U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 35063680

Date: DEC. 18, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a systems administrator specializing in cyber security, 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner satisfied the initial evidence requirements for this classification, either through his receipt of a major internationally recognized award or, in the alternative, by meeting at least three of ten evidentiary criteria set forth in the regulations. The matter is now before us on appeal pursuant to 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

To qualify as a noncitizen with extraordinary ability, a petitioner must demonstrate that they:

- Have "extraordinary ability in the sciences, arts, education, business, or athletics;"
- Seek to continue work in their field of expertise in the United States; and
- Through their work, would substantially benefit the country.

Section 203(b)(l)(A)(i)-(iii) of the Act. The term "extraordinary ability" means expertise commensurate with "one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

Evidence of extraordinary ability must initially demonstrate a noncitizen's receipt of either "a major, international recognized award" or satisfaction of at least three of ten lesser evidentiary criteria. 8 C.F.R. § 204.5(h)(3)(i)-(x).[1] If a petitioner meets either standard, U.S. Citizenship and Immigration Services (USCIS) must then make a final merits determination as to whether the record, as a whole, establishes their sustained national or international acclaim and recognized achievements placing them among the small percentage at the very top of their field. *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 Amin v. Mayorkas,* 24 F.4th 383, 391 (5th Cir. 2022) (finding USCIS' two-step analysis of extraordinary ability "consistent with the governing statute and regulation").

II. ANALYSIS

The Petitioner, who claims extraordinary ability in the fields of cybersecurity and computer science, has not indicated or shown that he has received a major, internationally recognized award. Therefore, the issue before us on appeal is whether he has established that he meets at least three of the ten initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

A. Evidentiary Criteria

The Petitioner claimed he could meet three of the ten criteria, including 8 C.F.R. § 204.5(h)(3)(ii), (v), and (vi), based, respectively, on his submission of evidence of his memberships in associations in his field, his original contributions in his field, and his authorship of scholarly articles.[2] The Director concluded that the Petitioner satisfied the criteria at 8 C.F.R. § 204.5(h)(3)(v) and (vi) but did not demonstrate his membership in an association that requires outstanding achievements as judged by recognized national or international experts in the field.

After reviewing all the evidence in the record, we conclude that the Petitioner has not established that he meets at least three of the ten evidentiary criteria. Accordingly, he has not established his eligibility for classification as an individual of extraordinary ability.

1. Evidence of Membership in Associations

The regulation at 8 C.F.R. § 204.5(h)(3)(ii) calls for "documentation of the [noncitizen's] membership in associations in the field for which classification is sought, which require outstanding achievements

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[1] Additionally, if the criteria at 8 C.F.R. § 204.5(h)(3) do not readily apply to a petitioner's occupation, they may submit "comparable evidence" to establish their eligibility. 8 C.F.R. § 204.5(h)(4).

[2] A cover letter from counsel, submitted at the time of filing, stated the Petitioner could meet the criterion at 8 C.F.R. § 204.5(h)(3)(iv), which requires evidence of participation as a judge of the work of others in the same field or an allied field. However, the Petitioner did not submit evidence in support of this criterion, did not address it in his response to the Director's request for evidence, and does not contest the Director's determination that he did not satisfy the criterion. Any ground of ineligibility that is not raised on appeal is waived. *See 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)). The Petitioner has not claimed he can meet the criteria at 8 C.F.R. § 204.5(h)(3)(i), (iii), (vii), (viii), (ix) and (x).

of their members, as judged by recognized national or international experts in their disciplines or fields."

Here, the Petitioner claims eligibility under this criterion based on his membership in the International Systems Security Association (ISSA), noting that this association "has a stellar reputation and requires outstanding achievements of its members."[3] The Petitioner provided a copy of his ISSA membership card indicating that he is a general member of this association, along with a copy of the *2021 Annual ISSA International Report*.

In a request for evidence (RFE) the Director advised the Petitioner that the initial evidence did not demonstrate that ISSA requires outstanding achievements as a condition for membership and that prospective members' achievements are judged by recognized national or international experts in the field, as required by the plain language of the regulation.

In response, the Petitioner reasserted his eligibility based on his ISSA membership and provided a copy of ISSA's "International Association Bylaws." Membership is addressed in the bylaws at article III, which states:

> Membership in the Association is based upon one having primary interest or active involvement in information systems security in the educational, private or public sector. In addition, membership is contingent upon interest in the purposes and objectives of the Association as stated in Article II and observance of the Code of Ethics as a prerequisite for and as a condition of continued affiliation with the Association. Membership is defined in policy by the Board of Directors, is subject to the provisions of the Articles of Incorporation and Bylaws and is not transferable or assignable.

The *2021 Annual ISSA International Report*, which the Petitioner resubmitted in response to the RFE, describes the association's "Fellows and Distinguished Fellows Program" which honors "established cyber professionals with demonstrated success and contributions to the industry." The annual report mentions that an ISSA Fellow must have 8 years of membership in the association, 12 years of relevant professional experience, and 5 years of "significant performance in the profession," while an ISSA Distinguished Fellow must have 12 years of association membership, 16 years of professional experience in the field, 10 years of documented exceptional service to the security community and a "significant contribution to security posture or capability." As noted, the Petitioner's membership card indicates his "general membership" in the ISSA.

The Director concluded the Petitioner did not demonstrate he meets the plain language of the criterion because the evidence provided, including the ISSA bylaws, did not demonstrate that this association requires outstanding achievement of members as judged by recognized national or international experts in their fields.

[3] At the time of filing, the Petitioner also provided a certificate indicating he was admitted as a member of "ISACA" in July 2023. However, he did not submit any supporting evidence about this association or reference this membership in his statement addressing the criterion at 8 C.F.R. § 204.5(h)(3)(ii).

On appeal, the Petitioner asserts that the recent United States Supreme Cout decision in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024) "means that the USCIS must take a more literal interpretation of criteria in the [extraordinary ability] process" and "places a much tighter leash on a federal agency's ability to interpret laws."

In his brief, the Petitioner also highlights a portion of the *Kazarian* decision in which the court determined that the AAO improperly imposed a novel evidentiary requirement when evaluating evidence submitted under the criterion at 8 C.F.R. § 204.5(h)(3)(iv). The Petitioner asserts:

> Please keep in mind that generating merely two (2) scholarly articles legally satisfies the Scholarly Articles criterion. Also, merely "reviewing 'diploma works' for fellow students at one's own university" as Dr. Kazarian did in the landmark *Kazarian* case satisfies the "Service as a Judge criterion. Both of these standards are remarkable [sic] low. These two standards are almost comically law [sic]. No other legal interpretation is reasonably or legally acceptable.

The Petitioner maintains that the criterion at 8 C.F.R. § 204.5(h)(3)(ii) "should also be adjudicated in a similar legal manner" and that "[t]he difficulty of satisfying the Membership in Association criterion must be of equal ease as 'scholarly articles' and 'serving as a judge.'" He contends that "under a proper adjudication in line with both *Kazarian* and *Loper*, and taking into account all the evidence submitted with his case, [he] has satisfied the 'Membership in Associations' criterion."

The Petitioner's assertions are not persuasive. First, the Petitioner has not addressed the specific evidence he submitted in support of the membership criterion and why he believes it demonstrates his eligibility, nor has he contested the Director's stated reasons for finding that evidence to be insufficient to meet the criterion. The record supports the Director's conclusion that the ISSA bylaws and annual report do not establish, by a preponderance of the evidence, that one must have outstanding achievements, as judged by recognized national or international experts, to be admitted to the ISSA as a general member. The Director did not, as implied by the Petitioner, impose a novel evidentiary requirement by requiring the Petitioner to satisfy the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

The record reflects that membership in the ISSA "is based upon one having primary interest or active involvement in information systems security in the educational, private or public sector" and is "contingent upon interest in the purposes and objectives of the Association." Nothing in this language indicates or implies that a prospective member must demonstrate "outstanding achievements" in the field of information systems security to be admitted to the ISSA. Further, the submitted evidence does not address the ISSA's process for admitting new members and therefore does not demonstrate that this process involves review by recognized national or international experts in the field who judge the achievements of prospective members.

Second, the Petitioner's assertion that *Loper* requires USCIS to "re-examine its adjudication" of the criteria found at 8 C.F.R. § 204.5(h)(3)(i)-(x) misinterprets the reach of the Supreme Court's decision. Loper overturned *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), ruling that federal courts need not defer to agencies' reasonable interpretations of ambiguous federal laws. Rather, *Loper* provides the judiciary with the sole prerogative to "say what the law is," stating: "Courts

must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Loper*, 144 S. Ct. at 2257, 2273.

Loper affects federal courts, not federal agencies. A federal court reviewing our interpretation of an ambiguous statute must follow *Loper*. But *Loper* does not change how we interpret such laws or mandate, as the Petitioner suggests, an immediate change in how USCIS adjudicates immigrant petitions for noncitizens of extraordinary ability.

Moreover, *Loper* involved an agency's interpretation of a statute. *Loper*, 144 S.Ct. at 2254-56. The Director's denial of this petition, and our adjudication of this appeal, rest on a determination of whether the Petitioner met his burden to demonstrate that he meets at least three of the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x); it is not based on the agency's interpretation of a statute. Even if the regulations are ambiguous, our interpretation of them would merit deference under *Auer v. Robbins*, 519 U.S. 452 (1997), which *Loper* did not reverse. *See, e.g., United States v. Boler*, 115 F.4th 316, 322 n.4 (4th Cir. 2024) (declining to apply *Loper* to an issue involving an agency's interpretation of its own regulations).

Finally, we acknowledge the Petitioner's claim that there is a "low bar" for meeting certain criteria under 8 C.F.R. § 204.5(h)(3)(i)-(x), specifically, the criteria pertaining to publication of scholarly articles and participation as a judge of the work of others. In this regard, agency policy guidance recognizes that, based on the plain language of the regulations, some of the criteria have multiple elements and/or clear qualitative requirements and some do not. For example, participating as a judge of the work of others in the same or an allied field of specialization alone, regardless of the circumstances, should satisfy the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(iv). *See generally* 6 *USCIS Policy Manual* F.2(B), https://www.uscis.gov/policy-manual.

The Petitioner suggests that there should be a similarly "low bar" for meeting the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii) but overlooks the multiple elements that must be met based on the plain language of that regulation. An individual cannot satisfy this criterion simply by providing evidence of their membership in an association in their field. Rather, a petitioner must submit evidence demonstrating that they are a member of an association in their field that requires outstanding achievements as judged by recognized national or international experts. As noted, the Director did not, as suggested by the Petitioner, improperly impose a novel evidentiary requirement that is not found in the plain language of the membership criterion.

The submitted evidence is insufficient to meet the Petitioner's burden to demonstrate that he meets all elements of the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii). Although the Petitioner established that he is a member of ISSA, the Director properly concluded that the submitted ISSA bylaws and annual report do not show that recognized national or international experts judged the Petitioner as having attained outstanding achievements in his field as a condition for admitting him as a general member. Accordingly, the Petitioner has not demonstrated that he meets this criterion.

2. Evidence of Authorship of Scholarly Articles

The regulation at 8 C.F.R. § 204.5(h)(3)(vi) calls for "[e]vidence of the [noncitizen's] authorship of scholarly articles in the field, in professional or major trade publications or other major media."

We withdraw the Director's determination that the Petitioner met this criterion. The Petitioner submitted several papers and one presentation slide deck in support of this criterion. However, the record does not demonstrate whether or where these articles and presentation were published and therefore does not contain evidence that they were published in professional or major trade publications or other major media, as required by the regulations. Rather, the identifying information on the submitted papers and presentation indicate that they were written by the Petitioner to fulfill his graduate program course requirements at [redacted]

The Director noted this evidentiary deficiency in the RFE and requested additional documentary evidence "to establish that the publications in which the articles appear are professional publications, trade publications or other major media." In response to the RFE, the Petitioner emphasized that the previously submitted papers qualify as "scholarly articles" based on the guidance and examples provided for adjudication of this criterion in the *USCIS Policy Manual*. However, the RFE response did not include evidence demonstrating that any of the submitted papers had been published in a professional publication, such as a peer reviewed journal, a major trade publication, or other major media. Therefore, the record does not support the Director's determination that the Petitioner satisfied this criterion.

B. Summary and Reserved Issue

Because the Petitioner has not demonstrated that he meets two of the three claimed evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), he cannot satisfy the initial evidence requirements for this classification. As such, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20 and further addressed at 6 *USCIS Policy Manual* at F.2(B)(2). Further, we need not address the Petitioner's contention that "the new '*Loper*' case also means that the AAO must put an end to the extra-statutory 'Final Merits Determination" in adjudicating extraordinary ability cases." Because the Applicant/Petitioner is ineligible for the benefit sought, we need not reach, and therefore reserve, these issues. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam) (holding that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision).

III. CONCLUSION

The Petitioner has not shown that he received a major, internationally recognized award or that he satisfied at least three of ten initial regulatory criteria, and therefore has not demonstrated his eligibility as an individual of extraordinary ability. Moreover, the Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields. 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).

Although we are not required to conduct a final merits determination, we nevertheless note that the Petitioner has not shown that the significance of his work to date 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)(l)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered sustained national or international acclaim in the field, and that he is one of the small

percentage who have risen to the very top of the field of endeavor. *See* section 203(b)(l)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

ORDER: The appeal is dismissed.