U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28981666

Date: DEC. 12, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, an artificial intelligence and natural language processing technology business, seeks to classify the Beneficiary, a software engineer, 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 Nebraska Service Center denied the petition, concluding the Petitioner did not establish the Beneficiary satisfied at least three of the initial evidentiary criteria. 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 dismiss the appeal.

I. LAW

Section 203(b)(1)(A) of the Act makes visas available to immigrants with extraordinary ability 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

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

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 achievements in the field through a one-time achievement (that is, a major, internationally recognized award) or 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).

II. ANALYSIS

Because the Petitioner has not indicated or established the Beneficiary has received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). Although the Petitioner claimed the Beneficiary met five criteria, the Director determined the Petitioner did not fulfill any of them. On appeal, the Petitioner maintains the Beneficiary qualifies for three categories of evidence.[1]

A. Evidentiary Criteria

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v).

In order to satisfy the regulation at 8 C.F.R. § 204.5(h)(3)(v), USCIS determines whether the person has made original contributions in the field.[2] USCIS then determines whether the original contributions are of major significance to the field.[3] Examples of relevant evidence include, but are not limited to: published materials about the significance of the person's original work; testimonials, letters, and affidavits about the persons original work; documentation that the person's original work was cited at a level indicative of major significance in the field; and patents or licenses deriving from the person's work or evidence of commercial use of the person's work.[4]

The Petitioner claims it demonstrated the Beneficiary's eligibility for this criterion based on the submission of reference letters and patent information. The record reflects the Petitioner presented

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[1] We consider the Petitioner's prior eligibility claims not contested on appeal to be abandoned. An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).
[2] *See generally* 6 USCIS Policy Manual F.2(B)(1), https://www.uscis.gov/policymanual.
[3] *Id.*
[4] *Id.*

several letters from individuals who worked with the Beneficiary. Although the letters indicate projects in which the Beneficiary collaborated or developed, the letters do not show how they resulted in original contributions of major significance in the field. Instead, the letters briefly describe the Beneficiary's projects without detailing the significance of the work in the field. For instance, "[the Beneficiary] worked as a Software Engineer on a project developing a single, universal solution for cardiac device patient management that meets the in-office needs of clinicians and the emerging and changing needs of remote patients" (O-B-); "[the Beneficiary] was responsible for a project that developed a clinical trial management system for pharmaceutical and biotechnology companies"; and "we've done a few projects related to upgrades of OpenStack-based clouds, performance testing of the different scenarios live-migrations that are relevant in the enterprise environments" (V-N-). Here, none of the letters further elaborate and describe whether the Beneficiary's projects or work has influenced or impacted the field in a major way. Similarly, although B-C- claimed the Beneficiary "had a tremendous impact on the [A-] product," the letter does not further explain or justify how the Beneficiary "had a tremendous impact." Moreover, B-C-'s vague claim refers to the limited impact on the employer rather than the overall field.

Detailed letters from experts in the field explaining the nature and significance of the person's contribution may also provide valuable context for evaluating the claimed original contributions of major significance, particularly when the record includes documentation corroborating the claimed significance.[5] Submitted letters should specifically describe the person's contribution and its significance to the field and should also set forth the basis of the writer's knowledge and expertise.[6] In this case, the letters lack specific, detailed information explaining how the Beneficiary has made original contributions of major significance in the field. USCIS need not accept primarily conclusory statements. *1756, Inc. v. The U.S. Att'y Gen.*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

Regarding the patents, the Petitioner offered a letter from O-R- who stated the Beneficiary "contributed to the design architecture of our entire solution by applying his knowledge and skills in maintaining scalable, high-loaded Web applications" for P-. In addition, O-R- briefly described two patents in which the collaborated and stated "[t]his was a novel solution to the technical problem faced by systems for matching electronic activities to CRM system," and "[t]his invention . . . represents a novel and original contribution to the development of information technology platforms for large-scale, complex enterprise revenue intelligence systems." Again, O-R- did not further elaborate and explain how the patents resulted in being majorly significant in the field. The letter, for example, does not show how the patents have impacted or influenced the field in a major manner. Furthermore, although O-R- listed five patents "where [the Beneficiary] has filed for patents to protect inventions," the letter does not indicate whether any of the patents have been commercialized or utilized by P- or has otherwise garnered widespread attention from the field.

Analysis under this criterion focuses on whether the person's original work constitutes major, significant contributions to the field.[7] Evidence that the person's work was funded, patented, or published, while potentially demonstrating the work's originality, will not necessarily establish, on its own, that the work is of major significance to the field.[8] Evidence that the person developed a patented

[5] *See generally* 6 USCIS Policy Manual, *supra*, at F.2(B)(1).
[6] *Id.*
[7] *See generally* 6 USCIS Policy Manual, *supra*, at F.2(B)(1).
[8] *Id.*

technology that has attracted significant attention or commercialization may establish the significance of the person's original contribution to the field.[9] Here, the Petitioner did not show how any of the patents involving the Beneficiary have been widely implemented throughout the field, has remarkably impacted or influenced the field, or has otherwise risen to a level of major significance in the field.

For the reasons discussed above, considered both individually and collectively, the Petitioner has not shown the Beneficiary has made original contributions of major significance in the field.

B. O-1 Nonimmigrant Status

We note that the record reflects that the Beneficiary received O-1 status, a classification reserved for nonimmigrants of extraordinary ability. Although USCIS has approved O-1 nonimmigrant visa petitions filed on behalf of the Beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different standard – statute, regulations, and case law. Many Form I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). Furthermore, our authority over the USCIS service centers, the office adjudicating the nonimmigrant visa petition, is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of an individual, we are not bound to follow that finding in the adjudication of another immigration petition. *See La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).[10]

III. CONCLUSION

The Petitioner did not establish the Beneficiary satisfies the criteria relating to original contributions. Although the Petitioner also claims the Beneficiary's eligibility for the leading or critical role criterion under 8 C.F.R. § 204.5(h)(3)(viii) and high salary under 8 C.F.R. § 204.5(h)(3)(ix), we need not reach these additional grounds because the Beneficiary cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3). We also need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Accordingly, we reserve these issues.[11]

Nevertheless, we have reviewed the record in the aggregate, concluding it does not support a conclusion that the Petitioner has established the Beneficiary's acclaim and recognition required for the classification sought. The Petitioner seeks a highly restrictive visa classification for the Beneficiary, intended for individuals already at the top of their respective fields, rather than those progressing toward the top. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (concluding that even major league level athletes do not automatically meet the statutory standards for classification as an individual of "extraordinary ability,"); *Visinscaia*, 4 F. Supp. 3d at 131 (internal quotation marks omitted) (finding that the extraordinary ability designation is "extremely restrictive

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[9] *Id.*

[10] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(3).

[11] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternate issues on appeal where applicants do not otherwise meet their burden of proof).

by design,"); *Hamal v. Dep't of Homeland Sec. (Hamal II)*, No. 19-cv-2534, 2021 WL 2338316, at *5 (D.D.C. June 8, 2021), *aff'd*, 2023 WL 1156801 (D.C. Cir. Jan. 31, 2023) (determining that EB-1 visas are "reserved for a very small percentage of prospective immigrants"). *See also Hamal v. Dep't of Homeland Sec. (Hamal I)*, No. 19-cv-2534, 2020 WL 2934954, at *1 (D.D.C. June 3, 2020) (citing *Kazarian,* 596 at 1122 (upholding denial of petition of a published theoretical physicist specializing in non-Einsteinian theories of gravitation) (stating that "[c]ourts have found that even highly accomplished individuals fail to win this designation")); *Lee v. Ziglar*, 237 F. Supp. 2d 914, 918 (N.D. Ill. 2002) (finding that "arguably one of the most famous baseball players in Korean history" did not qualify for visa as a baseball coach). Here, the Petitioner has not shown the significance of Beneficiary's work is indicative of the required sustained national or international acclaim or it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate the Beneficiary has garnered national or international acclaim in the field, and he is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2). The record does not contain sufficient evidence establishing the Beneficiary among the upper echelon in his field.

For the reasons discussed above, the Petitioner has not demonstrated the Beneficiary's eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.