U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-O-

DATE: MAR. 19, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a digital marketing consultant, seeks classification as an individual of extraordinary ability in business. *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, and a subsequent motion, concluding that the Petitioner 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 asserting that he fulfills 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 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 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). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if he or she is able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the individual's occupation.

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) (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

Because the Petitioner has not indicated or established that he has received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). In denying the petition, the Director found that the Petitioner met only one of the initial evidentiary criteria: leading or critical role for an organization with a distinguished reputation under 8 C.F.R. § 204.5(h)(3)(viii). The record reflects, for example, that the Petitioner performed in a critical role as a digital marketing consultant for [redacted] an organization with a distinguished reputation. Accordingly, we agree with the Director that the Petitioner fulfilled the leading or critical role criterion. On appeal, the Petitioner maintains that he meets three additional criteria, discussed below. We have reviewed all of the evidence in the record and conclude that it does not support a finding that he satisfies the requirements of at least three criteria.

A. Evidentiary Criteria

> *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 specification for which classification is sought.* 8 C.F.R. § 204.5(h)(3)(iv).

As evidence for this criterion, the Petitioner submitted his "Digital Marketing Process Step-by-step" outline for prospective clients. He also provided various "Digital Marketing" reports that he prepared for clients that retained his consulting services in order to develop their digital marketing strategies. For example, the record includes a digital marketing "Initial analysis," a "Measurement report"

(August 2016), and a "Yearly analysis" (January 2018) that he prepared for Apparis, an online fashion boutique. In addition, the Petitioner presented a "Measurement report" (December 2017) for a womenswear boutique; "User acquisition" (October 2017) and "Measurement" (November 2017 and December 2017) reports for an online talent platform; and "Initial analysis" and "Measurement" (July 2016) reports for an art and luxury lifestyle publication.

The Director determined that performing consulting services relating to clients' digital marketing strategies did not meet the requirements of this criterion. For example, the Director indicated that while providing feedback to clients demonstrated the Petitioner's competency in strategic marketing, his consulting work did not equate to participation as a judge of the work of others in the same or an allied field. The Director further noted that the phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified in the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

On appeal, the Petitioner contends that "digital marketing professionals' judgment of the work of others translate [*sic*] into the judgments of how digital marketing strategies affect real clients." He further states that "judging the work of others within the digital marketing field requires judging actual clients' digital marketing strategies and not judging other digital marketing consultants directly from a bench of judges."[1] The record, however, does not include sufficient information and evidence demonstrating that the Petitioner's activities analyzing business strategies, issuing reports on website traffic, and making recommendations to clients constitute participation, either individually or on a panel, as a judge of the work of others in the field. Accordingly, the Petitioner has not established that he meets this 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).

As evidence under this criterion, the Petitioner submitted various letters of support discussing his work as a digital marketing consultant and documentation relating to his clients' business activities. The Director considered this documentation, but found that it was not sufficient to demonstrate that the Petitioner's work constituted original contributions of major significance in the field. For the reasons discussed below, we agree with that determination.

In order to satisfy the regulation at 8 C.F.R. § 204.5(h)(3)(v), a petitioner must establish that not only has he made contributions that were original but that they have been of major significance in the field. For example, a petitioner may show that the contributions have been widely implemented throughout the field, have remarkably impacted the field, or have otherwise risen to a level of major significance in the field.

[1] In addition, the Petitioner asserts that "the requirement that a digital marketing professional judge the work of other digital marketing professionals (i.e., as a bench judge) is simply not applicable to this industry." He argues therefore that his evidence for this criterion should be evaluated as comparable evidence under the regulation at 8 C.F.R. § 204.5(h)(4). We will address the Petitioner's comparable evidence claim later in this decision.

On appeal, the Petitioner asserts that the Director erred in determining that the letters of support from experts in the field were insufficient to meet this criterion. The Petitioner contends that he "submitted independent, objective evidence that corroborated the statements of his clients regarding his original contributions of major significance in the field." Specifically, he claims that attracting clients who retained his digital marketing services is corroborative evidence of his influence in the field. In addition, he points to two "expert opinion" letters from business education administrators, [redacted] and [redacted] who were not his clients and who discussed his digital marketing projects.[2] We will address both of these letters below.

With respect to the Petitioner's letters of support, the Director explained that "USCIS may, in its discretion, use such letters as advisory opinions submitted by expert witnesses," but noted that USCIS is "ultimately responsible for making the final determination of the alien's eligibility." *See Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). As a result, we evaluate the content of letters to determine whether they support his eligibility. *See id.* at 795-96; *see also Matter of V-K*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

The Petitioner argues that *Matter of Caron Int'l* "addressed the question of whether a degree is required for a particular occupation" and therefore the decision "is irrelevant, and unsuitable" with respect to the facts in the instant case. Although *Matter of Caron Int'l* related to a different visa classification, we find the aforementioned precedent decision's guidance relevant to evaluating information contained in recommendation letters offered under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(v).

Here, the Petitioner contends that experts in the field have offered testimony regarding his original contributions of major significance in the field of digital marketing.[3] However, as discussed below, the letters do not offer sufficiently detailed information, nor does the record include adequate corroborating documentation, to demonstrate the nature of specific "original contributions" that the Petitioner has made to the field that have been considered to be of major significance.

For example, [redacted] Associate Dean for Academic Affairs in the School of Business at [redacted] asserted that the Petitioner has "made significant and original contributions noted for their excellence in the field of digital marketing." Specifically, [redacted] indicated that the Petitioner's "work with [redacted] has continued to have great influence on the magazine's website, [redacted] and marketing operations, allowing it to maintain its influence as a trend-setting and tastemaking publication in the art, fashion, and design worlds." [redacted] also discussed the Petitioner's projects for [redacted] and [redacted] and how his marketing strategies improved their digital presence, but the evidence does not show that the impact of the Petitioner's work for the aforementioned companies rises to the level of an original contribution of major significance in the field.

[2] The Petitioner argues that these two "expert advisory opinions are comparable evidence as set forth by 8 C.F.R. § 204.5(h)(4)." We will discuss the comparable evidence the Petitioner offers later in this decision.

[3] While we discuss a sampling of the recommendation letters, we have reviewed and considered each one.

In addition, [redacted] chief executive officer at [redacted] stated that the Petitioner "is making marked and major influences on the industries that he is serving, such as gig economy platforms, designer fashion, art and luxury firms" and that "[h]e is able to gain the trust of his clients to make radical changes to their digital marketing plans, such as his ability with [redacted] to install a total promotion pause." While [redacted] further indicated that the Petitioner's work "is influencing the digital marketing industry because of the kind of client referrals he is gaining," the record does not demonstrate that his strategies have affected that industry or the field of digital marketing in a substantial way or that his work otherwise constitutes an original contribution of major significance in the field.

Furthermore, the record contains letters from several of the Petitioner clients discussing how he improved their digital marketing strategies and helped expand their businesses. For instance, [redacted] co-founder of [redacted] asserted that the Petitioner's "findings and fast actions on or digital media presence led to the kind of growth in social engagement experience, customer base and revenue that had led us to really being a player in the competitive designer fashion retail business." Likewise, [redacted] co-founder and managing director of [redacted] indicated that her retail business "has been getting more and more press coverage and traffic because of how our digital brand reach is growing. Our digital presence grew substantially with [the Petitioner's] help." Similarly, [redacted] founder of [redacted] stated that the Petitioner's "work increased our platform's user base from roughly 15,000 users to 46,000 users as of early March 2018. Our company's main goal of growing our user base was essentially set on track because of [the Petitioner's] vital guidance. He has made an incredible impact on our startup company."

The statements and information from the Petitioner's clients and two educators, however, are not sufficient to show that his work has widely affected the field beyond his clients' projects or has otherwise risen to the level of contributions of major significance in the field. The language of this regulatory criterion requires that the Petitioner's original contributions be "of major significance in the field" rather than mainly affecting digital marketing projects for his clients. *See Visinscaia*, 4 F. Supp. 3d at 134-35 (upholding a finding that a ballroom dancer had not met this criterion because she did not corroborate her impact in the field as a whole). Without sufficient evidence demonstrating that his work constitutes original contributions of major significance in the field, the Petitioner has not established that he meets this criterion.

> *Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.* 8 C.F.R. § 204.5(h)(3)(vi).

As evidence for this criterion, the Petitioner submitted documentation showing that he posted various articles to LinkedIn's self-publishing platform. In addition, he presented information from *Wikipedia* describing LinkedIn as "a business- and employment-oriented social networking service that operates via websites and mobile apps." The record also includes an article from Forbes.com, entitled "Read

[4] [redacted] indicated that he taught a "Business Simulation" class taken by the Petitioner at [redacted]

This First, Before You Publish a Post on LinkedIn," which states that "LinkedIn's platform makes long form publishing available to every subscriber."[5]

The aforementioned information and evidence is not sufficient to demonstrate that the Petitioner's articles on LinkedIn's self-publishing platform constitute "scholarly articles . . . in professional or major trade publications or other major media." For example, the evidence does not show that the Petitioner's articles are scholarly in nature[6] or that LinkedIn's platform constitutes a professional or major trade publication or form of major media.[7] The Petitioner therefore has not established that he meets this criterion.

B. Comparable Evidence

On appeal, the Petitioner argues that the digital marketing reports that he prepared for clients that retained his consulting services, the expert advisory opinions, and the articles he posted to LinkedIn's self-publishing platform should be considered as comparable to the evidence listed in the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(iv), (v), and (vi), respectively.[8] The regulation at 8 C.F.R. § 204.5(h)(4) allows for comparable evidence if the listed criteria do not readily apply to his occupation. A petitioner should explain why he has not submitted evidence that would satisfy at least three of the criteria set forth in 8 C.F.R. § 204.5(h)(3) as well as why the evidence he has included is "comparable" to that required under 8 C.F.R. § 204.5(h)(3).[9]

Here, the Petitioner has not shown that the listed criteria do not readily apply to his occupation. He has not asserted or demonstrated that he cannot offer evidence that meets at least three of the ten criteria. As discussed, the Petitioner has claimed to meet more than three criteria. Moreover, the Petitioner has not shown that digital marketing consultants cannot present evidence relating to the other regulatory criteria such as published material about them and commanding a high salary. *See* 8 C.F.R. § 204.5(h)(3)(iii) and (ix). As such, the Petitioner has not established that he is eligible to meet the initial evidence requirements through the submission of comparable evidence. Furthermore, he has not demonstrated that the submitted documentation is truly comparable to the evidence required under the listed criteria at 8 C.F.R. § 204.5(h)(3)(iv), (v), and (vi), as claimed.

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[5] This article provides entrepreneurial tips for those interested in building their companies' search engine optimization, but does not indicate that articles posted to LinkedIn's platform undergo an editorial process or that the platform otherwise constitutes a professional publication in the field of digital marketing.

[6] A scholarly article should be written for "learned" persons in the field. "Learned" is defined as having or demonstrating profound knowledge or scholarship. Learned persons include all persons having profound knowledge of a field. *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* 9 (Dec. 22, 2010), https://www.uscis.gov/legal-resources/policy-memoranda.

[7] On appeal, the Petitioner contends that "the scholarly article standards stated by USCIS are inapplicable to his industry of digital marketing." He requests that his evidence for this criterion be evaluated as comparable evidence under the regulation at 8 C.F.R. § 204.5(h)(4). We will address the Petitioner's comparable evidence claim later in this decision.

[8] We note that our decision has already addressed this evidence under specific criteria, finding it insufficient to meet them.

[9] *See* USCIS Policy Memorandum PM-602-0005.1, *supra*, at 12.

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 and recognition of his work are indicative of the required sustained national or international acclaim or that they are 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 Petitioner 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 foregoing reasons, the Petitioner has not shown that he qualifies for classification 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. 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 P-O-*, ID# 2481873 (AAO Mar. 19, 2019)