MATTER OF D-D-N-S.ENC., S.E.

DATE: NOV. 2, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a hotel resort, seeks to classify the Beneficiary as an individual "of extraordinary ability" in business. *See* Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The classification the Petitioner seeks makes visas available to foreign nationals who can demonstrate extraordinary ability through sustained national or international acclaim and achievements that have been recognized in the area of expertise through extensive documentation. The Director determined that the Petitioner had not satisfied the initial evidence requirements set forth at 8 C.F.R § 204.5(h)(3), which requires a one-time achievement or accomplishments that meet at least three of the ten regulatory criteria.

I. LAW

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

> (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
>
> (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 regulation at 8 C.F.R. § 204.5(h)(3) sets forth two different methods by which a petitioner can demonstrate extraordinary ability sustained by national or international acclaim and recognition of achievement in the field. First, a petitioner can submit a one-time achievement (that is, a major, internationally recognized award). Second, a petitioner can satisfy at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

Satisfaction of the initial requirements does not however, in and of itself establish eligibility for this classification. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination). *See also Rijal v. USCIS*, 772 F.Supp.2d 1339 (W.D. Wash. 2011) (affirming our proper application of *Kazarian*), *aff'd*, 683 F.3d. 1030 (9th Cir. 2012); *Visinscaia v. Beers*, 4 F.Supp.3d 126, 131-32 (D.D.C. 2013) (finding that we appropriately applied the two-step review); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality" and that U.S. Citizenship and Immigration Services (USCIS) examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true").

II. ANALYSIS

A. Previously Approved O-1 Nonimmigrant Petition

While U.S. Citizenship and Immigration Services (USCIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the Beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). Moreover, we need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the Beneficiary, we would not be bound to follow the contradictory decision of a service center as the law is clear that an agency is not bound to follow an earlier determination as to a visa applicant where that initial determination was based on a misapplication of the law. *Glara Fashion, Inc. v. Holder*, 11 CIV. 889 PAE, 2012 WL 352309 *7 (S.D.N.Y. Feb. 3, 2012); *Royal Siam v. Chertoff*, 484 F.3d 139, 148 (1st Cir.2007); *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 177 (D.Mass.2000)) (Dkt.10); *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp.2d 800, 803 (E.D.La.1999), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

B. Evidentiary Criteria[1]

The Petitioner states the Beneficiary has extraordinary ability in business. On appeal, the Petitioner indicates it has submitted evidence that meets five of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

According to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), the evidence must establish that the Beneficiary is the recipient of the prizes or awards. In addition, it must demonstrate that the prizes or awards are nationally or internationally recognized. On appeal, the Petitioner points to letters from individuals involved with the hotel and tourism industries. The letters reference designations given to some of the Beneficiary's former employers, including given to the title of Results for the for two quarters, a nomination for "Best Hotel of the Year" for the and membership in In the case of each of these awards or designations, the recipient was the Beneficiary's employer, not the Beneficiary himself. Because the Beneficiary did not receive the honors, they cannot satisfy the plain language requirements of the regulation.[2]

In addition, the Petitioner does not sufficiently corroborate the issuance of the awards or designations cited. The only independent material is an article posted on the of announcing the Beneficiary's appointment as General Manager for However, the information appears in the "Appointments and Promotions" section of the publication without an author, consistent with a press release. Regardless, this piece does not suggest the Beneficiary received an award or prize. For these reasons, the Petitioner has not provided evidence sufficient to meet the plain language of this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

On appeal, the Petitioner states it has met this criterion through evidence of the Beneficiary's former membership in and role as the as well as his membership in the The Petitioner provided sufficient documentation to establish his membership and position in these organizations. However, this criterion also requires that the Petitioner demonstrate: (1) that

[1] We have reviewed all of the evidence submitted and will address those criteria the Petitioner claims to meet or for which the Petitioner has submitted relevant and probative evidence.

[2] The record lacks, for example, evidence that the entities recognizing the hotels acknowledged the Beneficiary's contribution in their selection announcement. The Petitioner also did not establish that the Beneficiary was so inextricably linked with the awarded entity that he is recognized in the field as the de facto honoree.

outstanding achievements in the field of expertise are a requirement for membership in the association, and (2) that nationally or internationally recognized experts make the determination of outstanding achievements.

In the case of the the Petitioner provided the Internal Rules. However, the translation accompanying the foreign language document is incomplete and missing large portions of text. As a result, the translation does not comply with the requirements of 8 CFR § 103.2(b)(3), which states: "Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Even considering the partial translation, the Internal Rules state the organization is for companies involved in the hospitality industry and that admission is "up to the Association's board." The rules list no other criteria for admission. The requirements for leadership positions within the organizations are omitted from the translation. Regardless, a leadership role is not a membership or level of membership. Thus, the Petitioner has not offered evidence showing that requires outstanding achievements, or that recognized national or international experts in the field make that determination.

As evidence of membership in the the Petitioner provided a letter from the Association's Director of Membership confirming that the has been a member since 2001. The Association's By-Laws state that any entity falling into the hotel category is invited to join and is accepted upon receipt of dues payment and the vote of two-thirds of the Board of Directors. The By-Laws do not provide any additional criteria for membership. Similarly, the only consideration for Directors involves an even distribution of industries and geographic regions represented. As a result, the Petitioner has not demonstrated that the Beneficiary is a member in the organization, that outstanding achievements are a requirement for membership, or that the determination of outstanding achievements is made by national or international experts in the field. For these reasons, the Petitioner has not met the requirements of this criterion.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.*

To satisfy this criterion, the material must "include the title, date, and author of the material, and any necessary translation." 8 CFR § 204.5(h)(3)(iii). As with all evidence submitted to USCIS, foreign language documents must comply with the above quoted regulation regarding translations, 8 CFR § 103.2(b)(3). The Petitioner provided several examples of material mentioning the Beneficiary. These include the following:

- Appoints General Manager for Exclusive New on the website;
- A blurb regarding his appointment to the same resort in
- appoints responsible for the hotel in

- [redacted] appoints new leaders," in [redacted]
- "[The Beneficiary] is the new manager of the [redacted]," in [redacted] and
- [redacted] in a [redacted] newsletter.

Although each of these items refers to the Beneficiary acting in his area of expertise, none satisfies the specific requirements of this criterion. The regulation specifically requires that the materials include the author and any necessary translation. *See* 8 CFR § 204.5(h)(3)(iii). Of the provided material, only the post from [redacted] includes an author. However, this article does not meet the regulatory requirements because the Petitioner did not submit the necessary translation. *See id.*; 8 CFR § 103.2(b)(3). Although the translation provided contains a "Certificate of Accuracy," there is no translator signature. In addition, the translation is not complete, as the first several lines of the foreign language document are omitted from the translation. Lastly, the translation includes: "(Reuters)" under the title, when the word Reuters does not appear on the Portuguese language version of the article.

In addition, the Petitioner did not show that [redacted] is a professional or major trade publication or other major media, as required by the regulation. *See* 8 CFR § 204.5(h)(3)(iii). In the response to the Director's request for evidence (RFE), the Petitioner stated: [redacted] is a web based newsletter targeted to the Brazilian hotel sector, and published by experienced professionals in the tourism industry." However, the record contains no independent information regarding [redacted] or any additional explanation why it constitutes a professional or major trade publication or other major media. Statements made without supporting documentation are of limited probative value and are not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The materials without listed authors appear to be press releases announcing appointments and promotions. The Petitioner also did not establish that the publications in which the remaining items appear are professional or major trade publications or other major media. For these reasons, the Petitioner has not submitted evidence that means the plain language requirements of this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

A leading role should be apparent by its position in the overall organizational hierarchy and the role's matching duties. In addition, the Petitioner must demonstrate that the organizations or establishments have a distinguished reputation. The record contains numerous documents regarding roles in which the Beneficiary has acted. The Beneficiary's most recent role is as the General Manager of the [redacted][3] Regarding his work in this capacity, the

[3] The Director noted inconsistencies in that the record at times refers to the Petitioner's position as "General Manager," while at other times calling him "Managing Director." Despite inconsistencies in the title, the evidence as a whole

Petitioner provided a job description, hotel organizational chart, the Beneficiary's resume, and peer letters. As the individual in charge of all operations and finances, the General Manager/Managing Director plays a leading and critical role for the hotel. Similarly, we agree with the Director's determination that the Beneficiary played a leading role as the Director of Operations for Portugal. Had the Petitioner corroborated the assertions in the letters and one press release that the hotels have received notable distinctions and honors, the Petitioner would have established that the Beneficiary meets this criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The Petitioner provided information regarding his 2014 earnings as the General Manager of Puerto Rico. The Petitioner submitted a letter from , Personnel Administration Manager of Puerto Rico's Human Resources Department. confirmed that the Beneficiary is the Managing Director at the resort and earns an annual salary of $130,000 in addition to all-inclusive room and board, transportation, and insurance benefits. The company's bonus program applies to him, whereby he can receive up to 24 percent of his salary as a bonus. The Petitioner provided a 2014 income tax withholding statement indicating the Beneficiary received $144,516.74 that year.

A print-out from the U.S. Bureau of Labor Statistics' website lists the mean wage for lodging managers in 2013 as $55,050. Lodging managers earning in the 90th percentile made $92,480. A print-out from lists 2013 median salaries for lodging managers as $46,800 for the United States and $54,100 for Puerto Rico. It lists the 90th percentile earners as making $92,500 for the United States and $93,500 for Puerto Rico.

The submissions from the Petitioner show that the Beneficiary received compensation as General Manager that is higher than the amount received by other lodging managers. The Beneficiary earned over 50 percent more than lodging managers with salaries in the 90th percentile. These earnings are sufficient to constitute a high salary when compared to others in the field. As a result, the Petitioner has satisfied this criterion.

C. Comparable Evidence

On appeal, the Petitioner asks us to consider the numerous letters submitted in support of the Beneficiary as comparable evidence. The Petitioner highlights letters that refer to the Beneficiary's positive impact on Puerto Rico and its tourism industry. The Petitioner states that these letters demonstrate the Beneficiary's extraordinary ability, international renown, acclaim, and respect.

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supports the Petitioner's explanation that these are the same position with duties that involve overseeing all major aspects of the hotel.

The regulation at 8 C.F.R § 204.5(h)(4) states: "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." Thus, to utilize this provision, the Petitioner must explain why the regulatory criteria are not readily applicable to the Beneficiary's occupation, as well as how the items are "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In this case, the Petitioner does not state which, if any, of the criteria do not readily apply to the Beneficiary's occupation as a businessman and hotel manager. Similarly, the Petitioner does not indicate the particular evidentiary criteria for which the exhibits are comparable. As a result, the Petitioner has not demonstrated that it may rely on 8 C.F.R § 204.5(h)(4), or that letters are indeed comparable to any of the criteria at 8 C.F.R § 204.5(h)(3)(i)-(x). *See* USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*, 22, (December 22, 2010), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf. For the above reasons, the Petitioner has not submitted comparable evidence under 8 C.F.R. § 204.5(h)(4).

D. Summary

The record shows that the Beneficiary has had a successful career in the hotel industry for many years. Notwithstanding the Beneficiary's experience in the field, for the reasons discussed above, we agree with the Director that he has not submitted the requisite initial evidence of a qualifying one-time achievement or documentation that satisfies three of the ten regulatory criteria.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must show that the individual has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of his or her field of endeavor. Had the Petitioner satisfied at least three evidentiary categories, the next step would be a final merits determination that considers all of the submissions in the context of whether or not the Petitioner has demonstrated: (1) 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," and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2), (3); *see also Kazarian v. USCIS*, 596 F.3d 1115, 1119-20 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination). Although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the record in the aggregate supports a finding that the Petitioner has not shown that the Beneficiary enjoys the level of expertise required for the classification sought.[4]

[4] We maintain *de novo* review of all questions of fact and law. *See Soltane v. United States Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, we maintain the jurisdiction to conduct a final merits determination as

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of D-D-N-S.ENC., S.E.*, ID# 14274 (AAO Nov. 2, 2015)

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the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii); *see also* INA §§ 103(a)(1), 204(b); DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).