U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28881711

Date: NOV. 15, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a restaurant business, seeks to classify the Beneficiary, an executive chef, 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 the Petitioner did not establish that the Beneficiary meets the initial evidence requirements for this classification by satisfying at least three of the ten criteria under 8 C.F.R. § 204.5(h)(3) or demonstrating his receipt of a major, internationally recognized award. 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

An individual is eligible for the extraordinary ability immigrant classification under section 203(b)(1)(A) of the Act if:

- They have extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and their achievements have been recognized in the field through extensive documentation;
- They seek to enter the country to continue working in the area of extraordinary ability; and
- Their entry into the United States will substantially benefit the country in the future.

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 a beneficiary's one-time achievement (that is, a major, internationally recognized award). If a petitioner

does not submit this evidence, then they must provide documentation that the beneficiary 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 demonstrates that the beneficiary 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).

II. ANALYSIS

The Beneficiary is a chef who completed his culinary training in the United Kingdom and has over 14 years of progressive professional experience in his field. The Petitioner, which operates an upscale restaurant in southern California, has employed him as its executive chef since 2019.

A. Evidentiary Criteria

The Petitioner does not claim the Beneficiary qualifies for extraordinary ability classification based on a one-time achievement; therefore, it must submit evidence demonstrating that he meets at least three of the ten initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director found that the Petitioner submitted sufficient evidence to establish that the Beneficiary has performed in leading or critical roles for establishments that have a distinguished reputation and therefore satisfies the criterion at 8 C.F.R. § 204.5(h)(3)(viii). The record supports this conclusion based on evidence related to the Beneficiary's leading or critical roles with the Petitioner and a prior U.S. employer, a Los Angeles-based restaurant that enjoys a distinguished reputation.

On appeal, the Petitioner asserts the previously submitted evidence demonstrates that the Beneficiary meets two additional criteria and that the Director erred in determining he is not eligible for classification as an individual of extraordinary ability.[1] Specifically, the Petitioner maintains that it met its burden to establish that the Beneficiary has displayed his work at artistic exhibitions or showcases and that he has commanded a high salary, or other significantly high remuneration for services, in relation to others in the field. *See* 8 C.F.R. § 204.5(h)(3)(vii) and (ix).

For the reasons provided below, we conclude that the Petitioner has not demonstrated that the Beneficiary satisfies the requirements of at least three of the ten criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

[1] The Petitioner initially claimed that the Beneficiary could meet up to five of the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), including the criterion at 8 C.F.R. § 204.5(h)(3)(i), relating to receipt of lesser nationally or internationally recognized awards for excellence, and at 8 C.F.R. § 204.5(h)(3)(v), relating to original contributions of major significance in the field. The Director determined that the Petitioner did not demonstrate the Beneficiary meets either of these criteria and the Petitioner does not contest the Director's findings or otherwise address these criteria on appeal. An issue not raised on appeal is waived. *See, e.g.*, *Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

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)

At the time of filing in September 2021, the Petitioner provided evidence that the Beneficiary was earning an annual salary of $85,000 for his services as an executive chef. Evidence relevant to demonstrating that a given salary is a "high salary" may include comparative wage or remuneration data for the person's field, such as geographical or position-appropriate compensation surveys. *See generally*, 6 *USCIS Policy Manual* F.2(B)(1), https://www.uscis.gov/policy-manual (providing guidance on evaluating initial evidence of extraordinary ability under the regulatory criteria at 8 C.F.R. § 204.5(h)(3)).

In support of its claim that the Beneficiary commands a high salary in relation to others, the Petitioner submitted the Bureau of Labor Statistics' (BLS) *Occupational Outlook Handbook* entry for "Chefs and Head Cooks," which states that the median annual wage for the occupation in the United States was $53,380 in May 2020, with the 10 percent of workers in the field earning more than $90,790. The submitted excerpt states that "pay is usually highest in upscale restaurants and hotels, where many executive chefs work, as well as in major metropolitan and resort areas." The Petitioner also submitted BLS Occupational Employment and Wage Statistics data which indicated a mean annual wage of $59,190 for chefs and head cooks in the [redacted] metropolitan area.

In a request for evidence (RFE), the Director advised the Petitioner that the BLS data alone was not sufficient to demonstrate that the Beneficiary has commanded a "high salary" as required by the plain language of the regulation. We agree as the submitted data included only an average salary for the city where the Beneficiary works and therefore cannot sufficiently support a claim that his salary is high, as opposed to "above average," in relation to similarly employed workers in the same geographic area.

The Petitioner's response to the RFE included additional evidence of the Beneficiary's earnings for the years 2022 and 2023, including evidence that he earned a salary of $95,000 as of early 2023. On appeal, the Petitioner asserts that the Director erroneously excluded this evidence. However, as noted by the Director, the Petitioner's evidence must establish the Beneficiary met this criterion at the time it filed this petition. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved when a beneficiary, initially ineligible at the time of filing, becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, our analysis of this criterion is based on evidence of the Beneficiary's annual salary as of September 2021.

The Director determined that the Petitioner did not meet this criterion; however, the decision does not fully address the evidence submitted in response to the RFE, which included additional salary data published by Glassdoor, Indeed and ZipRecruiter. The data from Glassdoor indicates an average salary of $52,752 for the position of "head chef" in the United States, with the highest earners receiving up to $78,000; however, it does not provide salary data for the metropolitan area where the Beneficiary works. Further, Glassdoor lists "executive chef" as a "related career" with a higher average salary of $65,491. Given that the Beneficiary is employed as an executive chef and performs higher level duties than those attributed to "head chefs," we cannot conclude that the head chef data provides an appropriate basis for comparison.

The information the Petitioner submitted from Indeed indicates that the average base salary for a head chef in the United States is $58,778 and it identifies a "high" salary of $83,048. However, it also identifies [redacted] among the highest paying cities for this occupation, with an average annual salary of $76,159. While the Beneficiary's salary of $85,000 is above this average salary for a similar but distinct occupation, there is insufficient data to support a determination that he earns a high salary in relation to others working as executive chefs in [redacted] Finally, the information from ZipRecruiter is insufficient for similar reasons, as it is limited to national data for the occupation of "head chef" and is therefore not a position-appropriate or geographically specific compensation survey. The Petitioner did not submit salary data for "executive chefs" from either of these sources or indicate that such information was not available.

Finally, the Petitioner provided California wages for chefs and head cooks from the U.S. Department of Labor's (DOL) O*Net Online website. This occupation includes executive chefs, but also positions such as chefs de cuisine, sous chefs, and private chefs. This DOL source indicates that the top 10 percent of workers in the [redacted] metropolitan area earn a salary of $103,930 or higher. While the Beneficiary's $85,000 annual salary is higher than the reported average, the evidence does not support a determination that it is a "high salary" in relation to similarly employed executive chefs in the same geographic area.

For all the reasons discussed, the Petitioner has not demonstrated that the Beneficiary meets this criterion.

B. Summary and Reserved Issues

The Petitioner asserts that the Beneficiary meets three of the ten criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), but did not establish that he meets the criterion at 8 C.F.R. § 204.5(h)(3)(ix), as claimed. As such, the Petitioner has not met its burden to establish that he meets the initial evidence requirement for this classification. Detailed discussion of the remaining claimed criterion at 8 C.F.R. § 204.5(h)(3)(vii) cannot change the outcome of the appeal. Therefore, we reserve and will not address this criterion. *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 D-L-S-*, 28 I&N Dec. 568, 576-77 n.10 (BIA 2022) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

C. Prior O-1 Approvals

We acknowledge that the Beneficiary is employed by the Petitioner in O-1B status, a classification reserved for nonimmigrants of extraordinary ability in the arts. Although USCIS has approved at least two O-1 nonimmigrant visa petitions filed on behalf of the Beneficiary, the prior approvals do not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different statute, regulations, and case law. The nonimmigrant and immigrant categories have different criteria, definitions and standards for persons working in the arts. "Extraordinary ability in the field of arts" in the nonimmigrant O-1 category means distinction. 8 C.F.R. § 214.2(o)(3)(ii). But in the immigrant context, "extraordinary ability" reflects that the individual is among the small percentage at the very top of the field. Moreover, each petition is separate and independent and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions.

III. CONCLUSION

The Petitioner has not submitted the required initial evidence demonstrating that the Beneficiary has a qualifying one-time achievement or that he meets at least three of the ten criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). 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 and conclude that it does not support a finding that the Beneficiary has the sustained acclaim and recognition required for the classification sought.

The Petitioner seeks to establish the Beneficiary's eligibility for a highly restrictive visa classification. 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 the Beneficiary's 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 Beneficiary has garnered sustained 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).

For the reasons discussed above, the Petitioner has not demonstrated the Beneficiary's 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.