U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7072339

Date: JAN. 23, 2020

Appeal of Nebraska Service Center Decision

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

The Petitioner, a "construction CMS consultant," 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 record did not establish that the Petitioner meets any of the ten initial evidentiary criteria for this classification, of which he must meet at least three. In addition, the Director determined that the Petitioner did not demonstrate that he seeks to enter the United States to continue to work in his area of claimed extraordinary ability.

On appeal, the Petitioner asserts that the Director overlooked and did not address three of the eight criteria that he claims to meet, failed to conduct a thorough review of the remaining evidence, and imposed novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5(h)(3).

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 withdraw the Director's decision and remand the matter to the Director for entry of a new decision.

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

As noted, the Petitioner is a construction CMS consultant who identifies his field of expertise as business development for the construction industry. 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 the denial decision, the Director stated that the Petitioner claimed to meet five of the ten criteria, relating to his receipt of lesser nationally or internationally recognized prizes or awards, published material about him and his work in the field, his authorship of scholarly articles, his performance in a leading or critical role for organizations or establishments that have a distinguished reputation, and his receipt of a high salary or other remuneration in relation to others in his field. *See* 8 C.F.R. §§ 204.5(h)(3)(i), (iv), (viii) and (ix). The Director concluded, however that the Petitioner had not satisfied any of these criteria, and therefore was not eligible for the benefit sought.

On appeal, the Petitioner asserts that he claimed to meet three additional criteria and submitted evidence related to his membership in associations requiring outstanding achievement of their members, his participation as a judge of the work of others in his field, and his original business-related contributions of major significance in the field. *See* 8 C.F.R. § 204.5(h)(3)(ii), (iv) and (v). The record reflects that counsel clearly addressed these three criteria in the cover letter accompanying the initial petition, and also identified and numbered the relevant evidentiary exhibits submitted in support of each criterion. Accordingly, we will remand the matter to the Director so that he can analyze the evidence submitted under the membership, judging and original contributions criteria.

Further, we agree with the Petitioner's assertion that the Director's decision was lacking a detailed analysis of the evidence submitted in support of his petition. An officer must fully explain the reasons

for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); see also *Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

The record reflects that the initial petition was accompanied by a 39-page cover letter that clearly identified the evidence submitted in support of eight criteria and indicated the numbered exhibit where such evidence could be found. The Director's decision states that the Petitioner submitted "copious amounts of extraneous material" and "a surfeit of documents," incorrectly implies that the documentation was not properly labeled or marked, and indicates that USCIS is not obligated to "sift numerous documents to find relevant information." Given the Petitioner's efforts to clearly label and identify the relevance of its evidentiary exhibits, these remarks were unwarranted.

Further, although the decision contains a brief analysis for each of the five criteria addressed, the Director's discussions of each criteria contain few or no references to the specific evidence considered. Accordingly, we find that the Petitioner was not adequately informed of the Director's reasons for determining that none of the materials submitted in support of five criteria satisfy the regulatory requirements at 8 C.F.R. § 204.5(h)(3). We will also remand this matter for the Director to re-examine the evidence submitted under the five criteria considered in the denial decision.

Finally, we acknowledge the Petitioner's assertion that the Director imposed novel substantive or evidentiary requirements beyond those set forth in the regulations. The Director determined that the Petitioner did not meet the evidentiary criteria relating to authorship of scholarly articles, performing in a leading or critical role, or commanding a high salary, because he did not demonstrate that the submitted evidence pertained to his proposed employment as a "construction CMS consultant" in the United States. The criterion at 8 C.F.R. § 204.5(h)(3)(vi) requires evidence of scholarly articles "in the field" and the criterion at 8 C.F.R. § 204.5(h)(3)(ix) requires evidence that the Petitioner has commanded a high salary in relation to others "in the field." The Petitioner has described his area of expertise as "business development in the construction industry." The record reflects that both his past employment and achievements, as well as his proposed occupation in the United States, could reasonably be considered to be within this same field.

However, the Director applied a more restrictive standard by requiring that the Petitioner establish, for example, that his past earnings were obtained through employment in the specific occupation of "construction CMS consultant." The Director also required that the Petitioner demonstrate he has held a leading or critical role in the same occupation in which he intends to work in the United States when considering whether he had satisfied the evidentiary criterion at 8 C.F.R. § 204.5(h)(3)(viii). This requirement is not found in the plain language of the regulation which requires "[e]vidence that the alien has performing in a leading or critical role for organizations or establishments that have a distinguished reputation."

Therefore, we agree with the Petitioner that such requirements should not have been imposed in determining whether the submitted evidence meets the plain language of the initial criteria set forth at

8 C.F.R. § 204.5(h)(3)(i)-(x). The Director should avoid imposing novel requirements when re-examining the Petitioner's evidence on remand.[1]

If the Director determines that the Petitioner satisfies at least three criteria, his decision should include an analysis of the totality of the record evaluating whether he has demonstrated, by a preponderance of the evidence, his sustained national or international acclaim and whether the record demonstrates that he is one of the small percentage at the very top of the field of endeavor, and that his achievements have been recognized in the field through extensive documentation. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2),(3); *see also Kazarian*, 596 F.3d at 1119-20.[2]

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[1] *See* USCIS Policy Memorandum PM 602-0005.1, *Evaluation of Evidence Submitted With Certain I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14.* 3 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[2] *See* USCIS Policy Memorandum PM 602-0005.1, *supra* at 4 (stating that USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established by a preponderance of the evidence the required high level of expertise of the immigrant classification).