U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-H-

DATE: AUG. 3, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a motion graphics artist, seeks classification as an individual of extraordinary ability in the arts. *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, Nebraska Service Center, denied the petition. The Director concluded that the Petitioner had satisfied only one of the regulatory criteria, of which a Petitioner must meet at least three.

The matter is now before us on appeal. In her appeal, the Petitioner submits a brief stating that she meets at least two additional criteria.

Upon *de novo* review, we will dismiss the appeal.

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 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 his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient 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).

Satisfaction of at least three criteria, however, does not, 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 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); *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 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

The Petitioner is a motion graphics artist who has designed and developed various advertising projects. The Director found that she met the artistic display criterion under 8 C.F.R. § 204.5(h)(3)(vii), but had not achieved any of the other criteria at 8 C.F.R. § 204.5(h)(3). On appeal, the Petitioner maintains that she is eligible for the awards criterion under 8 C.F.R. § 204.5(h)(3)(i), the published material criterion under 8 C.F.R. § 204.5(h)(3)(iii), the original contributions of major significance criterion under 8 C.F.R. § 204.5(h)(3)(v), and the high salary criterion under 8 C.F.R. § 204.5(h)(3)(ix). For the reasons discussed below, the record does not support a finding that the Petitioner meets the plain language requirements of at least two additional criteria she has addressed.

A. Evidentiary Criteria[1]

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 204.5(h)(3)(i).

[1] We will discuss those criteria the Petitioner has raised and for which the record contains relevant evidence.

At the initial filing of the petition, the Petitioner claimed eligibility for this criterion based on a award. The Director issued a request for evidence (RFE) and informed the Petitioner that her evidence did not reflect that she received a lesser nationally or internationally recognized prize or award. Because the Petitioner did not address the awards criterion in her RFE response, the Director determined that the Petitioner abandoned her eligibility claim for this criterion. On appeal, the Petitioner states that the Director did not give a basis for her ineligibility

The Petitioner's documentation reflects that her project, ' was presented at the conference. The Petitioner's evidence, however, does not document that she received a award or any other award from In addition, although the Petitioner presented background information regarding it relates to the conference rather than to the awards. The Petitioner does not offer any evidence on appeal showing that the award is nationally or internationally recognized for excellence in her field. Without evidence demonstrating that the Petitioner received the award and that it is nationally or internationally recognized for excellence, she has not established that she meets this regulatory 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.* 8 C.F.R. § 204.5(h)(3)(iii).

The Petitioner submitted documentation reflecting samples of her advertising work displayed in the media, such as and In addition, the Petitioner offered evidence that her conference presentations were included in DVD-ROM sets. The Petitioner further presented evidence described as materials she had authored, but she did not provide English language translations of the documents.[2]

In general, to meet this criterion, the material must be about the petitioner and, as stated in the regulations, be published in professional or major trade publications or other major media. Therefore, the submission of the Petitioner's artistic work, without published material that discusses her, does not meet this regulatory criterion. In addition, the record does not establish that the self-authored documents constitute material about the Petitioner relating to her work. The Petitioner has not offered evidence of published articles that talk about her in professional or major trade publications or other major media consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Therefore, the Petitioner has not established that she meets this criterion.

[2] 8 C.F.R. § 103.2(b)(3) requires that any foreign language document must 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.

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).

Throughout the proceeding, the Petitioner has relied on reference letters to satisfy this criterion.[3] The Director considered the letters and concluded that although they praised the Petitioner for her talents as a graphic designer and animator, they did not show that her contributions have been of major significance to the field as a whole. On appeal, the Petitioner contends that the Director's decision was an arbitrary reading of the regulation and did not offer any legal authority to deny this criterion.

Most of the letters focus on the Petitioner's work on projects with without explaining how her work is of major significance to the field as a whole. For instance, although a global brand director, indicated that the Petitioner's "interactive design skills were critical to the success of the project," he did not demonstrate that the Petitioner's contributions impacted the field beyond Similarly, current president and executive producer of indicated that he worked with the Petitioner on television advertisements when they were both at and stated that her "significant contribution[s] . . . lead to us landing important new accounts." Again, does not offer evidence showing the Petitioner's contributions beyond While the letters credit the Petitioner with assisting successful campaign projects, they do not establish that the Petitioner significantly influenced the field. *See Visinscaia*, 4 F. Supp. 3d at 134-35. (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole).

Further, the letters praise the Petitioner's skills and talents as "creative" and "rare." None of the letters, however, indicate how the Petitioner's skills or personal traits are original contributions of major significance in the field. Having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the Petitioner has already used those unique skills to impact the field at a significant level in an original way.

Moreover, the letters repeat the regulatory language and indicate that the Petitioner's contributions are "exceptional," "significant," and "outstanding" without describing how the Petitioner's contributions are of major significance in the field. Letters that repeat the regulatory language but do not explain how the petitioner's contributions have already influenced the field are insufficient to establish original contributions of major significance in the field. *Kazarian*, 580 F.3d at 1036 *aff'd in part* 596 F.3d at 1115. In 2010, the *Kazarian* court reiterated that the USCIS' conclusion that the "letters from physics professors attesting to [the petitioner's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122. The letters considered above primarily contain statements regarding the Petitioner's status in the field without providing specific examples of how those contributions rise to a level consistent with major

[3] We discuss only a sampling of these letters, but have reviewed and considered each one.

significance in the field. Repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, No. 95 CIV. 10729, *1, *5 (S.D.N.Y. Apr. 18, 1997). Moreover, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. 9, 15 (D.C. Dist. 1990). Without supporting evidence, the Petitioner has not met her burden of establishing that she has made original contributions of major significance in the field.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The Petitioner documented the display of her work at artistic showcases. For instance, as previously discussed, the Petitioner's work was exhibited at as well as at the in Italy. Thus, the Director concluded that the Petitioner satisfied this criterion, and the Petitioner's documentation supports that finding.

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 submitted copies of her paychecks with her current employer, reflecting hourly earnings of $52.88, or approximately $110,000 per year. In addition, the Petitioner presented copies of her paychecks with her previous employer, showing hourly earnings of $45.46, or approximately $95,000 per year. Finally, the Petitioner offered comparative salaries of motion graphic designers and multimedia artists and animators:

- $64,750 (national average) –
- $66,000 (California average) –
- $74,000 (California average) –
- $101,421 (Level 4 Wage[4] for California – www.flcdatacenter, and
- $112,000 (high national average) and $131,000 (high California average) –

The evidence provides average salary data for a motion graphics designer. Regarding the Petitioner's salary is at the high national average but below the high average for the California area, which is where the Petitioner resides. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings

[4] The Foreign Labor Certification (FLC) Data Center's Online Wage Library relies on the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) wage estimates. http://www.flcdatacenter.com/faq.aspx. The OES program collects data on wage and salary workers in nonfarm establishments in order to produce employment and wage estimates for about 800 occupations. The BLS produces occupational employment and wage estimates for over 450 industry classifications at the national level. The employment data are benchmarked to average employment levels. http://www.bls.gov/oes/oes_emp.htm#estimates.

versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). In the present case, the evidence the Petitioner submits does not establish that she has received a high salary or other significantly high remuneration for services in relation to others in the field.

Summary

As explained above, the evidence the Petitioner provided satisfies only one of the regulatory criteria. As a result, the Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

B. O-1 Nonimmigrant Status

We note the record of proceedings reflects that the Petitioner received O-1 status, a classification reserved for nonimmigrants of extraordinary ability. Although USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the Petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different standard. 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 Brothers Co. Ltd.*, 724 F. Supp. at 1103. Some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of the individual's qualifications).

Applications or petitions are not required to be approved where the petitioner has not demonstrated eligibility because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Agencies 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 has approved a nonimmigrant petition on behalf of the individual, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, *1, *3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

III. CONCLUSION

Had the Petitioner satisfied at least three evidentiary categories, the next step would be a final merits determination that considers all of the filings 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 individual "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*, 596 F.3d at 1119-20. 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 established the level of expertise required for the classification sought.

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, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-H-*, ID# 18287 (AAO Aug. 3, 2016)