U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-E-INC.

DATE: MAY 28, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a computer game developer, seeks to classify the Beneficiary as an outstanding researcher in the field of data science. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(B), 8 U.S.C. § 1153(b)(1)(B). This first preference classification makes immigrant visas available to foreign nationals who are internationally recognized as outstanding in their academic field.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary is internationally recognized as outstanding in his academic field. The Director then granted the Petitioner's motion to reconsider, but affirmed his decision to deny the petition.

On appeal, the Petitioner asserts that the Director used a subjective adjudicative standard and required evidence beyond the "preponderance of the evidence" standard, and that USCIS policy "articulates an erroneous legal standard."

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The statute requires that beneficiaries under this immigrant visa classification should stand apart in their academic area based on international recognition. To establish a professor or researcher's eligibility, a petitioner must provide initial qualifying documentation that meets at least two of six categories of specific objective evidence and demonstrates the beneficiary is recognized internationally within the academic field as outstanding.

Specifically, section 203(b)(1)(B)(i) of the Act provides that a foreign national is an outstanding professor or researcher if:

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States [for a qualifying position with a university, institution of higher education, or certain private employers].

To establish a professor or researcher's eligibility, a petitioner must provide initial qualifying documentation that meets at least two of six categories of specific objective evidence set forth at 8 C.F.R § 204.5(i)(3)(A)-(F). This, however, is only the first step, and the successful submission of evidence meeting at least two criteria does not, in and of itself, establish eligibility for this classification.[1] When a petitioner submits sufficient evidence at the first step, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the beneficiary is recognized as outstanding in his or her academic field. 8 C.F.R. § 204.5(i)(3)(i).

Finally, the regulation at 8 C.F.R. § 204.5(i)(3)(ii) provides that a petition for an outstanding professor or researcher must be accompanied evidence that the foreign national has at least three years of experience in teaching and/or research in the academic field.

II. ANALYSIS

The Beneficiary is employed by the Petitioner as a senior data scientist in its Business Intelligence and Risk team. In this position, he conducts research and development of machine learning, data mining and statistical modeling solutions to provide an understanding of game design and business behaviors for the Petitioner's computer games.

A. The *Kazarian* Analysis

On appeal, the Petitioner asserts that USCIS has misinterpreted the Ninth Circuit decision in *Kazarian v. USCIS*, 5906 F.3d 1115 (9th Cir. 2010), as that decision only mentioned a second step in adjudicating petitions for individuals of extraordinary ability, the final merits determination, in dicta. It goes on to state that the proper analysis to be conducted for petitions filed for that immigrant visa classification, as well as for outstanding professors and researchers and individuals of exceptional ability, was set forth in a district court decision, *Buletini v. INS,* 860 F.Supp. 1222 (E.D. Mich. 1994). That decision stated: "Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in [the regulation], the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard." *Buletini*, 860 F. Supp. at 1234. Thus the *Buletini* court did not reject the possibility of a final merits determination. To the contrary, the court implicitly assumed some sort of final merits determination. It did not say that an officer was required to find extraordinary ability once he or she found the three initial evidentiary criteria satisfied. Rather, it said that, in such a case, the officer must explain his or her reasons if he or she ultimately finds extraordinary ability is lacking. Thus, *Buletini* and *Kazarian* are not in conflict.

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of outstanding professors and researchers. USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*, PM-602-0005.1 (Dec. 22, 2010).

In addition, we note that in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Further, it is important to note that the controlling purpose of the regulation at 8 C.F.R. § 204.5(i)(3)(i) is to establish a beneficiary's international recognition, and any evidence submitted to meet these criteria must therefore be to some extent indicative of international recognition. More specifically, outstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition. The regulation at issue provides criteria to be used in evaluating whether a professor or researcher is deemed outstanding. *Employment-Based Immigrants*, 56 Fed. Reg. 30703, 30705 (July 5, 1991). Therefore, as the Director first determined that the evidence satisfied the plain language requirements of specific evidentiary criteria, and then evaluated whether that evidence, as part of the entirety of the record, was sufficient to demonstrate the Beneficiary's recognition as outstanding at the international level, his analysis was in keeping with the statute, regulations, and policy pertaining to the requested immigrant visa classification.

The Petitioner also expresses concern in its appeal brief that USCIS employs a common approach in adjudicating petitions for all three of the classifications as described in its policy memo, noting that the standards described in the pertinent regulations are very different. However, the policy memo is clear in describing a standardized methodology applied to petitions for these three different visa classifications, to which "similar evidentiary requirements and qualitative analyses apply."[2] In all three cases, an objective evaluation of the evidence submitted in support of evidentiary criteria is performed, followed by consideration of the totality of the evidence in determining whether the level of expertise for the particular immigrant classification has been established.

In this case, the Director found that the Beneficiary met the requirements of three of the six evidentiary criteria: those relating to participation as a judge of the work of others, the authorship of scholarly articles, and original scientific or scholarly contributions to the academic field. He also found, however, that the Beneficiary did not meet the requirements of two additional criteria, and after considering the totality of the record, that the Beneficiary is not internationally recognized as an outstanding researcher. Upon review, we agree that the Beneficiary meets the requisite two criteria, and note that the Petitioner does not challenge the Director's findings regarding the criteria relating to the Beneficiary's receipt of major prizes or awards, and published materials written by others about his work. We will therefore consider this evidence along with the balance of evidence in the record in conducting the final merits analysis.

B. Final Merits Determination

In addition to its concerns about the two-part adjudication model that has been adopted by USCIS, the Petitioner asserts that the Director did not give proper consideration to the reference letters it submitted, particularly those which were included in its response to the Director's notice of intent to

[2] USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM update AD11-14* 4 (Dec. 22, 2010)

deny (NOID). We note that in general, the submission of letters of support is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. S*ee Matter of Caron International*, 19 I&N Dec. 791, 795-796 (Comm'r 1988); *see also Matter of V-K-,* 24 I&N Dec. at 500 n.2 (BIA 2008). Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations.[3]

The Beneficiary's contributions as an employee of the Petitioner are described by [redacted] who supervised him for several months after he was hired. [redacted] describes how the Beneficiary built a report which analyzes player trends for a certain game developed by the Petitioner, as well as a model for a second game which provided data for marketing professionals, and explains how this work helped the company to retain customers. While he concludes that this work "is extremely beneficial to the wider research community on a grander scale," [redacted] does not elaborate or provide examples of how the Beneficiary's application of machine learning to improve customer retention has impacted the overall data science field or been recognized beyond those employed by the Petitioner.

[redacted] of the University of [redacted] supervised the Beneficiary in his doctoral studies and collaborated with him in all three of his published papers. He notes in his letter that a paper they co-published in 2015 in the scientific journal *Inverse Problems* was selected as one of its "Highlights of 2015" and was cited in papers written by other researchers in the field to the extent indicative of a "huge impact in the field of mathematics." However, while the Petitioner has submitted evidence of the number of times this paper has been cited by other researchers, and which indicates that published papers in the field of mathematics have generally been cited at a lower rate than those in other academic fields in the past, this evidence is insufficient to establish that this paper has received recognition by the Beneficiary's peers in the field through adoption of his techniques. Further, while [redacted] states the names of two researchers who have cited to this research, he does not provide further context or evidence which might demonstrate how they used this work and why it is considered to be outstanding. In addition, we note that the evidence of "baseline citations" for various academic fields that was submitted does not cover the period since this paper was published, and therefore does not provide an accurate basis for comparison to the work of others in the field.

In addition, a printout from the website of *Inverse Problems* lists the article mentioned above among 14 others which were selected "not as a list of the 'best' articles, but as an interesting and stimulating reading list." It goes on to state that articles were selected for many reasons, including "outstanding research and breakthroughs," "exceptionally clear exposition," or because they contain "results and tools useful to many readers." This selection clearly recognizes the Beneficiary's paper as standing out from others that were published in *Inverse Problems* in 2015, but does not indicate that it is considered to be outstanding in the field of data science at the international level when considering papers published in other journals and in related fields.

[redacted], a postdoctoral research at [redacted] University who collaborated with the Beneficiary on the paper published in *Inverse Problems*, states that all articles published in such journals "are thus internationally recognized as presenting substantive scientific advancement." However, we will not presume that any article that appears in a distinguished scientific journal, without

[3] Although we have reviewed all of the letters submitted in their entirety, not all of them will be mentioned in our analysis.

consideration of its content or the scientific community's reaction to it, is internationally recognized. Although [redacted] further writes that the computational approach presented in this paper "is novel and interesting" and "has since been applied to related problems by other researchers," she does not provide specifics of how she or others have done so, nor is this supported by documentary evidence in the record.

Additional letters are referenced by the Petitioner in its appeal brief, which it asserts show that other researchers have relied upon the Beneficiary's work. However, these three letters do not provide sufficient detail as to how, or whether, those researchers applied the Beneficiary's research in their own work. [redacted] of the University of [redacted] writes that the Beneficiary "developed a new computational approach" which he and others have applied, but does not specify how or to what extent he applied this approach in his own research. Similarly, [redacted] notes the Beneficiary's patent for a reconfigurable antenna, which he indicates "had a significant impact and was widely utilized by several well-known organizations." He also goes on to state that he "will be attempting to use [the Beneficiary's] method (for recovering the scattering and absorption coefficients from optical measurements) for my own research and teaching purposes," but does not indicate that he has already done so. The third letter, from [redacted] of the University of [redacted] does not state how the writer knows of the Beneficiary's work, or that she has applied his research to her own work.

Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." Id. If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). Given the lack of specificity and detail in these letters regarding the recognition and application of the Beneficiary's published research, together with the absence of documentary evidence to corroborate the authors' statements, this evidence does not establish that his work has been recognized or had an impact on the work of other researchers in the field of data science.

The Petitioner further asserts on appeal that the Director applied an incorrect standard when reviewing the evidence of the Beneficiary's participation as a judge of the work of others in his field. Specifically, it asserts that the Director introduced a requirement to the criterion at 8 C.F.R. § 204.5(i)(3)(i)(D) that he was chosen to conduct peer review because of his outstanding ability. However, the Director's decision clearly indicates that the Beneficiary meets this criterion. This is supported by three emails showing that he completed the review of an article submitted for publication in the journal *Computational and Mathematical Methods in Medicine*. However, the Petitioner does not assert, nor does the record support, that this activity sets the Beneficiary apart from his peers in the field.

Turning to the evidence of the patent application on which the Beneficiary is named as a co-inventor, the Petitioner asserts that this "in and of itself demonstrates his contribution to the academic field as patents are crucial in encouraging innovation and competition within the applicable academic field."

We must first note that both the Director and the Petitioner mistakenly refer to the language of the criterion at 8 C.F.R. § 204.5(i)(3)(i)(E) when discussing the patent application within the final merits determination. Under the two-part analysis under *Kazarian* as described above, once the Petitioner establishes that the requisite two criteria have been met, the analysis focuses on whether the totality of the evidence establishes that the individual is internationally recognized as an outstanding researcher. In this case, we previously noted that [redacted]s statement that this patent has had "a significant impact and was widely utilized by several well-known organizations" was not well-supported with details as to how the patent was utilized. The Petitioner now submits an English language version of previously submitted evidence from Google Scholar which shows that the patent has been cited by six other patent applications, including one assigned to The [redacted] Company. This limited evidence does not provide sufficient detail to support [redacted]s assertions regarding the impact and utilization of the Beneficiary's patent.

Accordingly, after consideration of all of the evidence in the record, we conclude that it does not sufficiently establish that the Beneficiary is internationally recognized as outstanding in the field of data science.

III. CONCLUSION

The Petitioner submitted evidence which establishes that the Beneficiary meets the initial requirements of at least two of the requisite evidentiary criteria. However, upon review of the totality of the record, we find that it does not establish that he is internationally recognized as an outstanding researcher in the field of data science.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of B-E-INC.*, ID# 2608207 (AAO May 28, 2019)