U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-S-A-S-

DATE: JAN. 17, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a salon and spa, seeks to classify the Beneficiary 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 of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, concluding that the Beneficiary had not satisfied any of the ten initial evidentiary criteria, of which he must meet at least three.

On appeal, the Petitioner contends that the Beneficiary meets at least three of the ten criteria and that he has sustained national or international acclaim at the top of his field of endeavor.

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 two options for satisfying this classification's initial evidence requirements. First, a petitioner can demonstrate that a beneficiary has a one-time achievement (that is a major, internationally recognized award). Alternatively, a petitioner must provide documentation for an individual that meets at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x) (including items such as awards, memberships, and published material in certain media). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if it is able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to a beneficiary's occupation.

Where a beneficiary 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). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "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." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

The Beneficiary works as artistic director and master hair colorist for the petitioning organization. The Petitioner did not indicate, and the record does not establish, that the Beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 204.5(h)(3). The Petitioner must therefore demonstrate the Beneficiary's eligibility under at least three of the criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x). On appeal, the Petitioner maintains that the Beneficiary meets the published material criterion at 8 C.F.R. § 204.5(h)(3)(iii), the display criterion at 8 C.F.R. § 204.5(h)(3)(vii), the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii), and the high salary criterion at 8 C.F.R. § 204.5(h)(3)(ix). In addition, the Petitioner requests that we consider comparable evidence for the original contributions criterion at 8 C.F.R. § 204.5(h)(3)(v). We have reviewed the entire record of proceedings, and it does not support a finding that the Beneficiary meets the plain language requirements of at least three criteria.

A. Evidentiary Criteria

> *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).

As evidence for this criterion, the Petitioner submits a 2006 article in entitled ' The article identifies 25 luxury service providers including the Beneficiary's blow-dry hair styling offered at It devotes three sentences to advertising his service and concludes by stating: "Blow-dry by [the Beneficiary] costs from Dhs180. Call The aforementioned article discusses 25 ways to experience a lavish lifestyle in and is not about the Beneficiary. The plain language of the regulatory criterion requires "published material about the alien." Further, the Petitioner has not demonstrated that the publication qualifies as professional or trade publication or major media. A webpage from asserts that ' and that it has a circulation of USCIS need not rely on the self-promotional material of the publisher. *See Braga v. Poulos*, No. CV 06 5105 SJO, *aff'd* 317 Fed. Appx. 680 (C.A.9). In addition, the record includes 2015 media kit and a listing an average circulation of but the Petitioner has not provided comparative statistics or other evidence showing that this number elevates the magazine to a form of major media.

The record also contains a 2005 article in magazine, but the author of the material is not identified as required by this criterion. Furthermore, while the article presents highlighting and lowlighting hair styling information and tips shared by Beneficiary, this material is instructional in nature and is not about him. In addition, the Petitioner provides information about from its publisher discussing its content and formula for success, but this documentation does not reflect that the magazine is a form of major media. The evidence also includes articles about the Beneficiary in magazine and but their authors were not identified and the Petitioner has not shown that these are qualifying publications.

The Petitioner also maintains that broadcast a television report focusing on the Beneficiary. The record contains various webpages from but those webpages do not show a report about the Beneficiary. Nor has the Petitioner offered a transcript of the news program or a copy of its video footage to demonstrate that the television coverage was about the Beneficiary. In addition, the Petitioner offers information from stating: ' is a television station in FL that serves the television market. The station runs programming from the network and identifies itself as The information from further indicates that is among TV Channels" and that the television market ranks among the Television Markets" in the United States. The record, however, does not include rankings or viewership information specific to or its program showing that it qualifies as a form of major media.

[1] The Director noted that this circulation in the United Arab Emirates, an Arabic-speaking "country of over 9.3 million people, is not necessarily major media."

In light of the above, the Petitioner has not established that the Beneficiary meets this regulatory criterion.

> *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).

The Petitioner initially claimed the Beneficiary satisfied this criterion through letters of recommendation from his colleagues and clients. The Director discussed this evidence and determined that it was not sufficient to demonstrate the Beneficiary's original artistic contributions of major significance in the field. Specifically, the Director found that the reference letters did not show that the Beneficiary's work has impacted the field of hair styling or was otherwise of major significance in the field. We find that the record supports those findings. In its appeal brief, the Petitioner does not contest the Director's analysis of the evidence or identify any erroneous conclusions of law or fact. Rather, the Petitioner requests that we consider the Beneficiary's "role as a top hair stylist" for individuals whose "appearance was required to be paramount" as comparable evidence for this criterion.[2]

The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" if the ten categories of evidence "do not readily apply to the beneficiary's occupation." It is the petitioner's burden to explain why the regulatory criteria are not readily applicable to a beneficiary's occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x). Here, the Petitioner has not explained or demonstrated that the criterion at 8 C.F.R. § 204.5(h)(3)(v) does not readily apply to artistic directors, colorists, or hair stylists. As such, the Petitioner has not shown that it may rely on comparable evidence.

Furthermore, while the record reflects the Beneficiary styled hair for important clients such as [redacted] (chief marketing officer for [redacted] a Canadian real estate development company) and [redacted] (a French art auctioneer), the record does not establish that this work is comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(v) which requires evidence of original contributions of major significance in the field. The Petitioner has not shown the evidence it claims as comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(v) is of the same caliber as that required by the regulation. Accordingly, the Beneficiary has not satisfied this criterion by meeting its plain language requirements or through the submission of comparable evidence.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii).

The Director determined that the Petitioner had not presented evidence that the Beneficiary's work has been displayed at artistic exhibitions or showcases. On motion to the Director and again on appeal, the Petitioner references a prior Texas Service Center decision involving the Beneficiary.

[2] We note that the regulations include a separate criterion for performing in a leading role for a distinguished organization at 8 C.F.R. § 204.5(h)(3)(viii), and the Beneficiary's role as a hair stylist will be further addressed there.

in which the Director concluded that he had met this criterion.[3] In the latest denial decision, the Director, citing *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988), correctly noted that USCIS "is not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. . . . Each matter must be decided according to the evidence of record on a case-by case basis." *See also La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000) (finding that we are not bound by a decision of a service center or district director); *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

In the present matter, the evidence offered for this criterion includes a February 2014 letter from a casting director stating: "The Beneficiary worked for magazine in 2008 during 2 days in as a hairdresser for a fashion shooting. I recommend his high quality and excellent job." This letter, however, was unaccompanied by published photographs from the magazine or other evidence showing that the Beneficiary's work was in fact exhibited or displayed by the magazine.

In addition, the Petitioner provides an article about the Beneficiary entitled "[The Beneficiary] in The regulations include a separate criterion for published material at 8 C.F.R. § 204.5(h)(3)(iii), and the aforementioned article has already been addressed there. Regardless, the article does not represent display of the Beneficiary's work at an artistic exhibition or showcase.[4] Lastly, the record includes a photograph that the Petitioner contends is evidence that "the Beneficiary was showcased in a full page stylized photo showing his innovative artistic skills and expertise." The Petitioner, however, does not identify the artistic exhibition or showcase in which the photograph was displayed. Nor does the record contain evidence from the exhibition or showcase organizer indicating that it was the Beneficiary's work on display. The evidence therefore does not establish that the Beneficiary meets this regulatory criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

In the appeal brief, the Petitioner contends that the Beneficiary has performed in a leading or critical role for its location in The record includes a letter from the Petitioner's managing member and copy of the Beneficiary's contract. Both documents provide a detailed list of the Beneficiary's duties and responsibilities, and they sufficiently demonstrate that he has performed in a qualifying role as artistic director and master hair colorist. In addition, the Petitioner offers articles in and that suffice to demonstrate that the petitioning

[3] The Director found that the Beneficiary had met this criterion based on information about his employers, a contract, and photographs of clients and salons. We find such determination to be an error, as this documentation does not constitute display of the Beneficiary's work in the field at artistic exhibitions or showcases.

[4] This article does not display his work.

organization has a distinguished reputation in the field. Accordingly, the Petitioner has 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.* 8 C.F.R. § 204.5(h)(3)(ix).

The record includes a December 2013 employment contract stating that the Beneficiary will receive "a salary of $85,000 per annum." In addition, the Petitioner offers the Beneficiary's December 2014 pay statement and his 2013 and 2014 Forms W-2, Wage and Tax Statements, reflecting earnings of $97,019.69 and $99,635.55, respectively. It also submits prevailing wage data from the Foreign Labor Certification Data Center and wage estimates from the U.S. Bureau of Labor Statistics for "Hairdressers, Hairstylists, and Cosmetologists." The Petitioner further provides online articles from [redacted] listing salary information for a "hairdresser" and a "hair stylist."

Although the Petitioner compares the Beneficiary's compensation to hairdressers, hairstylists, and cosmetologists, he has served as its artistic director and master hair colorist since 2013. Unlike the former occupations, the Beneficiary's job (as set forth in his contract) involves supervising and directing staff, overseeing photo shoots, researching new technologies and techniques, preparing and teaching product knowledge classes, and serving as an ambassador and spokesperson for the petitioning organization. The Petitioner must present evidence showing that the Beneficiary has earned a high salary or significantly high remuneration in comparison with those performing similar services in the field. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings versus other PGA Tour golfers); *see also Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding salary information for those performing lesser duties is not a comparison to others in the field); *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). Here, the Petitioner has not established that the wage information for hairdressers, hairstylists, and cosmetologists constitutes an appropriate basis for comparison. Based on the foregoing, the Petitioner has not demonstrated that the Beneficiary meets this regulatory criterion.

B. O-1 Nonimmigrant Status

We note the record of proceedings reflects that the Beneficiary 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 Beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition which is adjudicated based on 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 Brothers Co. Ltd.*, 724 F. Supp. at 1103. Furthermore, our authority over a USCIS service center, the office responsible for 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 Louisiana Philharmonic Orchestra, 2000 WL 282785* at *2.

C. Ineffective Assistance of Counsel

On appeal, the Petitioner asserts that previous counsel "failed to adequately provide the appropriate information to the adjudicating officer to allow for a reasoned review, evaluation, and adjudication of the [petition]." The Board of Immigration Appeals (the Board) established a framework for asserting and assessing claims of ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

Lozada sets forth the following threshold documentary requirements for asserting a claim of ineffective assistance:

- A written affidavit of the Petitioner attesting to the relevant facts. The affidavit should provide a detailed description of the agreement with former counsel (i.e., the specific actions that counsel agreed to take), the specific actions actually taken by former counsel, and any representations that former counsel made about his or her actions.
- Evidence that the Petitioner informed former counsel of the allegation of ineffective assistance and was given an opportunity to respond. Any response by prior counsel (or report of former counsel's failure or refusal to respond) should be submitted with the claim.
- If the Petitioner asserts that the handling of the case violated former counsel's ethical or legal responsibilities, evidence that the Petitioner filed a complaint with the appropriate disciplinary authorities (e.g., with a state bar association) or an explanation why the Petitioner did not file a complaint.

Id. at 639. These documentary requirements are designed to ensure we possess the essential information necessary to evaluate ineffective assistance claim and to deter meritless claims. *Id.* Allowing former counsel to present his version of events discourages baseless allegations, and the requirement of a complaint to the appropriate disciplinary authorities is intended to eliminate any incentive for counsel to collude with his client in disparaging the quality of the representation. We may deny a claim of ineffective assistance if any of the *Lozada* threshold documentary requirements are not met. *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000). As the Petitioner has not provided documents meeting the relevant evidentiary requirements set forth in *Lozada*, we will not further consider its ineffective assistance of counsel claim.[5] Regardless, as our review is *de novo*, we have considered the entire record including the new appellate arguments relating to the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and comparable evidence under 8 C.F.R. § 204.5(h)(4).

[5] We also note that present counsel has represented the Petitioner for both its motion on the Director's decision and its subsequent appeal, and thus has had opportunities to remedy any deficiencies in the information previous counsel provided to USCIS.

III. CONCLUSION

The Petitioner is not eligible because it has not submitted the required initial evidence for the Beneficiary demonstrating either a qualifying one-time achievement or documents that meet at least three of the ten criteria. As a result, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the level of expertise required for the classification sought. For the foregoing reasons, the Petitioner has not shown that he qualifies for classification as an individual of extraordinary ability.

ORDER: The appeal is dismissed.

Cite as *Matter of A-S-A-S-*, ID# 011766 (AAO Jan. 17, 2018)