U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23099341

Date: OCT. 20, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a biomedical researcher, seeks classification as an individual of extraordinary ability in the sciences. 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 revoked the approval of the petition, concluding that the record did not establish that the Petitioner met at least three of the ten evidentiary criteria required for eligibility. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

An individual is eligible for the extraordinary ability classification 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 United States to continue work in the area of extraordinary ability; and their entry into the United States will substantially benefit prospectively the United States. Section 203(b)(1)(A) of the Act.

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 one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then they must provide documentation that 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). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if they are 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); *Amin v. Mayorkas*, 24 F.4th 383, 391-92 (5th Cir. 2022).

However, USCIS may revoke its approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. The realization that a petition was approved in error may be good and sufficient cause for revoking its approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). USCIS may issue a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the filing's denial based on the petitioner's failure to meet their burden of proof. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA) 1987). The NOIR provides the opportunity to submit evidence in support of the petition and in opposition to the alleged grounds for revocation. 8 C.F.R. § 205.2(b). If the NOIR response does not rebut or resolve revocation grounds stated in the notice, USCIS properly revokes a petition's approval. *Matter of Estime*, 19 I&N Dec. at 451-52.

II. ANALYSIS

The Petitioner is a biomedical researcher, and intends to continue this pursuit in the United States. In her initial petition, she stated that she qualifies for the extraordinary ability classification under the following three evidentiary grounds:[1]

- 8 C.F.R. § 204.5(h)(3)(iv), participation as a judge of the work of others in the field;
- 8 C.F.R. § 204.5(h)(3)(v), original contributions of major significance in the field; and
- 8 C.F.R. § 204.5(h)(3)(vi), authorship of scholarly articles in the field.

The Petitioner's case was approved in April 2021. In May 2021, the Director issued a request for evidence (RFE), stating that the Petitioner had met the evidentiary criteria for participation as a judge and authorship of scholarly articles and requesting further documentation of her contributions to her field in order to establish her eligibility under the criterion at 8 C.F.R. § 204.5(h)(3)(v).[2] Upon receiving the Petitioner's timely response, the Director issued an NOIR stating that the petition had

[1] The Petitioner does not claim, and the evidence does not establish, that she has a one-time achievement under 8 C.F.R. § 204.5(h)(3) of the Act.

[2] The Petitioner correctly notes that RFEs should not be issued for previously-approved petitions. Under 8 C.F.R. § 205.2 and § 204.5(n), an approved I-140 remains valid indefinitely unless it is properly revoked, which requires the issuance of an NOIR. However, the Director subsequently issued a proper NOIR based solely on the evidence in the record at the time of the petition's approval, to which the Petitioner had a full opportunity to respond. 8 C.F.R. § 205.2(b). As such, this procedural error has been remedied and we will not address it further.

been approved in error because the record only established the Petitioner's eligibility for two criteria instead of the required three. The Director again stated that the Petitioner had established her authorship of scholarly articles and her participation as a judge, and requested further documentation of the Petitioner's original contributions of major significance to her field. The Petitioner provided a timely response, and the petition's approval was subsequently revoked with a finding that the Petitioner did not meet at least three of the required ten criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

A. The Director Properly Issued the Notice of Intent to Revoke

On appeal, the Petitioner contends that the Director had no authority to revoke the petition's approval because "[t]he revoking officer did not state that the original adjudicating officer was unreasonable in his or her original conclusion that the evidence was sufficient" and didn't cite an error in the approval apart from a lack of sufficient probative, relevant, and credible evidence establishing that the Petitioner had made a major contribution to her field. According to the appellate brief, this subjected the petition to "a higher standard of review . . . not rooted in law or policy guidance" but instead "a matter of subjective opinion." We disagree.

An officer issuing an NOIR does not need to demonstrate a "clear error" in the prior decision or to show that the approving officer was "unreasonable," as claimed by the Petitioner, but only to find that the unrebutted record at the time of the NOIR's issuance would merit the petition's denial based on the petitioner's failure to meet their burden of proof. *Matter of Estime*, 19 I&N Dec. at 451. If supported by the record, the realization that an approval was made in error may, in and of itself, be "good and sufficient cause" for revoking a petition. *Matter of Ho*, 19 I&N Dec. at 590.

Furthermore, it is a petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013); *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012); *Matter of Ho*, 19 I&N Dec. at 588-89; *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966). This burden remains with the petitioner throughout revocation proceedings. *Matter of Ho*, 19 I&N Dec. at 588-89, *Matter of Estime*, 19 I&N Dec. at 452 n.1 (citations omitted).

In order to meet their burden of proof, a petitioner must submit relevant, probative, and credible evidence leading us to believe that their claim is "more likely than not" or "probably" true. *Matter of Chawathe*, 25 I&N Dec. at 375-76 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (BIA 1989)) (explaining the "preponderance of the evidence" evidentiary standard petitioners must meet in these proceedings). A failure to meet this burden as to a material claim is sufficient to merit a petition's denial, and therefore sufficient to merit the revocation of its approval. *Id.*; *Matter of Estime*, 19 I&N Dec. at 451. Upon de novo review of the entire record, we conclude that at the time of the petitioner's approval, the Petitioner did not meet this burden of proof regarding her contributions to her field. 8 C.F.R. § 204.5(h)(3)(v). As such, the Director had good and sufficient cause to issue the NOIR. *Matter of Estime*, 19 I&N Dec. at 451.

The Petitioner further claims that NOIR did not state a good and sufficient cause for revocation because it did not "include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Id.* at 451-52. According to the appellate brief, the NOIR was issued "without acknowledging any discrepancies from the approval or what evidence is in question,"

and so did not provide an adequate explanation of the grounds of revocation. However, as explained above, an NOIR need only explain why the unrebutted record at the time of its issuance would merit the petition's denial based on a petitioner's failure to meet their burden of proof. *Id.* at 451. In the present case, the NOIR properly explains why the evidence of record at the time of the petition's approval was insufficient to meet the Petitioner's burden of proof and establish she had made a majorly significant contribution to her field, as required by 8 C.F.R. § 204.5(h)(3)(v).

For example, the notice states that the Petitioner's listing as a co-inventor on a patent does not, in and of itself, establish the significance of the underlying invention to the Petitioner's field, and that the record did not include corroborating documentation showing that the patent had resulted in significant commercial sales or had an impact on others in her field. This articulates why the patent documentation does not include the information needed to meet the Petitioner's burden of proof and show it is more likely than not that the invention documented in the patent is majorly significant to her field. *Matter of Chawathe*, 25 I&N Dec. at 375-76. The Director similarly provides reasoned explanations of why the remainder of the evidence did not establish, by a preponderance of the evidence, that any of the Petitioner's contributions to her field were of major significance. *Id.*, 8 C.F.R. § 204.5(h)(3)(v). As explained in the NOIR, this meant that the evidence at the time of the approval did not meet at least three of the criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), and so did not establish the Petitioner's eligibility for the extraordinary ability classification.

The NOIR is supported by the record and explains why the petition's approval was in error, and therefore states a good and sufficient cause for revoking that approval. *Matter of Ho*, 19 I&N Dec. at 590. However, as detailed below, the Petitioner has since overcome the NOIR's concerns and established eligibility under 8 C.F.R. § 204.5(h)(3)(v).

B. Contribution of Major Significance to the Field

The second issue on appeal is whether the record establishes that the Petitioner has made a scientific contribution of major significance to her field of pharmacology.[3] 8 C.F.R. § 204.5(h)(3)(v). On appeal, the Petitioner contends that the revocation was in error because "the statutory and regulatory framework defining eligibility for immigrant status as an alien of extraordinary ability nowhere requires that each and every research contribution by a petitioner be demonstrated to be majorly significant; the framework only requires that, as a whole, a petitioner's work be demonstrative of national or international acclaim in his or her field of expertise . . ." (emphases removed).

We agree that the plain language of 8 C.F.R. § 204.5(h)(3)(v) only requires evidence that a noncitizen made "contributions of major significance," not evidence that all of a noncitizen's work meets this standard. However, the Petitioner's interpretation of this criterion conflates it with the final merits evaluation under *Kazarian*, which is not applicable unless she can first show that she meets at least three of the initial evidentiary criteria. *Kazarian*, 596 F.3d at 1119-20; *see also Amin v. Mayorkas*, 24 F.4th 383, 391-92. As stated by the Director in the NOIR, 8 C.F.R. § 204.5(h)(3)(v) requires a showing that the Petitioner has made a specific contribution to her field, that this contribution was original, and that this contribution was majorly significant to the field. *See generally* 6 *USCIS Policy*

[3] It is noted that while the regulatory language calls for plural "contributions," a singular contribution may be sufficient to establish eligibility. *See generally* 6 *USCIS Policy Manual* F.2(B), https://www.uscis.gov/policymanual.

Manual, *supra*, at F.2(B) (describing factors to be considered in evaluating this criterion). While the Petitioner puts forward various arguments about how her overall citation record establishes her eligibility for this criterion, the issue of whether her body of work is indicative of national or international acclaim is one that USCIS does not reach until the final merits analysis. *Id.*; *Kazarian*, 596 F.3d at 1119-20. For this criterion, we will instead examine the originality and significance of the Petitioner's stated achievements.

On appeal, the Petitioner identifies three achievements as qualifying her for the criterion at 8 C.F.R. § 204.5(h)(3)(v): her development of a "never-before-seen PTX/FTS[4] combination therapy for cancer treatment," the "widespread commentary" caused by being "the first scientist to discover the deadly side effects of PTX, the best-selling cancer drug," and being "the first scientist to create a prodrug-based NLG919 molecule, pioneering a new approach to immunochemotherapy."[5] Upon review, the Petitioner has submitted sufficient documentation to establish that her 2016 paper[6] in *Nature Communications* regarding the prodrug-based NLG919 molecule is an original and majorly significant contribution to the field.

According to the support letter from Professor J-H- of [redacted] University, the Petitioner "creatively designed and synthesized a unique prodrug-based NLG919 molecule" that constitutes "a novel multi-functional drug delivery system for immunotherapy." Professor L-X- of the University [redacted] who collaborated with the Petitioner through her doctoral advisor, states that "[h]er work on multifunctional nanocarriers was one of the first to focus on properly designed . . . prodrugs" and has had success in breast cancer animal models. He further states that this work was a "driving force to a major revision in our thinking about the design of new drug carriers and reinvigoration of a field that had reached a conceptual dead end." Professor R-K-, of [redacted] further explains that the Petitioner's work "showed that the new combination of drugs can achieve synergistic effect while using a functional nanocarrier" and helped "overcome obstacles . . . and solve the problem of delivery drug combination with different pharmacokinetics and solubilities." Professor K-P- of [redacted] University states that this work created "a novel method to effectively induce immunogenic tumor cell death, pioneering a new approach for cancer immunotherapy," and describes how it inspired further research. This is supported by various sample citations provided by the Petitioner, showing that the article was considered notable by others in the field.

The article's Google Scholar record and the corresponding documentation from Clarivate Analytics demonstrating the article's noteworthy citation record further indicate that the *Nature Communications* paper was a majorly significant contribution to the Petitioner's field of pharmacology. Finally, the record indicates that this paper provided much of the preliminary data for a related grant proposal that ultimately received funding from the National Cancer Institute (NCI).[7] We therefore conclude that

[4] PTX is an abbreviation of Paclitaxel, a chemotherapy medication also known commercially as Taxol. FTS is an abbreviation of trans-farnesylthiosalicylic acid, a synthetic molecule used in cancer treatment research.

[5] While we will not address every claim made in each of the Petitioner's letters of support, we have considered and analyzed each one.

[6] The Petitioner was one of the paper's three equal first authors.

[7] We note that the Petitioner's appellate brief states that she "has received grants from the National Cancer Institute" based on her NLG919 research. However, the grant proposal included in the record is authored by the principal investigator, S-L- (the Petitioner's doctoral advisor), and includes a list of all of the investigators to be involved in the proposed research,

the Petitioner has established by a preponderance of the evidence her eligibility under the criterion at 8 C.F.R. § 204.5(h)(3)(v).

C. Final Merits Determination

The Petitioner has met three of the initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) and has overcome the Director's ground of revocation. As such, the Director must make a final merits determination to analyze the Petitioner's accomplishments and weigh the totality of the evidence to determine if it establishes her extraordinary ability in her field of endeavor. *Kazarian*, 596 F.3d at 1119-20.[8] Because the Director did not perform a final merits determination in their decision, we are remanding this matter for them to do so.

On remand, the Director should examine all of the evidence in the record and determine whether it shows, by a preponderance of the evidence, that the Petitioner's achievements have translated into a level of recognition that constitutes sustained national or international acclaim and demonstrates that she is among the small percentage at the very top of her field of endeavor. Section 203(b)(1)(A) of the Act; 8 C.F.R. § 204.5(h)(3).

III. CONCLUSION

Because the Petitioner has overcome the revocation ground, we will remand this proceeding so that the Director can make a final merits determination in keeping with the *Kazarian* framework.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

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noting their expertise and contributions to the preliminary data in the grant proposal. This list does not include the Petitioner. As noted above, the Petitioner's 2016 *Nature Communications* paper provides much of the proposal's preliminary data. However, as S-L- is the author and principal investigator of the grant proposal, which does not list the Petitioner as part of the research team, it is not apparent that the Petitioner was awarded this grant, as claimed in her brief.

Where there are discrepancies in the evidence, it is the Petitioner's burden to resolve these discrepancies using independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The Petitioner has not resolved the discrepancy between her claim that she has received NCI funding for her research and the documentation indicating that she was not one of the listed investigators on the relevant grant proposal, and this issue should be addressed on remand.

[8] Some factors that may establish that a noncitizen has extraordinary ability include senior or primary authorship of articles in particularly high-ranked journals, a total rate of citations which is high relative to others in the field, and employment or research experience with leading institutions in the field. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(2). Examples relevant to the Petitioner's field may be found in the credentials of the experts who wrote letters on her behalf in this case.