U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16025413

Date: MAY 17, 2021

Appeal of Texas Service Center Decision

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

The Petitioner, a cybersecurity firm, seeks to classify the Beneficiary 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 Texas Service Center denied the petition, concluding that although the record established that the Petitioner satisfied the initial evidentiary requirements, it did not establish, as required, that the Beneficiary has sustained national or international acclaim and is an individual in the small percentage at the very top of the field.

The Petitioner then filed a combined motion to reopen and reconsider. The Director dismissed both motions. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the appeal.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals 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 the beneficiary's 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 it 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 beneficiary 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 Beneficiary worked as an applications engineer for [redacted] in India before earning a master's degree at [redacted] University. The Petitioner hired him in 2014, first as a chief software architect and, since 2018, as a chief scientist.

The Director initially denied the petition in March 2020. The Petitioner filed its combined motion in May 2020, and the Director dismissed both motions in August 2020. The matter on appeal before us is the August 2020 motion dismissal, not the March 2020 denial of the underlying petition. In the August 2020 decision, the Director did not affirm the prior denial. Rather, the Director concluded that the motion did not meet the applicable requirements. Therefore, the question before us on appeal is whether the Director erred in dismissing the motion. Although the March 2020 denial notice is not before us, we will refer to portions of that decision for context.

A. Motion to Reopen

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The Petitioner initially claimed that the Beneficiary satisfied six of ten initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3), summarized below:

- (ii), Membership in associations that require outstanding achievements;
- (iv), Participation as a judge of the work of others;
- (v), Original contributions of major significance;
- (vi), Authorship of scholarly articles;

- (viii), Leading or critical role for distinguished organizations or establishments; and
- (ix), High remuneration for services.

The Director concluded that the Petitioner submitted sufficient evidence to meet the criteria numbered (iv), (v), and (vi), but not the other three claimed criteria. In a final merits determination, the Director cited four grounds, discussed below, for concluding that the Petitioner had not established that the Beneficiary has earned sustained national or international acclaim. The Petitioner addressed each of these grounds in the motion to reopen.

1. Membership in Associations

The regulation at 8 C.F.R. § 204.5(h)(3)(ii) calls for documentation of a beneficiary's membership in associations in the field, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields. The Petitioner initially asserted that the Beneficiary meets this requirement as a senior member of the Institute of Electrical and Electronics Engineers (IEEE). The Director discussed this membership under the individual criteria at 8 C.F.R. § 204.5(h)(3), but also asserted that, given the regulation's wording, the regulations were also relevant at the final merits determination. The Director concluded that the membership requirements do not reflect sustained national or international acclaim.

On motion, the Petitioner asserted: "Senior membership is regarded as a significant achievement because less than 2% of the overall IEEE members are elevated to the senior member status globally each year." The record shows that senior member status in the IEEE requires "at least ten years" "in professional practice," with "significant performance over . . . at least five of those years." As the Director noted, there is a higher level of membership, "Fellow." IEEE members can apply for senior member status, but fellow status is "conferred by the Board of Directors upon a person with an outstanding record of accomplishments" that "have contributed importantly to the advancement or application of engineering, science and technology." The Director concluded that fellow status is more indicative of acclaim than senior membership in the IEEE.

Also on motion, the Petitioner submitted new evidence of the Beneficiary's membership in Sigma Xi, described as a "Scientific Research Honor Society." The membership certificate indicates that the Beneficiary "was duly elected . . . in the year 2020." Sigma Xi's bylaws require "noteworthy achievement as an original investigator in a field of pure or applied science," but do not specify the nature of such achievement beyond stating that the evidence can take the form of "publications, patents, written reports or a thesis or dissertation."

In dismissing the motion, the Director concluded that the Petitioner had not shown that the Beneficiary's membership in either IEEE or Sigma Xi meets the regulatory requirements.

On appeal, the Petitioner repeats the assertion that "[l]ess than 2% of the overall IEEE members are elevated to the senior member status globally each year," and that a panel reviews applications for senior membership, but this information does not establish that IEEE senior membership meets the requirements of 8 C.F.R. § 204.5(h)(3)(ii), or – more relevant to a final merits determination – that senior member status either results *from*, or results *in*, sustained national or international acclaim. The "2%" figure does

not establish that those promoted to senior member status are in the *top* 2% of the field; requirements such as ten years of experience restrict eligibility in ways unrelated to achievement or recognition.

The Petitioner also repeats the assertion that Sigma Xi "induct[ed the Beneficiary] as a full member 2020." Because this induction took place after the petition's December 2019 filing date, this new evidence cannot establish eligibility as of the petition's filing date as required by 8 C.F.R. § 103.2(b)(1). Also, the Petitioner does not establish that Sigma Xi's requirement of "noteworthy achievement" equates to the "outstanding achievements" demanded by the regulation.

The Petitioner states that the IEEE "is the world's largest technical professional society" and "Sigma Xi is the world's largest scientific honor society," but the large size of these associations implicitly argues against restrictive membership requirements.

The Director concluded that the Beneficiary's memberships in Sigma Xi and the IEEE do not establish sustained national or international acclaim in the field. For the reasons discussed above, we conclude that the Petitioner has not overcome this conclusion on appeal.

2. Reviewing and Judging

In the March 2020 denial decision, the Director acknowledged that the Beneficiary's "participation in Technical Program Committees, Panels and Presentations" technically satisfies the criterion at 8 C.F.R. § 204.5(h)(3)(iv), pertaining to judging the work of others, but the Director concluded that this activity was "very limited," and that the Petitioner had not shown that the Beneficiary had received invitations to judge "on the basis of his extraordinary ability."

On motion, the Petitioner submitted invitations to review manuscripts submitted for publication in various journals. In dismissing the motion, the Director noted that these invitations took place after the petition's December 2019 filing date.

On appeal, the Petitioner states that the Beneficiary was "invited to participate in research panels at international conferences and workshops." The Petitioner lists four such panels that occurred between 2017 and 2019. In the context of the final merits determination, the key question is whether the conference organizers invited the Beneficiary to participate in the panels owing to his acclaim in the field, rather than because he cleared a substantially lower threshold such as subject matter expertise. The Petitioner cites no evidence on appeal that answers this question.

The Petitioner has not overcome, or directly addressed, the Director's conclusions from the August 2020 decision dismissing the motion.

3. Scholarly Articles

In the March 2020 denial notice, the Director concluded that the Beneficiary's scholarly writings meet the technical requirements of 8 C.F.R. § 204.5(h)(3)(vi), but that the Petitioner did not establish that those articles had contributed to sustained acclaim. The Director stated that the Beneficiary's published work took the form of a small number of minimally cited conference proceedings and patents, rather than articles "in reputed national or international scientific journals."

On motion, the Petitioner showed that some of the Beneficiary's articles appeared in journals prior to the filing date. The Petitioner also submitted patent filings from 2020. The Petitioner stated that "the beneficiary's patents have been cited 39 times as of May 2020," but did not establish that this citation rate demonstrates sustained acclaim or otherwise indicates a commensurate degree of influence in the field.

The Petitioner also asserted that the Beneficiary "has been . . . publishing detailed technical reports" from his work "with some of the world's largest communication companies." We note that the cover pages of these reports in the record are marked "CONFIDENTIAL – RESTRICTED ACCESS," with the instruction that they "shall not be disclosed outside of" the clients that commissioned the reports. Because publication entails dissemination, confidential reports do not qualify as *published* scholarly articles.

In the August 2020 decision dismissing the motion, the Director noted that some of the motion evidence relates to a period after the filing of the petition.

On appeal, the Petitioner states that the Director "did not consider the Journal publications and wrongly [asserted that] no articles were published in the international journals." The Petitioner discusses two journal articles and a patent published prior to the filing date.

The Petitioner is correct that the Director's August 2020 decision did not address the Petitioner's pre-filing publications. Nevertheless, it remains that, in the March 2020 decision, the Director acknowledged that "[t]he beneficiary did meet this criterion" for the purposes of the initial evidentiary requirements. For the final merits determination, the issue is not whether the Beneficiary's articles exist, but whether the industry's response to those articles amounts to sustained acclaim placing him at the top of the field. The Petitioner has shown that the Beneficiary has produced published work, and unpublished confidential reports for clients, but the existence of such material does not establish acclaim. On appeal, the Petitioner does not establish that its motion to reopen established that acclaim.

The Petitioner has not overcome this issue on appeal.

4. Leading or critical roles

The regulation at 8 C.F.R. § 204.5(h)(3)(viii) calls for evidence that the individual has performed in a leading or critical role for organizations or establishments with a distinguished reputation. In the March 2020 denial, the Director concluded that the Petitioner had not established the distinguished reputations of the organizations for which the Beneficiary had performed in such roles. Apart from not satisfying the requirements of the criterion, the Director stated: "This is also a contributing factor to conclude that the beneficiary did not meet the final merits determination."

On motion, the Petitioner submitted letters from various clients, and stated that these client letters establish the Petitioner's distinguished reputation. In dismissing the motion, the Director acknowledged these letters but did not state any conclusions regarding them. On appeal, the Petitioner asserts that the Director did not give due consideration to the letters. Therefore, we will discuss them below.

In separate letters, officials at [redacted], [redacted] and [redacted] each stated that the Petitioner "is an industry recognized cybersecurity research and analysis organization." Officials at [redacted] and

[redacted] each stated that the Petitioner "is an industry recognized cybersecurity research and analysis firm." An official of [redacted] stated that the Petitioner "is a distinguished cybersecurity research and analysis company with industry recognition," while an official of [redacted] stated that the Petitioner "is a recognized cybersecurity and cyber risk services organization." Other clients described the services that the Petitioner performed for them but did not directly address the company's reputation.

Vague, general references to the Petitioner's reputation do not suffice to establish a distinguished reputation. Merely repeating the language of the statute or regulations does not satisfy a petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F.2d 41 (2d Cir. 1990).

We emphasize that, in the initial March 2020 denial notice, the Director concluded that the Petitioner had satisfied three of the initial evidentiary criteria; the denial resulted from the final merits determination. The argument that the Petitioner satisfied a fourth initial criterion would not establish acclaim in the final merits determination.

In the context of the Beneficiary's acclaim, it is significant that the letters submitted on motion focused on the services that the Petitioner provided. Some letters did not mention the Beneficiary at all; others did so only to identify him as a member or leader of the team providing those services. The following examples illustrate the point:

- [redacted] "Led by [the Beneficiary], the [Petitioner's] security team has been working with our security and architecture teams to identify and mitigate platform security issues."
- [redacted] "Led by [the Beneficiary], the [Petitioner's] team has been working closely with our security and architecture teams to secure our platform services."
- [redacted] "Led by [the Beneficiary], the [Petitioner's] team has worked closely with our product engineering team in certifying data security and compliance of [redacted] cloud-based information services."

These letters amount to testimonials from satisfied clients; they do not show that the Beneficiary has earned sustained national or international acclaim in his field.

For the above reasons, the Petitioner has not established that the Director reached erroneous conclusions with respect to the motion to reopen.

B. Motion to Reconsider

A motion to reconsider must state the reasons for reconsideration and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

In its motion to reconsider, the Petitioner stated: "When considering all the newly submitted evidence along with what was previously submitted, we believe that [the Beneficiary] . . . has a degree of expertise significantly above that ordinarily encountered in the sciences." A motion to reconsider must establish that the prior decision was incorrect based on the evidence of record at the time of that decision. *See*

8 C.F.R. § 103.5(a)(3). Therefore, "newly submitted evidence" cannot support a motion to reconsider, and is properly considered, instead, in the context of a motion to reopen (already addressed above).

In the motion to reconsider, the Petitioner alleged no specific error in the March 2020 denial notice except to note that the Director referred to [redacted] University" instead of [redacted] University." The Petitioner acknowledged: "we believe that [the Director] just made a typographical error," rather than a substantive error that affected the outcome of the decision.

Apart from the misspelling of [redacted]' the Petitioner contended more generally that the Director did not "explain the specific reasons" for the denial. The Director, however, devoted two full pages of the March 2020 decision to the final merits determination (not counting the space devoted to the initial evidentiary criteria). The Petitioner tailored its motion to reopen to several of the points the Director raised in that discussion (and which we discussed above). The record does not support the Petitioner's claim on motion that the March 2020 decision lacked "specific reasons" for the denial.

On appeal, the Petitioner focuses on the evidence submitted in the motion to reopen. The Petitioner does not establish that the Director should have granted the concurrent, but procedurally separate, motion to reconsider.

III. CONCLUSION

As explained above, the Petitioner has not shown that the Director should have granted its motions to reopen and reconsider. Because the Petitioner has not overcome the Director's August 2020 decision dismissing those motions, we will not directly address the March 2020 denial or the merits of the underlying petition.

ORDER: The appeal is dismissed.