MATTER OF S-K-R-

DATE: JAN. 19, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an individual, seeks classification as an individual of extraordinary ability in the sciences. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). The Director, Texas Service Center, denied the petition. We dismissed a subsequent appeal. The matter is now before us on a motion to reopen and a motion to reconsider. The motion to reopen will be denied. The motion to reconsider will be denied.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On June 26, 2013, the Petitioner filed a Form I-140, Immigrant Petition for Alien Worker. The classification the Petitioner seeks makes visas available to foreign nationals 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 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 exhibits that meet at least three of the ten regulatory criteria. Within our appeal decision dated June 8, 2015, we affirmed the Director's ultimate determination that the Petitioner had satisfied two criteria; the judging criterion at 8 C.F.R. § 204.5(h)(3)(iv) and the authorship of scholarly articles criterion at 8 C.F.R. § 204.5(h)(3)(vi). On motion, the Petitioner submits a brief with additional material.

For the reasons discussed below, we reaffirm that the Petitioner has not established his eligibility for the classification sought. Specifically, the Petitioner has not submitted qualifying evidence of a one-time achievement pursuant to 8 C.F.R. § 204.5(h)(3), or documentation that satisfies at least three of the ten regulatory criteria set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(i)-(x). As such, the Petitioner has not demonstrated that he is one of the small percentage who are at the very top in the field of endeavor, and that he has sustained national or international acclaim. *See* 8 C.F.R. § 204.5(h)(2), (3).

II. RELEVENT LAW AND REGULATIONS

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
>
> (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 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 a petitioner does not have such an award, then he must provide sufficient evidence material that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x).

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 evidence is first counted and then, if the required number of criteria are met, 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 U.S. Citizenship and Immigration Services (USCIS) 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 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").

III. ANALYSIS

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." In this case, the Petitioner has not addressed whether the validity of our appeal decision has been, or is the subject of any judicial proceeding. Notwithstanding the

above, the motion does not overcome our decision dismissing the Petitioner's original appeal, which concluded that the Petitioner did not establish that he meets at least three of the regulatory criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

A motion to reopen must state the new facts to be provided and to be supported by affidavits or other documentation. 8 C.F.R. § 103.5(a)(2). However, any new facts must relate to eligibility at the time the Petitioner filed the petition. *See* 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider is based on the existing record and the Petitioner may not introduce new facts or evidence relative to his or her arguments. A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on fresh documents. *Compare* 8 C.F.R. § 103.5(a)(3) *and* 8 C.F.R. § 103.5(a)(2).

In our June 8, 2015, decision, we addressed all of the criteria for which the Petitioner had included relevant evidence. We specifically and thoroughly discussed the Petitioner's submissions and determined that while he met the judging criterion at 8 C.F.R § 204.5(h)(3)(iv) and the scholarly articles criterion at 8 C.F.R § 204.5(h)(3)(vi), he did not satisfy a third criterion by meeting any of the following criteria previously addressed:

- The awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i);
- The membership criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii);
- The published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii);
- The original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v);

On motion, the Petitioner focuses solely on the criterion at 8 C.F.R § 204.5(h)(3)(v), which requires evidence that the Petitioner has made contributions of major significance in the field. Accordingly, whether the Petitioner meets that criterion is the sole issue on motion. The plain language provides that the evidence must establish that the contributions rise to the level of major significance in the field as a whole, rather than to a project or to an organization. The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003). Contributions of major significance connotes that the Petitioner's work has significantly impacted the field. *See* 8 C.F.R. § 204.5(h)(3)(v); *see also Visinscaia*, 4 F. Supp. 3d at 135-136.

In our decision, we discussed the [redacted] Award to attend the [redacted]. The Petitioner asserts on motion that the ranking of his abstract as within the top ten percent of approximately 4,000 others furthers his eligibility under this criterion. As a result of this selection, the Petitioner presented his poster presentation at a second [redacted] conference. The Petitioner affirms that nearly 20,000 participants attended the conference and had the potential to be introduced to, and to benefit, from his research. The Petitioner further indicates that the record reflected that his studies would have

greater visibility and a broader reach for other research. Even if all of the conference participants viewed his poster presentation, the Petitioner has not submitted evidence that shows how this viewership has significantly furthered the field. At issue is the impact of this work upon dissemination.

While discussing the letter from Dr. Professor with the Department of Physics at the the Petitioner indicates our decision placed too much reliance on this individual's affirmation that the Petitioner's results will have a future effect in the field. The Petitioner points to his study with *in vivo* systems as the area that the bulk of Dr. letter covered. We addressed the project relating to *in vivo* markers in our appellate decision noting that Dr. refers to how the Petitioner's research on those markers will be highly beneficial. We accurately recounted the statements in that letter; he maintained that the Petitioner's findings are significant for *in vivo* markers and that the continuation of his work "will be beneficial for improved national security and the health of those people treated with medical laser technology." Within the motion, the Petitioner has not identified language in this letter that explained the impact the Petitioner's results have already had in the field.

Regarding Professor of Medicine and Consultant Physician at the the Petitioner provides a quote from the professor's letter that recounts the Petitioner's accomplishment exploiting the conservation of molecular pathways between zebra fish and humans. As noted by the Petitioner, Mr. confirmed that the Petitioner has "successfully translated his work using zebra fish to study cardiac complications to the field of diabetes." This letter does not suggest that the Petitioner's results led to other independent research teams using zebra fish or that the Petitioner's diabetes study has impacted the field.

The Petitioner also maintains that our previous decision should not have considered the letter from Dr. Senior Scientist at , in the context of the existence of only a single citation for the article discussed in that letter. The Petitioner provides a Google Scholar printout confirming that his articles and book chapter in the aggregate have now garnered 82 citations. In our decision, we noted that it was Dr. who discussed a single mention in a 2012 review article as demonstrating the impact of the cited study. Our reference to the single citation of that chapter was in direct response to Dr. assertion. While the total number of references to all of the Petitioner's research has now risen, those new citations postdate the filing of the petition and cannot establish eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(1), (12); *Katigbak*, 14 I&N Dec. at 49. While we further noted that a single brief mention in a citing article, the Petitioner did not submit other citing articles of this book chapter to show the level of reliance on the Petitioner's work. The record contains one other pre-filing citation to this chapter which references the Petitioner along with five other studies for the same proposition.

With respect to the Petitioner's citation numbers in the aggregate, initially the Petitioner documented 40 references to his research, and in response to the Director's request for evidence (RFE) he submitted a Google Scholar printout that reflected 59 citations. Accordingly, more than half of the 82 citations presented on motion postdate the filing of the petition. Moreover, more probative than

the number in the aggregate are the citations for individual articles. While the Petitioner's studies involving zebra fish have now garnered moderate citation, he has not demonstrated that these are indicative of a contribution of major significance, especially as of the date of filing. *Id.*

The Petitioner also asserts that we mistakenly placed too much emphasis on the future tense that Assistant Professor at the utilized within his letter. On motion, the Petitioner writes: "Dr. is affirmatively stating that the [Petitioner's] creat[ion of] the model to test the drug delivery for diabetes is [a] major significant contribution to the field." We recognized this achievement within our appellate decision, explaining:

> Dr. indicates the petitioner developed a key advancement in drug testing that is "one of the most novel research tools in the field" that allows researchers to "assess the effects of a huge library of FDA approved drugs from ' Dr. letter lacks an explanation of how widespread the use of the petitioner's development has been in the field.

We also analyzed the Petitioner's model discussed in other expert letters on record, concluding that they did not confirm the use of the Petitioner's model in the field. The Petitioner does not respond to this concern on motion with corroboration of the use of the Petitioner's advancement by independent researchers in the field.

As the letters from Dr. and others did not reflect that the Petitioner's advancement has resulted in a significant impact within the field, he has only established that his achievement in the model may have the potential to be significant in the field. Achievements that may occur in the future are not qualifying elements under this criterion. 8 C.F.R. § 103.2(b)(1), (12); *Katigbak*, 14 I&N Dec. at 49.

The Petitioner offers new facts supported by "peer-review recently received form [*sic*] an open-access journal for biomedical and life sciences." The Petitioner asserts: "The positive feedback, comments and remarks from [Editor-in-Chief and the publication's staff] show the significance and the present day impact of the research undertaken by [the Petitioner]." The Petitioner's manuscript under peer-review is titled, ' " The Petitioner did not corroborate that this study has been published. Within this draft article, the Petitioner and his coauthors refer to other researchers' results published in Therefore, this work, and the peer-review of it, both postdate the petition's filing date in The Petitioner cannot rely on research that was pending on the date he filed the petition, not even in a motion to reopen that requires new facts. *Id.*

Even if this new evidence could be considered within these proceedings, it remains that it would not satisfy this criterion's requirements. That the Petitioner's research was published after peer-review does not establish that the work qualifies him under this criterion. More probative is the impact of

that study upon dissemination in the field. In light of the above, the Petitioner has not provided new facts that overcome the conclusions in our June 8, 2015, decision.

IV. CONCLUSION

The motion will be denied 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. Here, the Petitioner has not met that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of S-K-R-*, ID# 15141 (AAO Jan. 19, 2016)