U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26377374

Date: JUN. 5, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a general manager, 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 Texas Service Center denied the petition, concluding that the record did not establish the Petitioner met the initial evidence requirements for the classification by establishing his receipt of a major, internationally recognized award or by meeting three of the ten evidentiary criteria at 8 C.F.R. § 204.5(h)(3). The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo 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 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; who seek to enter the United States to continue work in the area of extraordinary ability; and whose 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 the initial evidence requirements through either a one-time achievement or meeting three lesser criteria, 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 stated he is a highly qualified restaurateur with over 25 years of experience and has a "keen flair for innovation thinking in the development of South Indian vegetarian food as a global trend." The Petitioner further stated he opened three successful outlets of a traditional South Indian vegetarian chain in the United States. He will continue to work in the United States as a general manager in the restaurant industry. Because the Petitioner has not sufficiently shown that he 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 satisfied these criteria, summarized below:

- (i), documentation of the individual's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor
- (ii), membership in associations requiring outstanding achievements of their members
- (iii), published material about the individual in professional or major media
- (iv), participation as a judge of the work of others in the same of allied field
- (v), alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field
- (vii), display of his work in the field at artistic exhibitions or showcases
- (viii), evidence that the individual has performed in a leading or critical role for organizations or establishments that have a distinguished reputation
- (ix), high remuneration for services

The Director concluded the Petitioner met the criterion pertaining to performing in a leading or critical role for organizations or establishments that have a distinguished reputation. On appeal, the Petitioner does not pursue his initial claims that he meets the criteria relating to receipt of lesser nationally or international recognized prizes or awards, published material, original contributions, and display of work, nor does he contest the Director's conclusions regarding these issues. We therefore consider those issues abandoned.[1]

[1] *See Matter of R-A-M-*, 25 I&N Dec. 657. 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

We will not disturb the Director's determinations regarding the Petitioner's performance in a leading or critical role for organizations with a distinguished reputation. But for the reasons discussed below, we agree with the Director that the Petitioner has not satisfied the other claimed criteria.

A. Evidentiary Criteria

> *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)

The Petitioner claimed membership in two organizations. After reviewing the Petitioner's material, the Director determined that he did not meet the requirements of this criterion because he did not establish that the organizations required outstanding achievements as a condition of membership and the associations were not in the field for which classification is sought, in this case as a general manager. Within the appeal, the Petitioner maintains that the memberships he has attained qualify under this criterion.

This criterion contains several evidentiary elements the Petitioner must satisfy. First, the Petitioner must demonstrate that he is a member of an association in his field. Second, the Petitioner must demonstrate both of the following: (1) the associations utilize nationally or internationally recognized experts to judge the achievements of prospective members to determine if the achievements are outstanding, and (2) the associations use this outstanding determination as a condition of eligibility for prospective membership.

First, we consider the South Indian Chef Association (SICA). On appeal, the Petitioner submits a print-out from the SICA website stating it is a fraternity of culinary professionals representing the finest hotels, restaurants, and culinary institutions in South India. The Petitioner also states SICA candidates must hold a position of Chef de Partie/Sr. Chef de Partie, Kitchen Executive/Junior Sous Chef, Chef, Executive Chef or Corporate Chef, or a position of equal designation. The Petitioner submits a copy of his official SICA identification card and certificate. While we acknowledge the Petitioner is a member of SICA, the Petitioner did not provide sufficient evidence to demonstrate this association is in the field classification is sought since he will be a general manager. In fact, the Petitioner listed the positions members must hold to become eligible for this association and he did not list the position of general manager. In addition, the Petitioner did not provide sufficient evidence regarding the eligibility requirements for becoming a member of SICA and it is therefore not clear how members are eligible to join. The submitted documentation does not show that SICA utilized national or international recognized experts to judge the achievement of prospective members to determine if the achievements were outstanding. Also lacking was an indication that SCIA used this outstanding determination as a condition of eligibility for membership. Each of these are mandatory requirements within the regulation.

The Petitioner further provides a copy of his membership card and certificate of membership for the American Culinary Federation, Inc. (ACF). According to the print-out from the ACF website, the association is a "professional organization for chefs and cooks," and it has more than 14,000 members throughout the United States. While we acknowledge the Petitioner is a member of ACF, the Petitioner

did not provide sufficient evidence this association is in the field of management. The Petitioner also submits a letter from the President of the [redacted] Chapter of ACF, who stated a Chef must be invited by a Fellow of the ACF to complete the application process and we only choose Chefs at the "top of their game." Although the letter confirms members are at the "top of the game," this information is not sufficient to demonstrate the requirements for becoming a member of ACF and it is therefore not clear how members are eligible to join. In other words, the record does not establish how the ACF ascertains whether prospective members are at "the top of their game." The submitted documentation does not show that ACF utilized national or international recognized experts to judge the achievement of prospective members to determine if the achievements were outstanding. Also lacking was an indication that ACF used this outstanding determination as a condition of eligibility for membership. It is insufficient to allege eligibility through conclusory assertions that are not supported by sufficient evidence, which proves the allegation.[2]

On appeal the Petitioner does not explain how any of the organizations require outstanding achievements as one of the minimum requirements for membership. For the reasons stated above, the Petitioner has not established eligibility under this criterion.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought. 8 C.F.R § 204.5(h)(3)(iv).

The Petitioner states he served as a judge for one episode of a cooking show where he determined the "Most Innovative South Indian Cuisine." On appeal, the Petitioner submits a letter from Insideus Media confirming that on [redacted] 2014, the Petitioner was a judge for one episode of a cooking show where six chefs were given 45 minutes to present their cooking to the Petitioner. The Petitioner scored the contestants on presentation, taste, innovation, and judged the winner of the contest.

The Director concluded that the Petitioner did not show he judged the work of others in the same of allied field of specification for which classification is sought. In this case, the Petitioner judged the work of chefs; however, the Petitioner's work for which classification is sought is to work as a general manager in the restaurant industry. On appeal, the Petitioner does not provide evidence to overcome the Director's concerns or demonstrate he judged the work of individuals in the field of restaurant management. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *See 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). Similarly, USCIS need not accept primarily conclusory assertions. *See 1756, Inc.*, 745 F. Supp. at 17.

For these reasons, the Petitioner has not established that he meets 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).

To meet this criterion, a petitioner must demonstrate that their salary or remuneration is high relative

[2] *Matter of Ho,* 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998); *Fano v. O'Neill*, 806 F.2d 1262, 1266 (5th Cir. 1987); *1756, Inc. v. Att'y Gen*, 745 F. Supp. 9, 17 (D.D.C. 1990).

to the compensation paid to others working in the field in similar positions and geographic locations. *See generally* 6 *USCIS Policy Manual, supra*, at F(2) appendix (stating that it is the petitioner's burden to provide geographical and position-appropriate evidence to establish that a salary is relatively high); *see also Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings versus other PGA Tour golfers); *Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding salary information for those performing lesser duties is not a comparison to others in the field); *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). The burden is on the petitioner to provide appropriate comparative evidence. Examples may include, but are not limited to, geographical or position-appropriate compensation surveys. Persons working in different countries should be evaluated based on the wage statistics or comparable evidence in that country, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States.

On appeal, the Petitioner submits an offer letter it executed with [redacted] on July 10, 2017. The offer letter offered the Petitioner a general manager position with an annual base salary of $180,000. The Petitioner also submits a copy of the *Occupational Outlook Handbook's* entry for the "Food Service Managers" occupational category, which indicated a 2021 median pay of $55,440 per year. The Petitioner contends a salary of $180,000 is much higher than the median pay for a food service manager. However, an offer letter alone is not sufficient evidence to establish the Petitioner received the claimed salary. The Petitioner also submits Form W-2, Wage and Tax Statement, 2021, that indicated the Petitioner's compensation as $13,880.00. The Petitioner does not explain the discrepancy in the claimed salary and the salary he was actually paid according to the tax statement.

On appeal the Petitioner submits copies of his pay statements for 2022; however, this is over two years after the current petition was filed. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

We find that the evidence in the record is insufficient to demonstrate that he has commanded a high salary in relation to others in his field. Accordingly, for the reasons discussed above, we conclude that the Petitioner's evidence did not establish that he satisfies 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 lesser criteria. We also need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20, or render a determination on the

issue of whether the Petitioner's entry will substantially benefit prospectively the United States. Accordingly, we reserve these issues.[3]

Nevertheless, we have reviewed the record in the aggregate and concluded that it does not support a conclusion 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 those progressing toward the top. *Price*, 20 I&N Dec. at 954 (Assoc. Comm'r 1994) (concluding that even major league level athletes do not automatically meet the statutory standards for classification as an individual of "extraordinary ability,"); *Visinscaia*, 4 F. Supp. 3d at 131 (internal quotation marks omitted) (finding that the extraordinary ability designation is "extremely restrictive by design,"); *Hamal v. Dep't of Homeland Sec. (Hamal II)*, No. 19-cv-2534, 2021 WL 2338316, at *5 (D.D.C. June 8, 2021) (determining that EB-1 visas are "reserved for a very small percentage of prospective immigrants"). *See also Hamal v. Dep't of Homeland Sec. (Hamal I)*, No. 19-cv-2534, 2020 WL 2934954, at *1 (D.D.C. June 3, 2020) (citing *Kazarian,* 596 at 1122 (upholding denial of petition of a published theoretical physicist specializing in non-Einsteinian theories of gravitation) (stating that "[c]ourts have found that even highly accomplished individuals fail to win this designation")); *Lee v. Ziglar*, 237 F. Supp. 2d 914, 918 (N.D. Ill. 2002) (finding that "arguably one of the most famous baseball players in Korean history" did not qualify for visa as a baseball coach). 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). The record does not contain sufficient evidence establishing that he is among the upper echelon in his field.

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.

[3] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, n.7 (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).