U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28580471

Date: NOV. 30, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a software engineer and developer, seeks classification as an individual of extraordinary ability in the sciences. *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 that the Petitioner satisfied the initial evidence requirements for this classification by demonstrating his receipt of a major, internationally recognized award or by meeting at least 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 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 may demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). Absent such an achievement, the petitioner must provide sufficient qualifying documentation demonstrating that they meet at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i) – (x).

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, a software engineer and developer, provided evidence to establish his eligibility under seven of the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i) –(v), (viii), and (ix).[1] The Director concluded he met the judging criteria at 8 C.F.R. § 204.5(h)(3)(iv) and we agree. On appeal, the Petitioner limits his claims to the criteria at 8 C.F.R. § 204.5(h)(3) (ii), (iii), (viii) and (ix).[2]

> *Evidence of 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 relies on his membership in [redacted] to satisfy this criterion. The Director concluded that [redacted] is a networking site created to connect companies that contract their work with potential freelancing software engineers rather than a professional association, and that the evidence was insufficient to show that the organization requires outstanding achievements of its members.

On appeal, the Petitioner asserts that [redacted] is "an elite network for the world's best" software developer talents, serving more than 10,000 clients, including Fortune 500 companies. Furthermore, he argues that because [redacted] gets more than 100,000 applications and uses a rigorous selection process in which less than three percent of applicants are chosen, the organization requires outstanding achievements of its members.

[1] As the Petitioner did not claim to meet the remaining criteria, we will not address them here.

[2] We, therefore, consider the criteria at 8 C.F.R. § 204.5(h)(3)(i) and (v) to be 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)) (standing for the proposition that an issue not raised on appeal is waived.)

The Petitioner provided an article about [redacted] founder titled, "Dropout turned entrepreneur helps find talent amid engineer squeeze," explaining that he founded the company to create a "network that connects [] the world's top talent with tech companies globally, on demand." He goes on to explain that with [redacted] he has created a "cloud[redacted] where the talent caliber is that of [redacted] or even Israeli talent, but it is virtual." Furthermore, he explains that he aims through his company to match employers to those talented "engineers . . . who live in a small city . . . [and] allow[] them to stay at home but get the big jobs anyway." In essence, [redacted] is an employment agency and the Petitioner has not established that such an agency, regardless of the caliber of the talent, qualifies as a professional association.[3]

According to the Petitioner, [redacted] "[c]andidates must be able to read, write, and speak English extremely well" and be "passionate and driven individuals who are hands-on and fully engaged in their work." They "are then assessed for technical knowledge and problem-solving skills, and only candidates with 'exceptional results' are accepted." While we acknowledge that [redacted] selection process appears to be strenuous and that the company is attracting high skilled information technology (IT) professionals, it is insufficient to establish that [redacted] selection process requires "outstanding achievements of their members." *Matter of Chawathe*, 25 I&N Dec. at 375-76. The Petitioner provides his [redacted] profile which emphasizes his years of experience, portfolio, location, and specifies the multiple IT languages and technologies he uses. While the Petitioner's skillset is extensive and impressive, [redacted] profile does not highlight any "outstanding achievements" of his or appear to require any particular achievements beyond his selection and marketable job skills for employment in the IT field. Additionally, because the nature of the Petitioner's relationship with [redacted] is that of an agent-talent, and not as a "member" in a professional association, the evidence is insufficient to meet the plain language of the criterion. *Id.*

We note that although the Petitioner's selection by [redacted] is not sufficient to meet this criterion, his selection could be considered in a final merits determination under the second step in *Kazarian's* analytical framework, where we consider whether the totality of the evidence demonstrates he has sustained national or international acclaim and that he is among the small percentage at the very top of the field of endeavor. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).

> *Evidence of published material about the individual in professional or major trade publications or other major media, relating to their work in the field for which classification is sought. Such evidence must include the title, date, and author of the material, and any necessary translation. 8 C.F.R. § 204.5(h)(3)(iii)*

On appeal, the Petitioner asserts that the online news article appearing in [redacted] meets this criterion because the article was about him and [redacted] qualifies as major media. We acknowledge that this article [redacted] is about the Petitioner. However, the article does not meet the plain language of the regulation, which requires that the published material include the title, date, and author of the material. *See* 8 CFR § 204.5(h)(3)(iii). While the article has a date and title, there is no identified author.

[3] For example, a scientific society dedicated to artificial intelligence, would likely qualify as a professional association. *See* 6 USCIS Policy Manual, 2.B(1)(criterion 2), https://www.uscis.gov/policymanual.

Evidence that the person 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 to others working in the field. *See* 6 USCIS Policy Manual 2.B(1)(criterion 9), https://www.uscis.gov/policy-manual. Furthermore, relevant caselaw has confirmed that "in relation to others in the field" should be interpreted as allowing comparisons to those employed in the same occupation at a similar level. *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 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 Petitioner asserts that his 2022 wages of $144,800 (which is equivalent to 25,629,600 Argentine pesos) as a consultant is high in relation to other IT developers in Argentina. He provides an online article published on [redacted].com, which cites to a report published by the Ministry of Economic Development and Production for the city of [redacted] stating that in Argentina, the average salary for IT developers in general is 315,612 Argentine pesos and the market average is 209,309 Argentine pesos. Although the article cites to salary information from a government report, the report itself has not been provided, and therefore, we are unable to ascertain the basis for the salary information, its validity, and the specific occupation(s) it covers. Without this relevant information, the evidence remains insufficient to meet this criterion. *Matter of Chawathe*, 25 I&N Dec. at 375-76.

Evidence that the person has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii)

We decline to reach and hereby reserve the Petitioner's appellate arguments regarding this criterion because he has not demonstrated his eligibility under at least two other criteria and is therefore unable to reach the requisite minimum of at least three criteria under step one of *Kazarian's* analytical framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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 and conclude 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. 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 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).

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.