainer Agreement with [previous counsel] and paid him \$3,000 as agreed upon.
9. The following day, I forwarded [previous counsel] all the documents pertaining to my I-140 petition as well as supplemental evidence.
10. On March 23, 2011, I paid additional \$2,000 to [previous counsel].
11. In April 2011, I requested a copy of the appeal file from [previous counsel]. He refused to provide me any and asked me to wait for USCIS’s final decision. Therefore, I had no clue what had been filed with the USCIS by [previous counsel].
12. On May 13, 2011, Texas Service Center denied the Motion to Reopen because no new facts had been provided to meet the requirements for filing a motion to reopen. On the same day, my I-485 adjustment application was denied.

13. [Previous counsel] advised me to file an appeal with AAO and promised me his best and most professional service. I was asked to wait patiently as AAO's processing time would be around 12 to 14 months.
14. Subsequently, I tried to follow up with [previous counsel] on the status of the appeal. He became increasingly annoyed and told me not to call him any more due to his busy calendar. He asked me to contact his wife for any further questions.
15. On March 22, 2012, AAO issued a decision and summarily dismissed my appeal because of the lack of a legal brief along with the supporting documents.
16. According to AAO, [previous counsel] failed to submit a legal brief or any additional documents in support of my appeal as specified on Form I-290B, Notice of Appeal.

The petitioner also submits an April 21, 2012 letter of complaint concerning previous counsel's services addressed to the "State Bar of California" and a photocopy of an envelope addressed to previous counsel. Below the petitioner's signature at the closing of the letter appears a copy notation bearing previous counsel's name and address. There is no documentary evidence (such as a certified mail receipt) indicating that the letter was actually sent to previous counsel informing him of the allegations leveled against him and that he was afforded an opportunity to respond. Accordingly, the petitioner's evidence does not meet the second requirement set forth in *Matter of Lozada*.

The April 21, 2012 letter of complaint addressed to the State Bar of California was accompanied by a photocopy of an envelope addressed to the State Bar of California, but there is no documentary evidence indicating that the letter was sent or that the complaint was actually filed with that organization. Accordingly, the petitioner's evidence does not meet the third requirement set forth in *Matter of Lozada*. According to the State Bar of California, <http://www.calbar.ca.gov/>, previous counsel has "no public record of discipline" and "no public record of administrative actions."³

In *Matter of Lozada*, the Board of Immigration Appeals stated:

Failure to specify reasons for an appeal is grounds for summary dismissal It would be anomalous to hold that the same action or, more accurately, inaction that gives rise to a summary dismissal of an appeal could, without more, serve as the basis of a motion to reopen. To allow such anomaly would permit an alien to circumvent at will the appeals process, with its regulatory time constraints, by the simple expedient of failing to properly pursue his appeal rights, then claiming ineffective assistance of counsel. Litigants are generally bound by the conduct of their attorneys, absent egregious circumstances. *LeBlanc v. INS*, 715 F.2d 685 (1st Cir. 1983).

³ See <http://members.calbar.ca.gov/fal/Member/Detail/233945>, accessed on December 4, 2012, copy incorporated into the record of proceeding.

Id. at 639.

The petitioner has failed to submit evidence showing that the inadequate quality of previous counsel's representation resulted in dismissal of the appeal. Accordingly, the petitioner has not demonstrated that previous counsel's actions were prejudicial and that previous counsel's assistance was ineffective. Based upon the record of proceeding before the AAO, the AAO finds that the petitioner's ineffective assistance of counsel claim has not been established.

Counsel also asserts that the petitioner meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i) – (ix). As the petitioner's ineffective assistance of counsel claim has not been established, the AAO will only consider arguments and evidence on motion relating to the grounds underlying the AAO's most recent decision dated March 22, 2012. The petitioner bears the burden of establishing that the AAO's decision summarily dismissing the appeal pursuant to the regulation at 8 C.F.R. § 103.3(a)(1)(v) was in error. If the petitioner had shown that the AAO erred by summarily dismissing the appeal or that he received ineffective assistance from counsel, then there would be grounds to reopen the proceeding. The petitioner has not done so in this proceeding.

As previously noted, the regulation at 8 C.F.R. § 103.5(a)(4) states that “[a] motion that does not meet applicable requirements shall be dismissed.” Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen is dismissed, the decision of the AAO dated March 22, 2012 is affirmed, and the approval of the petition remains revoked.