U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10088671

Date: NOV. 27, 2020

Appeal of Nebraska Service Center Decision

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

The Petitioner, a business development executive, 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 did not establish, as required, that he meets at least three of the ten evidentiary criteria for this classification, and therefore did not satisfy the initial evidence requirements.

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, the Petitioner has not met this burden. Accordingly, 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 international 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 criteria 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) (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).

II. ANALYSIS

The Petitioner is an owner, co-founder, and senior business executive of luxury furniture company [redacted], which does business as [redacted].

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 Petitioner claims to have met three of the ten criteria, summarized below:

- (iii), Published materials in professional or major trade publications or other major media;
- (viii), Leading or critical role for organizations that have a distinguished reputation; and
- (ix), High salary or other significantly high remuneration in relation to others in the field.

The Director determined that the Petitioner met two of these criteria. Specifically, the Director determined that the Petitioner submitted sufficient evidence of published materials about him and relating to his work to satisfy the criterion at 8 C.F.R. § 204.5(h)(3)(iii). The Director also concluded that the Petitioner commanded a high salary or other significantly high remuneration in relation to others in his field, consistent with 8 C.F.R. § 204.5(h)(3)(ix). Finally, the Director determined that, while the Petitioner established his leading role with [redacted], he did not provide independent evidence establishing the distinguished reputation of that organization and therefore did not meet the criterion at 8 C.F.R. § 204.5(h)(3)(viii).

The record reflects that articles about the Petitioner, relating to his work for [redacted], have been featured in Architectural Digest and home décor industry publications and therefore we agree with the Director's conclusion that he satisfied the published materials criterion.

The Petitioner argues on appeal that the Director overlooked or mischaracterized ample evidence pertaining to [redacted]'s distinguished reputation in its industry in determining that he did not satisfy the leading or critical roles criterion at 8 C.F.R. § 204.5(h)(3)(viii). The Petitioner's assertions

are persuasive, as the record contains substantial independent evidence demonstrating the company's reputation. For example, the company, its furniture products, and its high-profile business partnerships with retailers, hospitality chains and a renowned furniture designer have received media coverage in Architectural Digest, Elle Décor, Forbes, and other publications. Based on this evidence, we will withdraw the Director's finding that the Petitioner did not meet the leading or critical roles criterion.

However, for the reasons discussed below, we conclude that the evidence does not support the Director's finding that the Petitioner satisfies the requirements of the third claimed criterion at 8 C.F.R. § 204.5(h)(3).

> Evidence that the individual 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)

To satisfy the requirements of this criterion, the Petitioner must establish that he commands a high salary, or significantly high remuneration, based on a comparison with others in his field in similar positions.[1]

A letter accompanying the initial filing identifies the Petitioner's position as a "brand development executive" and indicates that [redacted] pays him an annual salary of $195,000 and additional benefits (including coverage of his housing, automobile costs, and "personal expenses") totaling $263,000. [redacted]'s controller provided a letter confirming that, per the Petitioner's employment agreement, the company makes mortgage and car payments on his behalf valued at approximately $110,000 annually. The Petitioner did not account for the remaining $153,000 in benefits and the record does not contain a copy of the referenced employment agreement. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. The Petitioner must support their assertions with relevant, probative, and credible evidence. See Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010).

The Petitioner's 2018 individual federal tax return indicates that he reported actual wages of $178,092 and additional income of $452,284 derived from [redacted]'s profits, which he received as a 40 percent owner of the company. Copies of his recent paystubs confirm that he was being paid a salary of $195,000 in 2019.

The Petitioner submitted geographically targeted comparative salary data sourced from U.S. Department of Labor resources and Glassdoor. However, this evidence does not provide a meaningful comparison of the Petitioner's salary or total remuneration in relation to others in his field.

First, the comparative salary information provided is for the occupations of marketing manager, sales manager, director of sales and marketing, senior sales and marketing executives, and other sales and marketing related positions. The record does not reflect that the Petitioner is a sales or marketing manager; in fact, [redacted]'s organizational chart identifies him as the senior executive in the

[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. at 11 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html, noting that it is the petitioner's burden to provide geographical and position-appropriate evidence to establish that a salary is relatively high.

company and shows that he supervises two employees with Vice President of Sales job titles as well as managerial and support staff dedicated to operations, warehousing, financial, and other company functions. Moreover, the company's supporting letter confirms the chief executive nature of the Petitioner's role. [redacted]'s Creative Director, [redacted] confirms that the Petitioner "[a]s the company's senior most executive . . . is responsible for the overall operations and management of [redacted]" including "every aspect of our U.S. and international business" with oversight of "international supply chain and logistics, expenses and accounting, operations, sales and integration." Based on this information, the record does not establish that the submitted salary data for sales and marketing managers and related occupations provided a meaningful basis for comparing the Petitioner's salary in relation to others working in similar positions.

As a result, the record does not include objective earnings data showing that the Petitioner has earned a "high salary" or "significantly high remuneration" in comparison with those performing similar work in a chief executive capacity during the same time period. See Matter of Price, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings versus other PGA Tour golfers); see also Grimson v. INS, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); Muni v. INS, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

Further, even if we determined that the submitted salary information was appropriate given the Petitioner's occupation, he seeks to compare his total compensation (including his base salary, benefits and his share of [redacted]'s profits) to surveys that report only base salary figures. For example, the Petitioner compares his total compensation figure to the U.S. Department of Labor data for both Sales Managers and Marketing Managers in the [redacted] metropolitan area at the Level 4, or fully competent, wage. The Occupational Employment Statistics (OES) data submitted from the FLCDatacenter.com website does not include bonuses or benefits.[2] Therefore, the appropriate figure for means of comparison is the Petitioner's base salary of $195,000. The Petitioner's salary exceeds the reported average Level 4 wages for both sales managers and marketing managers in [redacted] but it does not meet the "high" wage for these occupations as reported on the U.S. Department of Labor's CareerOneStop resource. Even if the Petitioner had established that he is employed as a sales manager or marketing manager, this evidence would not establish that his salary is high, as opposed to just above average, in comparison to others in the field.

Accordingly, we will withdraw the Director's conclusion that the Petitioner has met the criterion at 8 C.F.R. § 204.5(h)(3)(ix).

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 and therefore has not satisfied the initial evidence requirements for this classification. 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.

[2] See the OES FAQ page at https://www.bls.gov/oes/oes_ques.htm (last visited on Nov. 24, 2020).

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields. The record reflects that the Petitioner has co-founded and led a successful, family-owned luxury furniture company with a growing reputation and market share in its industry, and that he and his brother have both received some media recognition as the "faces" of the company. However, 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 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 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.

ORDER: The appeal is dismissed.