U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-M-G-

DATE: AUG. 7, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a healthcare provider, seeks to classify the Beneficiary, a surgeon, as an individual of extraordinary ability in the field of "[redacted] surgery." *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 petition, concluding that while the Petitioner satisfied three of the ten initial evidentiary criteria, as required, it did not show the Beneficiary's sustained national or international acclaim and demonstrate that he is among the small percentage at the very top of the field of endeavor.

On appeal, the Petitioner submits additional evidence and a brief, arguing that it has demonstrated the Beneficiary's required acclaim and that he has risen to the very top of his field.

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

I. LAW

Section 203(b)(1)(A) of the Act makes visas available to certain immigrants 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 options for satisfying this classification's initial evidence requirements. First, a petitioner can demonstrate a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then he or she must provide documentation that meets at least three of the ten criteria listed under 8 C.F.R. § 204.5(h)(3)(i)-(x) (including items such as qualifying awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the submitted material in a final merits determination and assess whether the record, as a whole, 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. United States Citizenship and Immigration Services (USCIS)*, 596 F.3d 1115, 1119-20 (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, 1343 (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 evidence, including the Beneficiary's resume, indicates that he received his medical physician and surgeon license from Pennsylvania in May 2013, and his certification from the American Board of Surgery in September 2017. According to a September 2018 letter from the Petitioner, since July 2018, the Beneficiary has worked for the Petitioner as a '[redacted] Surgeon/Minimally Invasive[redacted] Surgeon," receiving an "annual salary [of] $261,000 with a potential quality bonus of $39,000."

A. Evidentiary Criteria

The Director concluded that the Petitioner did not meet the membership in associations criterion under 8 C.F.R. § 204.5(h)(3)(ii) or the original contributions of major significance criterion under 8 C.F.R. § 204.5(h)(3)(v). The record supports this conclusion. Specifically, while the Petitioner has submitted evidence of the Beneficiary's membership in associations in the field for which classification is sought, it has not demonstrated that these associations "require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields." Similarly, while the evidence – including reference letters as well as documentation on the Beneficiary's research and citation frequency – shows that he is a surgeon who might have the potential to impact the field, it does not confirm that he has already made original contributions of major significant in the field of "[redacted] surgery."

Although the Director determined that the Petitioner did not meet the above criteria, he did find that the Petitioner satisfied three other criteria listed under 8 C.F.R. § 204.5(h)(3)(i)-(x). While we agree that the record confirms that the Petitioner meets two criteria – as relating to the Beneficiary's participation as a judge, 8 C.F.R. § 204.5(h)(3)(iv), and his authorship of scholarly articles, 8 C.F.R. § 204.5(h)(3)(vi), we disagree that it also satisfies the criterion relating to the Beneficiary's salary or remuneration under 8 C.F.R. § 204.5(h)(3)(ix).

The Petitioner has presented evidence from professional publications – including JSM Pediatric Surgery and Saudi Medical Journal – confirming that the Beneficiary has served as one of their manuscript reviewers. Additionally, the record demonstrates that he has authored scholarly articles that are published in professional journals. For example, the Journal of Case Reports and Images in Surgery published his article [redacted]; and Cases Journal published his paper [redacted].

While the record supports the Director's determination that the Petitioner satisfies two criteria under 8 C.F.R. § 204.5(h)(3)(iv) and (vi), it does not establish that it also meets the third criterion under 8 C.F.R. § 204.5(h)(3)(ix), which requires "[e]vidence that the [Beneficiary] has commanded a high salary or other significantly high remuneration for services, in relation to others in the field." According to a June 2018 letter from the Petitioner, it has employed the Beneficiary as a "physician specializing in [redacted] surgery," compensating him with an annual salary of $261,000 as well as "a potential quality bonus of $39,000." A 2018 employment agreement references the potential bonus as "deferred compensation" or "compensation at risk." The Beneficiary's 2018 pay stubs confirm his hourly rate of $125.48 and an annual salary of $261,000.

In addition, the Petitioner has presented the following documentation in support of its claim that the Beneficiary has commanded a high salary or other significantly high remuneration: (1) a printout from O*NET OnLine, providing wage data on "Physicians and Surgeons, All Other" in [redacted] New Jersey, the Petitioner's office location; (2) a United States Bureau of Labor Statistics printout, listing the hourly mean wage and annual mean wage for surgeons in "General Medical and Surgical Hospitals"; (3) a printout from Foreign Labor Certification Data Center, stating that due to "limitations in the OES [Occupational Employment Statistics] data," the website cannot provide "[l]eveled wages" for surgeons in the [redacted] New Jersey, area; and (4) a printout from indeed.com, indicating an average salary range for "physician bariatric surgeon[s]" in the United States who have reported their salaries to the website.

Most of these documents relate to salaries of physicians and surgeons, but do not parse out specific information on the salaries of surgeons in [redacted] medicine.[1] According to the Petitioner's September 2018 letter, [redacted] medicine is the Beneficiary's primary, if not entire, practice. The letter states that he has worked as a surgeon providing "minimally-invasive surgical procedures" in [redacted] medicine" and that he "fill[s] the need for further [redacted] care in the [redacted] region." Salary evidence on surgeons who are not in [redacted] medicine is therefore insufficient to demonstrate

[1] According to the Petitioner, [redacted] medicine is "the specialty field of treating patients suffering from [redacted]

that the Beneficiary "has commanded a high salary or other significantly high remuneration for services, in relation to others in the field." *See* 8 C.F.R. § 204.5(h)(3)(ix); *Matter of Price*, 20 I&N Dec. 953, 955 (Assoc. Comm'r 1994) (comparing a professional golfer's earnings with those of other Professional Golfers' Association (PGA) Tour golfers); *Skokos v. United States Dep't of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding salary information for those performing lesser duties does not establish a proper basis of comparison); *Crimson v. Immigration and Naturalization Service (INS)*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (comparing National Hockey League (NHL) enforcer's salary with salaries of other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salaries of other NHL defensemen).

The remaining relevant documentation, which is from indeed.com, provides average salary information on bariatric surgeons, indicating that "[t]he average salary for 'physician [redacted] surgeon[s]' ranges from approximately $175,930 per year for Surgeon[s] to $227,401 per year for Hospitalist[s]." This evidence also does not establish that the Petitioner satisfies the criterion. First, the regulation requires the Petitioner to offer evidence showing that the Beneficiary has commanded a high salary or significantly high remuneration relative to others in the field, rather than a salary that is above average in his field. Second, the salary information from indeed.com is limited to those who reported their salaries to the website, and the Petitioner cannot confirm the accuracy of the self-reported information. The Petitioner has not demonstrated that the wage information it has presented constitutes an appropriate basis for comparison. As such, it has not shown that the Beneficiary's annual salary and potential bonus constitute "a high salary" or "other significantly high remuneration for services" as compared to other surgeons in [redacted] medicine. *See* 8 C.F.R. § 204.5(h)(3)(ix).

B. Final Merits Determination

The Petitioner has not submitted the required initial evidence of the Beneficiary's receipt of a one-time achievement or his satisfaction of at least three of the ten criteria listed under 8 C.F.R. § 204.5(h)(3)(i)-(x). It has also not established the acclaim and recognition required to classify him as an individual of extraordinary ability in the field of "general and [redacted] surgery." *Kazarian*, 596 F.3d at 1119-20.

The Petitioner seeks a highly restrictive visa classification, intended for individuals who are already at the top of their respective fields, rather than for individuals progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Price*, 20 I&N Dec. at 954. Here, the Petitioner has not shown that the significance of the Beneficiary's academic, scholarly, research, and professional accomplishments is indicative of the required sustained national or international acclaim or that 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 that 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.[2] *See* section 203(b)(1)(A) of the Act; 8 C.F.R. § 204.5(h)(2).

[2] While the Petitioner has cited to our non-precedent decisions discussing foreign nationals' qualifications as individuals of extraordinary ability, these decisions were not published as a precedent and therefore do not bind USCIS officers in

III. CONCLUSION

The record does not establish that the Beneficiary qualifies for classification as an individual of extraordinary ability. The appeal will therefore 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 Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of V-M-G-*, ID# 3751527 (AAO Aug. 7, 2019)

future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Specifically, the foreign nationals discussed in the non-precedent decisions were not in the same field as that of the Beneficiary, and had submitted documents that were qualitatively different than those in this case.