U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 4655136

Date: DEC. 19, 2019

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a[n] provider of chronic care management products and services seeks to classify the Beneficiary as an alien 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 petition, concluding that the Petitioner had not established that the Beneficiary satisfied any of the ten initial evidentiary criteria, of which he must meet at least three.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(1) 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 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).

Where a petitioner 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).

II. ANALYSIS

At the time of filing the Petitioner, a provider of chronic care management products, employed the Beneficiary as its senior mobile applications developer.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that the Beneficiary has received a major, internationally recognized award, it must demonstrate 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 not met any of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). On appeal, the Petitioner asserts that the Beneficiary meets seven of the evidentiary criteria, as discussed below. After reviewing all of the evidence in the record, we find the Petitioner has not established that the Beneficiary satisfies three of the criteria, as required.

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.* 8 C.F.R. § 204.5(h)(3)(ii)

The Petitioner asserts that the Beneficiary meets this criterion because several "prestigious groups in healthcare have… sought to work with [the Petitioner] and want to develop applications with [the Beneficiary.]" It lists several healthcare providers and universities as examples of these groups, and the record reflects the Petitioner's business relationship with these and other entities.

However, the criterion requires that the Beneficiary, not the Petitioner, be a member of the association or organization. Here the Petitioner does not submit evidence, such as bylaws or other documentation, demonstrating that these organizations extend membership to individuals. It further does not provide materials showing how the Petitioner's partnerships equate to the Beneficiary's membership in these entities, or how its partners' desire to develop applications with the Beneficiary constitutes membership or otherwise establishes that the Beneficiary holds such a membership. Even had the record included this information, the Petitioner does not provide evidence showing that these organizations require outstanding achievements of their members, as judged by recognized national

or international experts in the field of applications development. For these reasons, the Petitioner has not demonstrated that the Beneficiary meets 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 Director concluded that the Petitioner had not established the Beneficiary's eligibility for this criterion as it provided published material about it, rather than about the Beneficiary related to his work. On appeal, the Petitioner argues that the Director erred by "failing to recognize that any publication documenting the success of [the Petitioner] is by necessity praising the abilities and contributions of [the Beneficiary]."[1]

Here the record contains numerous articles about the Petitioner, its products, and its business activities.[2] For example, the articles '[redacted]" published online at www.hughhuffaker.com[3] and [redacted]" published at www.thesiliconreview.com, focus on the Petitioner and contain interviews with its chief executive officer. The record also includes articles about its products, such as the article [redacted] published in *JMIR mHealth and uHealth* and [redacted] published on www.cobioscience.com.[4] In addition, the marketwatch.com article [redacted] relates to the Petitioner's business activities. However, in order to establish eligibility for this criterion, the published material should be about the Beneficiary relating to his work in the field, not just about his employer.[5] 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). Therefore, the Petitioner has not demonstrated the Beneficiary's eligibility for this criterion.

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[1] We note briefly the Petitioner's appellate argument that the Director erred in failing "to acknowledge the extensive documentation of the circulation of online articles submitted in support of the petition." While the record includes online circulation statistics for most, but not all, of the publications' websites, the Petitioner does not provide comparative online statistics establishing that they are high relative to others, or otherwise demonstrating that they rise to the level of major media. *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* 7 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html (noting that evidence of published material about the alien in major media should establish that the circulation (on-line or in print) is high compared to other circulation statistics.).

[2] While we discuss a sampling of the articles here, we have reviewed the record in its entirety.

[3] The Petitioner does not provide evidence regarding www.hughhuffaker.com, such as online circulation statistics, or other materials, which may establish that its circulation is high relative to others, or otherwise demonstrating that it qualifies as a major medium. *See* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 7.

[4] The Petitioner does not provide additional information about *JMIR mHealth and uHealth* or about cobioscience.com which may establish that either is a professional publication or major trade publication or a major media publication.

[5] *See* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 7.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv)

The Petitioner claims that the Beneficiary meets this criterion as he "has served on several panels judging new technological innovations and the application developments associated with different telehealth products." However, the Petitioner does not submit evidence corroborating this assertion, such as correspondence confirming the Beneficiary's participation as a judge, materials identifying him in such a role, or other relevant documentation. The Petitioner therefore has not established that the Beneficiary participated, either individually or on a panel, as a judge of the work of others in the field of application development as required.

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 Petitioner asserts that as the Beneficiary's work was displayed at numerous conventions and conferences, he meets this criterion. The record reflects that the Petitioner has participated in numerous conferences and conventions including the [redacted]s 15th Annual Pow Wow and the [redacted] Investor Conference. However, the Petitioner does not provide evidence, such as information on displays, conference materials, or other relevant documentation, showing that the Beneficiary displayed his work at these events.

Moreover, the evidence in the record reflects that these conferences were primarily commercial in nature. For example, an article about the Pow Wow states that it is "designed to provide a [redacted] update to community primary care providers, surgeons, specialists, as well as medical oncologists & radiologists." A press release about [redacted] Investor Conference notes that its focus is on "opportunities in the areas of [redacted] health." However, this criterion requires evidence that the Beneficiary's work be displayed at artistic exhibitions or showcases.[6] For these reasons, the Petitioner has not established the Beneficiary's eligibility for 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 Director, in determining that the Beneficiary did not meet this criterion, noted "there is no supporting financial documentation…demonstrating the beneficiary's actual earnings for any period of time." On appeal, the Petitioner asserts that it provided financial documentation in the form of the Beneficiary's paystubs both with its initial submission and in response to the Director's September 2018 request for evidence (RFE) that "demonstrate that [the Beneficiary] earns $122,000 compared to other Mobile Application Developers who earn an average of $55,000 to $60,000 annually."

Upon review of the record, we note that while both the brief submitted with the initial petition and with the RFE list paystubs as part of the included documentation, this financial documentation is not contained therein. Absent verifiable evidence of his earnings, the Petitioner has not established the

[6] *See* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 9.

amount of the salary commanded by the Beneficiary. We note further that even had the record demonstrated the Beneficiary's salary or other remuneration, it lacks evidence, such as geographical or position-appropriate compensation surveys,[7] establishing that his salary is high relative to other mobile application developers, as required. The Petitioner, therefore, has not shown that the Beneficiary meets this criterion.

As discussed above, we find that the Petitioner has not established that the Beneficiary meets the five criteria relating to membership, published material, judging, artistic display, and salary. Although on appeal the Petitioner also claims that the Beneficiary meets criteria related to leading or critical role and original contribution, we need not reach these issues. We reserve them as the Beneficiary cannot meet the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3). *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

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. 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 acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals 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. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown that the significance of the Beneficiary's work 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. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated the Beneficiary's eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[7] *See* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 11.