



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF B-T-, INC.

DATE: AUG. 29, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a software service, seeks to classify the Beneficiary, a data scientist who specializes in applied statistical modelling, 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, Nebraska Service Center, denied the petition. The Director concluded that the Petitioner had not established that the Beneficiary enjoys the necessary sustained national or international acclaim.

The matter is now before us on appeal. In its appeal, the Petitioner maintains that the Director incorrectly applied case law and erred in his final merits analysis of the evidence.

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

I. LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph 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,

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- (i) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (ii) 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.¹ The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then he or she must provide sufficient qualifying 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).

Satisfaction of at least three criteria, however, does not, in and of itself, establish eligibility for this classification. *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), *aff'd*, 683 F.3d 1030 (9th Cir. 2012); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality" and that USCIS examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true"). Accordingly, where a petitioner submits qualifying evidence under at least three criteria, we will determine whether the totality of 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.

II. ANALYSIS

The Beneficiary received his Ph.D. in Electrical and Computer Engineering from the [REDACTED] at [REDACTED] during which time he applied statistical models to automatic impaired speech recognition. While a Ph.D. student he also worked as an intern for [REDACTED]. Subsequently, at [REDACTED] the Beneficiary developed statistical modeling solutions for the financial sector. According to the Beneficiary's curriculum vitae, he has worked for the Petitioner since October 2013 as a data product designer.

The Petitioner initially offered exhibits relating to six criteria, namely the membership criterion, the judging criterion, the contributions of major significance criterion, the authorship of scholarly

¹ 8 C.F.R. § 204.5(h)(2).

articles criterion, the leading role criterion, and the high salary criterion.² The Director found that the Petitioner met the initial evidence requirements for three criteria, judging, contributions, and scholarly articles, but concluded in a final merits determination that the submissions were not commensurate with national or international acclaim.

On appeal, the Petitioner maintains that once it submitted the necessary initial evidence, the burden shifted to the Director to show why the Beneficiary is not eligible for the classification sought. Also, the Petitioner states that the Director erred in conducting a final analysis of each item individually rather than in the aggregate. Finally, the Petitioner affirms that the Director erred in finding that the Beneficiary has not performed in a leading or critical role for an organization or establishment with a distinguished reputation.³ For the reasons discussed below, we will review all evidence in the context of the final merits determination, concluding that the record is not indicative of the necessary level of acclaim and status in the field.

A. Prior O-1 Nonimmigrant Visa

We note that U.S. Citizenship and Immigration Services (USCIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the Beneficiary. This prior approval, however, does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. There are instances when I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dep't of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989).

We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the Beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

B. Criteria

The record supports the Director's findings regarding the judging and scholarly articles criteria.⁴ Specifically, the Beneficiary has reviewed manuscripts for peer-reviewed journals and authored

² 8 C.F.R. § 2041.5(h)(3)(ii), (iv), (v), (vi), (viii), and (ix).

³ 8 C.F.R. § 204.5(h)(3)(viii).

⁴ 8 C.F.R. § 204.5(h)(3)(iv), (vi).

scholarly articles relating to modelling techniques for recognition of impaired speech. While the Director concluded that the Beneficiary meets the contributions criterion, in the final merits determination the Director questioned whether the Beneficiary's contributions were of major significance, which is a requirement to meet the criterion.⁵ Regardless, as that issue is a qualitative one and the Director's basis of denial was set forth in a final merits determination, we will, in this case, address it at that stage of our analysis. With respect to the leading or critical role criterion, once a Petitioner satisfies at least three of the regulatory criteria, the analysis shifts to whether the evidence establishes that the Beneficiary has the necessary status and acclaim in the field. As the Director found that the Beneficiary meets three criteria, any items that might relate to other criteria are better considered under the final merits analysis.

C. Final Merits Analysis

On appeal, the Petitioner maintains that the Director misapplied *Kazarian*, 596 F. 3d at 1119-20 and should have, instead, looked to the reasoning in *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994). According to the Petitioner, this case held that the burden shifts to USCIS once the necessary initial evidence is produced. First, we note that in contrast to the broad precedential authority of the case law of a United States circuit court such as the 2010 decision in *Kazarian*, we are not bound to follow the published decision of a United States district court in cases arising within the same district.⁶ The reasoning underlying a district judge's decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law.⁷

Buletini, a district court decision from 1994, stated that once USCIS determines that the evidence is sufficient to meet three of the criteria listed in the regulation, it must deem the foreign national to have extraordinary ability unless it "sets forth specific and substantiated reasons for its finding that the [beneficiary], despite having satisfied the criteria, does not meet the extraordinary ability standard."⁸ While the court expressed the requirement that USCIS explain its reasons, it does not suggest the overall burden of proof shifts to USCIS.⁹

In the final merits determination, as noted in the appellate brief, we consider the totality of the record to determine if a petitioner has demonstrated, by a preponderance of the evidence, that he has sustained national or international acclaim, and that his achievements have been recognized in the field through extensive documentation,¹⁰ making him one of the "small percentage who have risen to

⁵ 8 C.F.R. § 204.5(h)(3)(v).

⁶ See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

⁷ *Id.* at 719.

⁸ 860 F.Supp. at 1234.

⁹ See also *Muni v. INS*, 891 F. Supp. 440, 443 (N.D. Ill. 1995) (including a "Totality of the Evidence" section that, like *Buletini*, requires USCIS to explain why evidence that meets three criteria does not establish eligibility, while not suggesting the burden shifts to USCIS). Finally, even in revocation proceedings, the final burden remains on the petitioner and is not discharged until issuance of the visa. *Tongatapu Woodcraft of Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984).

¹⁰ While the statute requires extensive documentation, eligibility is to be determined not by the quantity of the filings

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the very top of the field of endeavor.” We consider the entire record, including submissions that do not meet any of the enumerated criteria.

With respect to the Petitioner’s concern that the Director did not consider the evidence in the aggregate in his final merits analysis, it is appropriate to first discuss and analyze the foreign national’s accomplishments as a framework to perform an overall, final determination. We then weigh all of the filings together to determine if his successes are sufficient to demonstrate that he has extraordinary ability in the respective field of endeavor.¹¹

The Petitioner documented the Beneficiary’s full membership in [REDACTED] which requires “noteworthy achievements in research.” The honor society defines noteworthy achievements as primary authorship of two papers, for which an earned doctoral degree may be substituted. On appeal, the Petitioner does not contest the Director’s finding that this entity does not require outstanding achievements of its members as judged by national or international experts.¹² We agree that the listed requirements for membership do not constitute the type of outstanding achievements contemplated by the regulation. Similarly, the Beneficiary’s membership in [REDACTED] is based on class ranking rather than outstanding achievements in the field. Regardless, for purposes of the final merits determination, the record does not confirm that his selection for these honor societies at the school where he was studying is indicative of or consistent with recognition beyond that school.

The Beneficiary reviewed an article for the [REDACTED] and one for [REDACTED]. The nature of the Beneficiary’s judging experience is a relevant consideration as to whether the evidence is indicative of the Beneficiary’s national or international acclaim.¹³ On appeal, the Petitioner points to information [REDACTED] offers contributors. The materials note that reviewers and editors are the authors’ peers, with comparable standing in the same research field. Given this statement, the Petitioner extrapolates from the statement that editors have “specialized understanding and prior distinguished accomplishments in the subfield of acoustics,” that the reviewers, as their peers, have similar accomplishments. The item goes on, however, to state that editors “seek advice from reviewers who are knowledgeable in the general subject of the paper.” We do not read this section to imply that every reviewer has distinguished accomplishments. Ultimately, scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field; not every peer reviewer enjoys international recognition. The record does not contain information that either journal relies on a small number of distinguished, credited reviewers that would garner the reviewer name recognition. Without responsibilities that set the Beneficiary apart from others in his field, such as evidence that he has reviewed manuscripts for a journal that credits a small, elite group of

alone but by their quality. *Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm’r 1989)). We “examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence.” *Id.*

¹¹ See § 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2), (3); see also *Kazarian*, 596 F.3d at 1119-20.

¹² 8 C.F.R. § 204.5(h)(3)(ii).

¹³ See *Kazarian*, 596 F.3d at 1122.

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referees, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, the Petitioner cannot establish that the Beneficiary's judging experience is commensurate with national or international recognition.

The Petitioner offered several letters discussing the Beneficiary's original contributions to applied statistical research. On appeal, the Petitioner maintains that the Director gave insufficient weight to these letters. We consider them below. The submission of letters from experts supporting the petition, however, is not presumptive evidence of eligibility; USCIS may, as this decision will do below, evaluate the content of those letters as to whether they support the foreign national's eligibility.¹⁴

The first group of letters relate to the Beneficiary's master's and doctoral work on speech recognition at [REDACTED] a professor of electrical and computer engineering and the Beneficiary's advisor at that institution, summarizes his research on spoken assistive technology there. [REDACTED] explains the challenges of this project, including the large amounts of data necessary from those who find it tiring to speak for long periods of time and the difference in speech production between those with speech disorders and those with unimpaired speech. According to [REDACTED] the de facto statistical models for unimpaired speech recognition are [REDACTED]. The Beneficiary first demonstrated the inability of both phone- and word-based [REDACTED] to recognize impaired speech with high accuracy. He then performed the first research on applying the [REDACTED] model adaption technique to the problem of recognition of impaired speech achieving a higher recognition accuracy using only a small amount of impaired speech data. [REDACTED] further states that the Beneficiary expanded on this work for his Ph.D. dissertation, conceptualizing and developing a new statistical model adaptation algorithm, [REDACTED] with "larger improvements than [REDACTED] concludes that the Beneficiary collaborated with experts in clinical speech and hearing and that his studies open up new research opportunities in statistical modeling.

[REDACTED] vice president of emerging technologies for [REDACTED] who was previously a team manager at [REDACTED] discusses the Beneficiary's two projects as an intern at the lab. In the first project, the Beneficiary used talker-dependent values to extract speech features that provided significant improvement in sound class detection performance relating to a speaker's profile (male or female) for [REDACTED] learning systems. With respect to his second project, the Beneficiary investigated ways to improve the performance of the speech-feature-to-sound-category mapping process. The Beneficiary's variance-sensitive algorithm offered substantial gains in classification accuracy for sound class detection. [REDACTED] concludes that the Beneficiary's work exceeded the company's expectations for senior researchers.

¹⁴ See *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988); see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

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Two independent references also address the Beneficiary's work with [REDACTED] for speech recognition. [REDACTED] is a scientist at the [REDACTED] an assistant professor at the [REDACTED] and the founder and chief executive officer of [REDACTED]. He characterizes the Beneficiary's research on the application of statistical modeling to automatic recognition of disordered/impaired speech as "pioneering." [REDACTED] concludes that the Beneficiary's study, one of the earliest in this area, "serves as a benchmark of these techniques' ability to model the production of speech in individuals diagnosed with motor speech disorders." [REDACTED] notes that the Beneficiary presented his findings in this area at two conferences. While [REDACTED] confirms that this work benefits scientists in the field of spoken assistance technology such as himself, he does not explain how he or any other independent researcher has utilized the Beneficiary's findings.

[REDACTED] a professor at the [REDACTED] expresses his excitement over the Beneficiary's innovation with [REDACTED] providing a "significant increase in accuracy for speech recognition in the data-scarce scenario." [REDACTED] confirms that the Beneficiary's technique "has potential applications in tackling statistical modelling challenges in speech synthesis as well." While [REDACTED] offers an example, he does not suggest that the Petitioner's technique is already in use in other areas. Rather, he concludes that the Beneficiary's methods "hold great promise for not just data-scarce speech recognition, but also data-scarce speech synthesis."

Also discussing the Beneficiary's work at [REDACTED] a senior research engineer with [REDACTED] and a fellow former student, describes his work for two courses. In these projects, he attests, the Beneficiary made significant accuracy gains in the automatic recognition of nasal vowels and showed that articulatory dynamics improve the accuracy of speech recognition systems. Finally, [REDACTED] addresses the Beneficiary's participation in [REDACTED] 2008 [REDACTED] which reached the final round. [REDACTED] confirms that the Beneficiary's statistical models were instrumental to the team's success.

All of the Beneficiary's citations relate to his speech recognition work. On appeal, the Petitioner correctly notes that the Director incorrectly calculated the average number of citations for these articles. More relevant than the average number are the highest numbers received by individual articles. Three of his articles garnered moderate citation. While these numbers are higher than the average in computer science, as identified in the Director's decision, they are not representative of the type of national or international acclaim required for this classification. We acknowledge that the number of citations is not, by itself, determinative. The Petitioner must, however, offer some documentation of his acclaim beyond the Beneficiary's circle of colleagues. The Petitioner did not provide examples of the citing articles to show the extent they relied on the Beneficiary's work. Moreover, while the Petitioner did supply letters from those who have not previously worked with the Beneficiary, neither author details how his own work has been influenced by the Beneficiary. For these reasons, the Beneficiary's research contributions pertaining to speech recognition, an area he is no longer pursuing, are not indicative of national or international acclaim.

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After graduating from [REDACTED] the Beneficiary applied his methodologies in a different area. [REDACTED] senior director of software engineering at [REDACTED] and the Beneficiary's project manager at that company, states that the Beneficiary was the only new hire added to [REDACTED] a new internal initiative. During his time there, he worked on two major applied research projects. First, according to [REDACTED] the Beneficiary developed a methodology for designing mathematical functions to score or classify financial instruments, for example to clarify the liquidity of corporate bonds, a subjective notion with no direct correlate of liquidity. The Beneficiary not only developed a flexible scoring framework that is applicable to any scenario with subjective, hard to quantify attributes, but also offered recommendations on how and when to use it. [REDACTED] then discusses the Beneficiary's second research endeavor aimed at developing language models to drive natural search interfaces for the company's data platform used to retrieve financial data on corporate entities. He simplified the existing multi-step search process to a single search query that a user could enter as a question and showed how a user could use the system to perform rule-based investment research, such as a query for all private companies in North America with a specific net income range. While the Beneficiary benefited his employer, the record does not reflect that his work at [REDACTED] has influenced the wider field at a level consistent with national or international acclaim.

Finally, while the Beneficiary has been working for the Petitioner since 2013, the company has not detailed what contributions the Beneficiary has made while working there. Rather, the initial letter includes a list of projects without an explanation of their significance in the field. Accordingly, the Petitioner has not established any recent contributions. In light of the discussion above, the Petitioner has not documented original contributions whose significance in the field is commensurate with national or international acclaim. Rather, he has produced promising methodologies with applicability in the field.

The Petitioner documented that the Beneficiary authored several scholarly articles relating to his Ph.D. research area. It is appropriate to consider the field's response to these articles in this final merits determination.¹⁵ As discussed above with respect to the Beneficiary's contributions, the Beneficiary has only garnered a moderate level of citation, has not shown the extent to which those authors relied on his findings, and has offered letters from independent experts who do not detail their reliance on his work. For these reasons, the Petitioner has not demonstrated that the Beneficiary's publication history is indicative of or consistent with national or international acclaim.

On appeal, the Petitioner relies on the Beneficiary's roles for [REDACTED] and the Petitioner to show eligibility. According to [REDACTED] the Beneficiary improved the accuracy and workability of the company's data platforms. [REDACTED] does not detail how widely the Beneficiary's project is used at the company or its ultimate impact there. Even assuming this role was a critical one for the organization and that the organization enjoys a distinguished reputation, the record lacks evidence showing that [REDACTED] selected the Beneficiary based on his national or international acclaim or that the Beneficiary garnered such acclaim based on his impact there. As noted above, the record

¹⁵ *Kazarian*, 596 F.3d at 1122.

contains little information about the Beneficiary's role for the Petitioner, such as how he fits within the overall hierarchy of the company or his impact there. For these reasons, the Petitioner has not demonstrated that the Beneficiary's roles are commensurate with national or international acclaim.

Finally, the Petitioner initially relied on the wage it was paying the Beneficiary. The Director noted that the salary was below the top 10th percentile for computer and information research scientists. The Petitioner does not contest that conclusion on appeal. We find that the Beneficiary's salary is not indicative of or consistent with national or international acclaim.

Ultimately, the evidence in the aggregate does not distinguish the Beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. The record establishes that the Beneficiary is an experienced data scientist with academic honors who, while studying for his Ph.D. worked on important projects with promising results that have been referenced in other published articles. He participated in the widespread process of manuscript review, successfully completed his assigned projects that improved the accuracy and usefulness of his employer's data platforms, and earned a salary above the median but less than the top 10 percent. The Petitioner, however, has not met its burden of demonstrating that these accomplishments, even in the aggregate, are commensurate with sustained national or international acclaim in the Beneficiary's field.

III. CONCLUSION

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 Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of B-T-, Inc.*, ID# 17969 (AAO Aug. 29, 2016)