U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF F-S-M-C-

DATE: AUG. 19, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner seeks to classify the Beneficiary, a digital graphics designer, as an individual of extraordinary ability. *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 Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, concluding that the Beneficiary had satisfied only one of the ten initial evidentiary criteria, of which he must meet at least three. On appeal, the Petitioner submits a brief, arguing that the Beneficiary meets at least three of the ten criteria.

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 is a digital graphics designer with the petitioning organization. Because the Petitioner has not indicated or established that the Beneficiary has received a major, internationally recognized award, it must show that he satisfies at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director found that the Beneficiary had met only one of the initial evidentiary criteria: leading or critical role at 8 C.F.R. § 204.5(h)(3)(viii). On appeal, the Petitioner asserts that the Beneficiary also meets the following criteria: awards at 8 C.F.R. § 204.5(h)(3)(i), published material at 8 C.F.R. § 204.5(h)(3)(iii); and high salary under 8 C.F.R. § 204.5(h)(3)(ix). Upon review of all of the evidence, we conclude that it does not support a finding that the Beneficiary meets the requirements of at least three criteria.

A. Evidentiary Criteria

> *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).

The Petitioner contends that the Beneficiary meets the eligibility requirements of this criterion based on the [redacted] Innovation award received by his company, [redacted] for their project, [redacted] The Petitioner asserts that awards "granted to a company ultimately are an honor to and testament of achievement of its founders" and therefore, "[the Beneficiary] was the recipient of" the award. The record contains articles and recommendation letters that confirm the Beneficiary's role as one of the company's three members and co-founders. Regarding the company's receipt of the 2010 [redacted] Innovation award, the Petitioner refers to a letter from [redacted], the director of [redacted]

Innovation. He states that "[w]e crowned [the Beneficiary's] team in 2010 as the winners of the competition." Though [redacted] indicates that [redacted] Innovation is "France's biggest competition of Design Thinking and Open Innovation[,]" the Petitioner has not provided supporting documentation to establish that the [redacted] Innovation award is nationally or internationally recognized for excellence in the field. The Petitioner, for example, did not provide evidence, such as media articles, showing that winning this competition is tantamount to an award consistent with this regulatory criterion.[1]

Accordingly, the Petitioner did not demonstrate that the Beneficiary fulfills 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.* 8 C.F.R. § 204.5(h)(3)(iii).

The record contains articles from various publications and websites, such as The Next Web, Venture Beat, Killer Startups, Obsession, Press Citron, and Silicon Maniacs. They discuss the Beneficiary's company, [redacted] and its iPhone application that is described as a game that "involves a series of missions which you can choose to complete, by taking a photograph that fits a certain description or criteria." Users can create their own missions, encourage "other people to complete them, as well as complete other people's missions." While the articles reference the Beneficiary's role as co-founder and one of three members, they are not specifically about him. Rather, the articles discuss his company, only briefly mentioning the Beneficiary. For example, "[redacted]" contains direct quotes from one of the company's other co-founders and members, [redacted] but does not discuss the Beneficiary. Articles that are not about a petitioner do not meet this regulatory criterion. *See, e.g., Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles regarding a show are not about the actor). As the Petitioner has not established that the articles are about the Beneficiary, we need not address whether the publications in which they appeared qualify under the criterion.[2]

Accordingly, the Petitioner did not demonstrate that the Beneficiary fulfills this 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).

The record contains evidence, such as media articles and recommendation letters, showing that the Beneficiary has performed in a critical role for the Petitioner, an organization that has a distinguished reputation. Therefore, the Petitioner has demonstrated that the Beneficiary satisfies this criterion.

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[1] *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* 6 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[2] In addition, we note that the evidence does not demonstrate the publications qualify as major media and they should be addressed in any future proceeding. *See* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 7.

> *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).

To establish eligibility under this criterion, 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).

The Petitioner indicates that at the time of the petition's filing in October 2017, the Beneficiary received an annual salary of $155,000. The record contains a letter from [redacted] the co-founder and Senior Vice President of Operations for the Petitioner. [redacted] confirmed the Beneficiary is employed as their Director of Design, and his salary was raised to $170,000 in April 2018. The Petitioner also submitted the Beneficiary's IRS Form W-2, Wage and Tax Statements, that reflect earnings of $156,858 in 2017. Concerning the Beneficiary's job duties, [redacted] stated that in his director role, he is "indispensable as a leader and mentor who imparts his vision to the junior designers" and it was his "successful effort to build an entire Department of Design" that led "to the change in his title from Chief Creative Designer to Director of Design." [redacted]'s letter indicates that the Beneficiary's duties are more closely aligned with a senior management position rather than the graphic design category.

The Petitioner asserts that according to "[Department of Labor (DOL)] and industry data, [the Beneficiary] is paid a higher salary relative to others in his field." As evidence, the Petitioner refers to the DOL Office of Foreign Labor Certification Online Wage Library that shows the annual salary from June 2017 to July 2018 in the [redacted] Metropolitan area ranged from $44,054 to $84,864 for graphic designers and from $61,693 to $110,261 for multimedia artists and animators. The Petitioner also states that the DOL Career One Stop website reflects similar median salaries for graphic designers ($68,380) and multimedia artists and animators ($82,090).

In addition, the Petitioner referred to survey data from Glassdoor, LinkedIn, and Indeed as evidence that the Beneficiary "commands a high salary in relation to others in the field." For example, the Petitioner claims that Glassdoor indicates the average annual salary of a graphic designer in the [redacted] Metropolitan area in 2018 was $73,367; LinkedIn reflects the median base salary of "senior designer" was $100,000; and Indeed shows an average annual salary for a "senior graphic designer" as $92,928.

However, as noted in the Director's denial, the comparative salary documentation in the record does not include data regarding average salaries for directors of graphic design, such as the Beneficiary, nor do they distinguish among differing levels of expertise, education, and years of work experience. Further, the 2018 Indeed documentation reflects salaries as high as $175,000 for senior digital graphic designers in the [redacted] metropolitan area, which exceeds the Beneficiary's 2017 salary of

$155,000. Though the Petitioner contends on appeal that "the fact that highest paid Senior Digital Graphics Designers in 2018" are paid this amount proves that the Beneficiary's 2018 $170,000 salary is "a high salary" relative to others in the field, we disagree. As explained above, the evidence does not include sufficient comparative salary documentation for individuals with the Beneficiary's level of expertise and experience, and performing similar services as a director of graphic design, to show that his $155,000 annual salary at the time of filing satisfies the eligibility requirements of this criterion.

For the reasons stated above, the Petitioner has not submitted evidence showing that the Beneficiary has earned a high salary or other significantly high remuneration relative to others in his field and not just a salary that is above average in his field.

Accordingly, the Petitioner did not demonstrate that the Beneficiary fulfills this criterion.

B. O-1 Nonimmigrant Status

In addition, we note that the record 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 a 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 Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). Furthermore, our authority over the USCIS service centers, the office 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. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

III. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's eligibility because it has failed to submit the required initial evidence of either a qualifying 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). Thus, we do not need to fully address the totality of the materials in a final merits determination. *Kazarian*, 596 F.3d at 119-20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Beneficiary has 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 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 F-S-M-C-*, ID# 3718065 (AAO Aug. 19, 2019)