U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8966955

Date: AUG. 12, 2020

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in the field of business, seeks classification 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had a one-time achievement (that is, a major, internationally recognized prize or award) or met at least three of the evidentiary criteria listed under 8 C.F.R. § 204.5(h)(3)(i)-(x). On appeal, the Petitioner asserts that he meets six of those evidentiary criteria and has sustained national or international acclaim.

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

The Petitioner is an entrepreneur in the field of business, who co-founded a business in his native country offering [redacted] testing ([redacted]) services and distributing related equipment, holding the position of technical director at the time of filing. He holds a diploma as an engineer in "Physical and chemical methods of processes and materials" from [redacted] University in [redacted] Russia, and received a diploma of professional retraining in management in 2015. The record includes evidence that he has established a business in Texas which he intends to grow if granted permanent resident status.

A. Evidentiary Criteria

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). The Director found that the Petitioner met one of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to his authorship of scholarly articles. On appeal, the Petitioner asserts that he also meets five additional evidentiary criteria, which are analyzed in detail below. After reviewing all of the evidence in the record, we find that he does not meet the requisite three evidentiary criteria and is not otherwise eligible for the requested benefit.

> 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)

In his decision, the Director found that while the evidence established that the Petitioner is a member of [redacted], it did not establish that this organization requires outstanding achievements of its members. This conclusion was based upon an analysis of the translated portions of the [redacted]'s charter, and upon review we agree with the Director's finding regarding this criterion. On appeal, the Petitioner requests that we "accept[s] the evidence existing on record to further support [the Petitioner's] national reputation as

an expert in the field of [redacted] Testing." Since the Petitioner did not directly address this criterion, we will consider his claim to this criterion abandoned.[1]

> 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)

To satisfy this criterion, the Petitioner submitted evidence pertaining to an interview of him that he asserts was aired on the television channel "Russia 24." He also submitted evidence he claims demonstrates that Russian-language magazines National Business and Ecology, Production and Business of the XXI Century published articles about him. As discussed below, we find that the Petitioner has not established that he meets this criterion.

With respect to the television interview, the Petitioner submitted an "air participation certificate" from the deputy director of [redacted] which indicates that the interview aired on the program [redacted] with the topic of "science in small business." The Director found that this description of the topic showed that the program was not about the Petitioner, but about science in small business and "the current state of small and medium-sized businesses" in the [redacted] region. However, in reviewing the interview, we note that the interviewer identifies the Petitioner and his company, and asks about his experiences and opinions as a small business owner in the technical sector. The Petitioner describes his company and its services, but also relays information about his experience as an entrepreneur. Accordingly, we disagree with the Director and find that the interview is about the Petitioner and his work as an entrepreneur.

The Director also found that the evidence from Wikipedia about the channel "Russia 24-[redacted]" and Russian television channels in general was insufficient to establish that it qualifies as major media, as material from this online encyclopedia carries no assurance of reliability. We further note that the list of Russian television channels obtained from Wikipedia is incomplete, as indicated by the gap in page numbering. On appeal, the Petitioner submits additional evidence from the website of '[redacted]' information about the "State Internet Channel Russia," and a copy of regulations concerning mass communications in Russia. However, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988). In addition, even if we were to consider this evidence, it does not support a finding that "[redacted]' or the "Russia 24-[redacted] channel on which it appeared qualify as major media. While it is one of several state-owned television channels in Russia, the fact of government ownership does not establish its qualification as major media. The evidence does not show that in comparison to both state and privately owned television channels in

[1] See Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); Hristov v. Roark, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). While we would consider this evidence in a final merits determination per Kazarian, 596 F.3d 1115, we have determined that the Petitioner has not met the initial evidentiary requirements and will therefore not reach a final merits determination.

Russia, "Russia 24-[redacted]" is highly rated or viewed, or that the program on which the Petitioner appeared receives relatively high viewership ratings.

In addition, the certificate from [redacted] includes discrepancies with other evidence in the record concerning its "publication" or broadcast. Specifically, the Petitioner included a letter from his brother, who is the general director of [redacted], the company they founded. The letter requests the certificate from [redacted] stating that the interview of the Petitioner was broadcast on [redacted] 2016 at [redacted] We first note that although the translation of the certificate includes the words "with [the Petitioner's last name and first and middle initials], the technical Director of '[redacted] a comparison of those words in the original Russian-language letter requesting the certificate shows that they do not appear in the original Russian-language certificate. In other words, the Russian-language certificate from [redacted] does not name the Petitioner, his title or the name of his company, despite that information appearing in the English language translation. The certificate therefore does not identify the Petitioner as the subject of the interview which it states was broadcast. In addition, the certificate indicates that the interview was initially aired on [redacted] 2017, a year after the date stated in the request letter. This also conflicts with the date that the video of the interview (accessed via the link provided by the Petitioner) is stated to have been posted on [redacted]'s website, [redacted] 2016. The Petitioner must resolve these discrepancies in the record with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent such a resolution, this evidence does not establish that the interview of the Petitioner was broadcast or "published" as required.[2]

As indicated above, the Petitioner also submitted a document titled "Magazine's articles reviews," which includes a translator's certification and accompanies a copy of materials appearing in the Russian-language magazines National Business and Ecology, Production and Business of the XXI Century. However, the document is a summary of these articles, rather than a translation of them. The regulation at 8 C.F.R. § 103.2(b)(3) requires any document in a foreign language to be accompanied by a full English language translation, not a summary. Accordingly, we cannot evaluate this evidence since it is not accompanied by an English language translation.

For all of the reasons stated above, we find that 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)

The Director found that this criterion had been met, but did not provide an analysis of the evidence submitted. The record includes a copy of an article co-authored by the Petitioner which was published in the journal The Physics of Metals and Metallography. He also submits untranslated copies of what

[2] We further note that the video of this interview was accessible through the website of the Petitioner's company, [redacted] and not the entity through which it was claimed to be broadcast, [redacted] Further, the video linked to a YouTube channel in the Petitioner's name, not an outlet or platform linked to [redacted] provided by the Petitioner and accessed on July 14, 2020. Given the discrepancies identified with the certificate above, the record lacks evidence to show that the interview was aired by [redacted] as claimed. These additional discrepancies regarding the publication or airing of this interview must also be addressed in any further proceedings in this matter.

appear to be papers presented at conferences, as well as pages from the curriculum vitae or online profile of another researcher which list him as a coauthor on two conference papers. The evidence of the publication of a single scholarly article at the time the petition was filed is sufficient to meet this criterion; however, the untranslated and unsubstantiated evidence cannot be considered.[3]

> 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)

In order to meet the requirements of this criterion, a petitioner must establish that they have performed in a leading or critical role, and that the organization or establishment for which they performed that role has a distinguished reputation. A leading role should be apparent by its position in the overall organizational hierarchy and through the role's matching duties. A critical role should be apparent from its impact on the organization or the establishment's activities. An individual's performance in this role should establish whether the role was critical for the organization or establishment as a whole.

The record includes evidence which establishes that the Petitioner was a co-founder of [redacted] and that he has served as its technical director since its founding in 2013. A letter from the company's director, who as previously noted is the Petitioner's brother, indicates that he was instrumental in recognizing an untapped market for [redacted] sales and services and devising the company's business plan. He further indicates that the Petitioner led the accreditation process for the company's testing laboratory, which is supported by documentary evidence in the record.

Regarding [redacted]'s reputation, the Director noted that some of the documents submitted in support of this claim included spelling errors in the English translations, or lacked a proper certification from the translator as required per 8 C.F.R. § 103.2(b)(3). Upon review, we do not agree that the typographical errors in these translations are material to the probative value of the evidence. However, we do agree that it does not demonstrate that [redacted] has the requisite distinguished reputation.

Several types of evidence were submitted in support of this criterion, and specifically to show that [redacted] has a distinguished reputation. This includes a list of contracts showing clients to whom the company sold several types of testing equipment, and letters from some of those companies which express satisfaction with the equipment delivered. Other letters thank [redacted] for providing [redacted] services, some of which specifically name the Petitioner as the employee who provided those services. While this evidence indicates that the company is actively doing business and, at least in some cases, receiving positive feedback from its clients, it does not establish that [redacted] has distinguished itself from other companies providing similar products and services. This includes the extensive evidence of the Petitioner's work testing cranes for the [redacted] natural gas plant. While this may be an important, large-scale project, the evidence does not show that [redacted]s role in it has garnered the company a distinguished reputation.

[3] Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. Id. Because the Petitioner did not submit an English language translation of the document, we cannot meaningfully determine whether the translated material is accurate and thus supports the Petitioner's claims.

The Petitioner also submitted a letter from the president of the [redacted] Chamber of Commerce and Industry, issued after a request from his brother for support for the instant petition. The letter confirms, among other things, that [redacted] does not owe any taxes, fees, penalties or fines, and is not in bankruptcy or any pending litigation proceedings. It also indicates that the company received "confirmation of the competence of a commercial mobile laboratory," that it has had a net profit in the preceding three years, and that it was included in a regional governmental report titled [redacted]. Although this letter as well as others in the record mention this report, the actual report was not submitted, and thus the context of [redacted]'s mention in it cannot be evaluated to determine whether it reflects on the company's reputation. Further, although the letter shows that [redacted] is an active company and in compliance with all local rules and regulations, this is not sufficient to establish that it has a distinguished reputation.

In addition, the record includes a letter dated [redacted] 2018 from the "Entrepreneurship and Industry Development Fund" which notifies that [redacted] has been included in a list of nominees for "The Best Company in Russia-2018." We first note that the English translation of this letter does not include a translator's certification as required per 8 C.F.R. § 103.2(b)(3). Because the Petitioner did not submit a properly certified English language translation of the document, we cannot meaningfully determine whether the translated material is accurate and thus supports his claims.

For all of the reasons stated above, we find that the Petitioner does not meet 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 Petitioner submitted several types of evidence in support of this criterion, including a governmental grant for small businesses in the [redacted] region in the amount of 300,000 rubles which was awarded to [redacted] in 2013. In his decision, the Director found that this grant could not be considered to be part of the Petitioner's remuneration, since it was awarded to his company, not him. Although the Petitioner does not directly refute the Director's finding on appeal or explain why the value of this award should be considered as part of his remuneration, he continues to refer to this evidence as supporting his claim under this criterion. Upon review we agree with the Director, and further note that a document titled "Regulations on providing grants (subsidies) to small business startups in 2016" states in part 5.2.5 that "[T]he plan for spending subsidy funds in a business in a business project (paragraph 4.3 of Appendix 2) should not to include payments for taxes, fee, fines and penalties, as well as payments on wages employees." We will therefore not consider this amount as part of the Petitioner's remuneration.

The Petitioner also submitted a "Form No. 2-NDFL" listing his monthly income in 2016, as well as a letter from his brother confirming his employment and salary with [redacted] during the same period. In his decision, the Director noted a discrepancy between the statement on the letter that the Petitioner's average monthly salary was 147,000, while the form indicated that he was paid 149,000 for each month

in 2016.[4] On appeal, the Petitioner submits a letter from [redacted]s accountant, which explains that salary reductions due to leaves of absence are not recorded on the Form No. 2-NDFL. Accordingly, we will accept this evidence as representative of the Petitioner's salary in 2016.

Regarding the evidence of the salaries of other business professionals in the field to which the Petitioner's salary may be compared, the record includes evidence in the form of job postings listed on the websites rabota66.ru, Superjob and HeadHunter, some of which indicate they were posted in the months prior to the filing of the instant petition. We first note that job postings such as these provide only a snapshot of a single job opportunity, and do not show overall industry trends, or ranges of salaries based upon level of experience and qualification. They are therefore generally not adequate to establish the appropriate data for comparison for purposes of this criterion. In addition, there is a great deal of variance in the offered wages, ranging from 30,000 to 100,000 rubles per month, and the reasons for this variance are not apparent in the job offerings. Further, many of the positions do not appear to be comparable to the Petitioner's role and duties with [redacted] For example, one of the positions titled as technical director involves management of the service department of an automobile dealer, while others are for management of construction projects. Since the Petitioner's duties include management of the [redacted] testing laboratory as well as oversight of all [redacted] and quality projects, market analysis and client management, these positions do not represent an appropriate comparison to his. Other positions are labelled "Head of laboratory of [redacted] testing," with salaries ranging from 30,000 to 47,000 rubles per month. However, these positions are limited to management of an [redacted] laboratory, and do not include the broader market analysis, client management and overall company leadership duties which are inherent to the Petitioner's roles as technical director and co-founder. For all of these reasons, these job postings do not establish an adequate basis for comparison to the Petitioner's salary.

Other evidence includes a salary survey for the position of "Director of the technical center," obtained from the website trud.com. As the evidence does not provide a description of the duties of this position, however, the Petitioner has not established that this survey provides data which is appropriate for comparison to his salary. To this point, the survey provides wages for similarly titled jobs such as "technical director" and "director for technical development," but does not provide descriptions of the duties for those positions or an explanation as to why individuals in those positions earn higher salaries. More importantly, the survey provides only average wages; however, the regulation requires evidence that the Petitioner "has commanded a high salary or other significantly high remuneration for services, in relation to others in the field," rather than a salary that is above average.

On appeal, the Petitioner submits additional information to demonstrate that the Petitioner's salary in 2016 was high relative to others in the field. As previously noted, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988). We have therefore limited our review to the materials in the record at the time of the Director's decision.

[4] The Director also questioned the credibility of the Form No. 2-NDFL (which he referred to as paystubs) and the [redacted] letter as neither indicated the currency in which these wages were paid. Since the evidence shows that the Petitioner was working in Russia in 2016, and that the form is used by employers in Russia to report employee incomes to the government, we take administrative notice that his salary was paid in rubles.

As the Petitioner has not demonstrated that his salary is (or was) high in relation to others in his field, we find that he does not meet this criterion.

We note that the Petitioner also asserts on appeal that he meets the criterion at 8 C.F.R. § 204.5(h)(3)(v), relating to original contributions of major significance in his field. However, as we have determined that he meets only one of the other five criteria he claims to meet, the issue of whether he meets an additional criterion is moot, since the evidence does not establish that he satisfies the initial evidence requirement of meeting at least three of the evidentiary criteria. We therefore decline to reach, and hereby reserve the Petitioner's appellate arguments regarding this criterion. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is 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 his 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 Petitioner has garnered national or international acclaim in the field, and that 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 his 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.