U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-K-S-

DATE: NOV. 7, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a cancer researcher, seeks classification 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 petition, concluding that the Petitioner had satisfied only two of the ten initial evidentiary criteria, of which he must meet at least three.

On appeal, the Petitioner asserts that he meets the required three criteria, and argues that the Director did not give sufficient weight to letters, grant funding, and citations of the Petitioner's published articles.

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. A petitioner can either demonstrate a one-time achievement (that is, a major, internationally recognized award), or 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 qualifying 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 they are 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

The Petitioner is employed as a research associate at [redacted] Children's Hospital Medical Center [redacted]. Because he has not indicated or established that he has received a major, internationally recognized award, the Petitioner 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 only fulfilled two of the initial evidentiary criteria, relating to judging the work of others and authorship of scholarly articles.

On appeal, the Petitioner maintains that he meets one additional criterion, discussed below. We have reviewed all of the evidence in the record, and conclude that it does not show that the Petitioner satisfies the requirements of at least three criteria.

> *Evidence of the individual'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)

We agree with the Director's determination that the Petitioner has satisfied this criterion. Specifically, the Petitioner documented that he performed peer review for a number of scholarly journals. (The Petitioner also pointed to his position on one journal's editorial board, but the record does not establish that he actually judged the work of others while on that board. The regulation calls for participation as a judge, rather than simply being in a position to judge the work of others.)

Evidence of the individual'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)

The record shows that the Petitioner is a co-author of several scholarly articles published between 2010 and 2015. We agree with the Director's determination that the Petitioner met this criterion.

We note that neither of the above two criteria, on their own, call for evidence of acclaim; a researcher could meet either, or both, of those criteria without being in the small percentage at the very top of the field. Conclusions about acclaim, or the lack thereof, would ensue during the final merits determination if the initial evidence warranted proceeding to that determination.

Evidence of the individual'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 maintains that he meets this criterion. To satisfy this criterion, he must establish that not only has he made original contributions but that they have been of major significance in the field. The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003). Therefore, to satisfy this criterion as a scientist, the Petitioner must establish not only that he has made original scientific contributions, but also the major significance of those contributions.

Major significance in the field may be shown through evidence that his research findings or original methods or processes have been widely accepted and implemented throughout the field, have remarkably impacted or influenced the field, or have otherwise risen to a level of major significance in the 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* 8-9 (Dec. 22, 2010), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf.

The Petitioner described the research he performed as a doctoral student at [redacted] University School of Medicine:

> My work identified that [redacted] cancers resistant to the drug [redacted] . . . have decreased expression of the calcium sensing protein CaSR.[1] Using genetic systems I went on to show that re-expressing this protein makes the resistant cells sensitive to [redacted] This observation has been used by me and other researchers to identify . . . potential drugs to treat drug-resistant [redacted] cancers.

[1] Counsel for the Petitioner claimed that the Petitioner "identified a new protein called calcium-sensing receptor (CaSR)." The Petitioner himself made no such claim in his own statement, and his published work includes citations to many earlier articles discussing CaSR. Therefore, it is incorrect to state that the Petitioner "identified a new protein." Counsel's characterizations of the Petitioner's work and its significance have no weight in this proceeding. The unsupported assertions of counsel are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

During his postdoctoral training at [redacted] Children's, the Petitioner showed that a type of [redacted] cancer called [redacted] produces high levels of protein, a trait that potential treatments could exploit without harming surrounding healthy tissue. The Petitioner stated that he received a "Department of Defense grant of $300,000 a year. . . . The grant is extremely competitive and is awarded to only 5% of applicants."

Grant documents from the U.S. Department of Defense show the grant's recommended total amount as $568,848 over three years, less than $190,000 per year, rather than the $300,000 figure claimed by the Petitioner. The 2015 [redacted] Cancer Research Program received 617 applications, of which 31 were recommended for funding, consistent with the Petitioner's "5%" figure. The average grant amount was more than $1 million. Grant documents described the review process for grant applications but did not specify the eligibility requirements for the grant.

In the denial notice, the Director noted that grant funding, by its nature, is provided in advance of the research to be performed, in order to cover the anticipated expenses of that research. Therefore, the awarding of grant funding cannot demonstrate, in advance, the major significance of the funded research. The Director stated: "While these [grants] may be significant awards for new or young professionals, they are limited competitions which clearly exclude thousands of practiced and distinguished persons who have tenured and more celebrated careers."

On appeal, the Petitioner contests the Director's characterization of the grant recipients. The Petitioner submits a funding announcement from the Department of Defense, indicating that "[i]nvestigators at all academic levels . . . are eligible to submit an application." This evidence refutes the finding that only "new or young professionals" qualify for the grants, but it does not establish that the grants are *prima facie* evidence that awardees have made contributions of major significance. The funding announcement refers to "the *potential* for a major impact," but the wording of the regulation does not merely call for contributions of major potential. We note that the Petitioner received "level 1" funding, for "research that is in the earliest stages of idea development," with "[n]o preliminary data required."

Counsel asserted that the Petitioner's most recent research, involving immunotherapy, "promises to have a significant impact on patient care" and "will facilitate the development of [new treatment] methods." These statements are inherently speculative and do not establish existing contributions of major significance.

Subsequently, the Petitioner submitted copies of articles that contain citations to the Petitioner's published work, to support the assertion that his "research has . . . invoked widespread public commentary throughout the world." Asserting that citations to the Petitioner's work also appear in three textbooks, counsel stated:

> The materials cited by textbooks are regarded as being scientific fact and undisputed by prevailing scientific thought. The fact that [the Petitioner's] research articles have been cited in three textbooks should prove that his work is regarded by textbook editors as being original, scientifically sound and major accomplishments.

Counsel did not corroborate the claim that only "major accomplishments" appear in textbooks. Furthermore, the Petitioner has not shown that all the publications in question are, in fact, textbooks. One of the claimed textbooks is actually a compilation of articles that appeared in *Frontiers in Physiology*. The other two claimed textbooks are volumes in a series called [redacted] *Cancer: New Insights for the Healthcare Professional*. That series appears to consist of annual aggregations of press releases. The Petitioner submitted no evidence that any of these publications are used as textbooks.

With its initial finding and again in response to the Director's RFE, the Petitioner submitted printouts from Google Scholar showing the number of citations to his published work. The Petitioner also submitted copies of unpublished appellate decisions from 2004 and 2006, approving petitions from researchers with comparable citation histories. As he acknowledged, these unpublished decisions have no weight as precedent and are not binding in unrelated 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. The Petitioner has not shown that the cited cases had similar fact patterns to the matter now on appeal. Furthermore, the record shows that citation rates vary from one field to another, and the cited cases did not involve cancer researchers.

On appeal, the Petitioner contends that the proper use of citations involves "comparing the level of citation of his individual scholarly contributions to those of all papers published in his field in the same year." The Petitioner cites tables of citation rates in the field of clinical medicine, and states that two of his articles "are among the top 10% most cited" from 2013, and two others "are among the top 20% more cited papers" from 2015. The relevant portion of those tables is reproduced below

Percentage	2013	2015
0.01%	1040	810
0.10%	309	172
1.00%	94	51
10.00%	27	15
20.00%	17	9

We first note that while the few most highly cited papers earned citations numbered well into the hundreds, setting them clearly apart from the remaining group, the relative difference between the number of citations for papers ranked in the tenth, twentieth or even fiftieth percentiles is much smaller. It is therefore not apparent from this data alone that the research reported in papers ranked in those percentiles represents a contribution of major significance to the field. In addition, these figures do not provide information about how, or the extent to which, the Petitioner's work impacted the work of those researchers that cited his publications. Furthermore, the Petitioner has not shown that his research into cancer genetics is most appropriately classified under "Clinical Medicine" rather than "Biology & Biochemistry" (which, the record shows, has higher citation rates) or "Molecular Biology & Genetics" (for which the Petitioner submitted no data). The Petitioner is not a physician and does not practice clinical medicine.

The Petitioner has not presented sufficient evidence to show that the citation rate of his articles demonstrates major significance in the field.

In addition to the citing articles, the Petitioner submitted what he described as "Media Articles discussing Petitioner's work." Of the eight submitted pieces, five were press releases issued by institutions participating in the research (or sourced solely from such press releases); one was a blog post by the Petitioner's collaborator; and one was a post on an online cancer forum. The remaining "Media Article" was an online product listing from a retailer of chemicals. The listing identified 15 articles reporting research using that product, including one of the Petitioner's articles. The listing invited more such submissions, with a link reading "Did you use this product in your Paper? If so click here." These materials do not show scientific media attention to the Petitioner's work, and thus do not support assertions that the research described has made a contribution of major significance to cancer research. Rather, for the most part they reflect efforts by the originators to attract that attention.

The Petitioner also submitted letters from mentors and collaborators. For example, the Petitioner's at Children's, stated:

> At present, there is no treatment for cancers that are refractory to inhibitors. Thus, [the Petitioner's] work provides a way in which such cancers can be treated. Given the importance of the work, this study was published in the highly reputed journal Science Signaling and has also been featured in an accompanying focus paper.

The author of that paper of Cancer Center, stated that she has never worked with the Petitioner but is "very familiar with his published research." stated: "Journals typically only publish highlight articles when the work summarized is generally recognized as particularly important . . . . I believe [the Petitioner's] study will certainly impact the future development of cancer therapeutics." She added that the Petitioner's work "will likely have a positive impact on treatment of cancers," but did not identify any existing improvements to treatment stemming from the Petitioner's work. Her article strikes the same tentative tone; even its title is phrased as a question: Projections of the future impact resulting from the Petitioner's work do not establish that he has already made such a contribution.

, now of , was the editor of *Science Signaling* when that journal published 's highlight article. stated that the Petitioner's "study was particularly important not only for the biomedical findings, but [also] for the interdisciplinary approach by which the study was performed."

of the University of stated that the Petitioner's doctoral work "addresses the important problem of chemo-resistance in cancer therapy as well as identifying a strategy that can be used to overcome this problem." did not indicate that the Petitioner's work has resulted in proven new treatments or has otherwise had a significant impact on the field of cancer research. Rather, asserted: "Extending this research can . . . lead to development of novel therapies to treat drug resistant cancers." Noting that two of the Petitioner's articles have appeared in *Cancer: New Insights for the Healthcare Professional* claimed: "The fact that his work was chosen for this forum is proof that my fellow researchers believe his work to be of great importance." The record contains no objective documentary evidence to establish the criteria for inclusion in *Cancer*.

The Director found the submitted letters insufficient to establish the major significance of the Petitioner's contributions. On appeal, the Petitioner contends that the Director dismissed the letters "in boilerplate terms rather than addressing the actual letters." Above, we have discussed specific examples from the submitted letters. We find that the letters do not establish that the Petitioner's contributions have major significance in the field. Instead, the letters attest to the still-unrealized potential of the Petitioner's research. We note that some of the letters (and third-party articles) emphasize the need for further research in certain areas, but the record shows that the Petitioner is no longer conducting research in those areas; when he changed research institutions, his specific research focus changed as well.

Any research must be original and likely to present some benefit if it is to receive funding and attention from the scientific community. In order for a university, publisher, or grantor to accept any research for graduation, publication, or funding, the research must offer new and useful information to the pool of knowledge. Not every researcher who performs original research that adds to the general pool of knowledge has inherently made a contribution of major significance in the field as a whole. While the record includes numerous attestations of the potential impact of the Petitioner's work, none of the Petitioner's references provide examples of how the Petitioner's work is already affecting cancer treatment.

U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *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"). Thus, the content of the references' statements and how they became aware of the Petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a researcher who has made original contributions of major significance in the field. *Cf.* 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013) (concluding that USCIS' decision to give little weight to uncorroborated assertions from professionals in the field was not arbitrary and capricious).

While the record, including the reference letters, establishes that the Petitioner's research has value and has received some attention in the field, it is insufficient to confirm that the impact or influence of his work has risen to the level of "major significance" in the field. *See Kazarian*, 596 F.3d at 1122 (finding that "letters from physics professors attesting to [a petitioner's] contributions in the field" were insufficient to meet this criterion); *Visinscaia v. Beers*, 4 F. Supp. 3d 126, 134-35 (D.D.C. 2013) (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole). The Petitioner has not sufficiently shown that his research—which has led to incremental advancements in the field, as such are expected in any original research—qualifies as contributions of major significance in the field. For example, he has not presented evidence demonstrating that his research has provoked widespread commentary, has been referenced as authoritative, or has received notice from others at a level indicative of its "major significance" in the field, as required under the criterion. *See Kazarian v. USCIS*, 580 F. 3d 1030, 1036 (9th Cir. 2009), *aff'd in part*, 596 F. 3d 1115, 1122 (9th Cir. 2010); USCIS Policy Memorandum PM-602-0005.1, *supra*, at

8-9. Accordingly, based on the relevant documents in the record, the Petitioner has not shown, by a preponderance of the evidence, that he has made original contributions of major significance in the field.

We agree with the Director that the Petitioner has not established the major significance of his original contributions.

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. For the foregoing reasons, the Petitioner has not shown that he qualifies for classification as an individual of extraordinary ability.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of N-K-S-*, ID# 5236251 (AAO Nov. 7, 2019)