U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21035246

Date: AUG. 16, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, a plant pathologist, 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner met the initial evidence requirements for this classification through evidence of a one-time achievement or meeting at least three of the evidentiary criteria 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 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). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if he or she is 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).

II. ANALYSIS

The Petitioner received her Ph.D. in plant pathology from the University [redacted] in 2006, and has focused her research in the [redacted] tropical fruits including pineapples and bananas. She submitted evidence showing her intent to continue working in her field in the United States.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that she has received a major, internationally recognized award, she 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 two of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to her authorship of scholarly articles and participation as a judge of the work of others. On appeal, she asserts that she also meets the evidentiary criteria relating to her original contributions of major significance to the field.[1] After reviewing all of the evidence in the record, we find that the Petitioner has not met the initial evidentiary requirements for the requested classification and is therefore not eligible as a noncitizen of extraordinary ability.

> *Evidence of the alien'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)

In order to satisfy the regulation at 8 C.F.R. § 204.5(h)(3)(v), a petitioner must establish that not only have they made original contributions, but that the contributions have been of major significance in

[1] The Petitioner does not contest the Director's decision regarding the criterion at 8 C.F.R. § 204.5(h)(3)(ii) relating to her membership in associations in the field which require outstanding achievement of their members. We therefore consider this issue to be abandoned. *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).

the field. For example, a petitioner may show that the contributions have been widely implemented throughout the field, have remarkably impacted or influenced the field, or have otherwise risen to a level of major significance. *See Visinscaia*, 4 F. Supp. 3d at 134-35.

The record shows that the Petitioner is named as one of [redacted] inventors on a United States patent, [redacted]' granted in 2014, relating to the development of a [redacted] banana plant. As noted by the Director in his decision, this evidence establishes that she has made an original contribution to her field of expertise. But the regulation at 8 C.F.R. § 204.5(h)(3)(v) also demands that contributions be of major significance, which in the case of inventions should be supported by evidence of adoption by at least one industry actor outside of the petitioner's employer. *Amin v. Mayorkas,* 24 F.4th 383 (2022)(*citing Visinscaia,* 4 F.Supp. 3d at 126.) In responding to the Director's request for evidence (RFE), the Petitioner provided evidence of the [redacted] and its effect upon the global banana industry, but stated that the patent was not in use due to "the cost associated with purchasing and using the patent and lack of acceptance by the general public." The Director noted this statement in his decision, concluding that "the potential significance of a contribution does not meet the plain language requirement of this criterion."

On appeal, the Petitioner stresses that the patent is a "solution to [redacted] to Banana crops" and "was proven scientifically to [redacted] and is therefore of major significance even without evidence of adoption or commercialization. However, she has not submitted evidence of any actual impact that this research has had on other researchers in her field or on the banana industry. The Petitioner also argues that the patent "took years of research and breakthroughs in [redacted]' but the evidence in the record does not support her claim that this work is considered to be a breakthrough by others in the field of plant pathology, or that it influenced or was relied upon by other researchers in the field. Although she submitted reference letters from colleagues at the University of [redacted] all of them predate her work related to the patent, and she did not present evidence that her patent generated widespread interest amongst other researchers.

The Petitioner also asserts on appeal that the provision at 8 C.F.R. § 204.5(h)(4) for the submission of evidence comparable to that contemplated in the evidentiary criteria "leaves open discretion if or when there are grey areas in determining eligibility for benefit sought," and that per that provision we may "treat the patent as a criterion." However, as noted above, that provision requires that the Petitioner establish that the evidentiary criteria under 8 C.F.R. § 204.5(h)(3) do not readily apply to his occupation. She does not make such a claim on appeal, and has already demonstrated by submitting her patent and other documentation in support of this criterion that it does apply to her occupation. As such, she has not established that her patent should be considered as comparable evidence of her eligibility for this classification.

After review of the Petitioner's appeal and the evidence in the record, we agree with the Director and conclude that she has not established that she meets this criterion.

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 her 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 she 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 her 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.