U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10066114

Date: AUG. 25, 2020

Appeal of Nebraska Service Center Decision

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

The Petitioner, a researcher in the field of civil engineering, seeks classification as an alien 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 had received a major, internationally recognized award or met at least three of the evidentiary requirements listed under 8 C.F.R. § 204.5(h)(3)(i)-(x). On appeal, the Petitioner asserts that he meets the requisite three criteria.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. See Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal.

I. LAW

Section 203(b)(1) 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 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 that 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).

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). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "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." Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

The Petitioner is a research assistant at [redacted] University, focusing on the development of software tools for the simulation and analysis of the effects of earthquakes and tsunamis on structures. He received a Ph.D. in civil engineering from the same institution in 2014, and indicates that he intends to continue this work in the United States.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that he has received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director found that the Petitioner met two of the evidentiary criteria, relating to his authorship of scholarly articles and his service as a judge of the work of others in his field. On appeal, the Petitioner asserts that he also meets the evidentiary criterion concerning his scientific contributions of major significance. After reviewing all of the evidence in the record, we find that while it establishes that the Petitioner meets the requisite three of the evidentiary criteria, it does not establish that he has enjoyed sustained national or international acclaim or is one of the very few at the top of his field.

> Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv)

The Petitioner submitted two certificates from the journal Computer Methods in Applied Mechanics and Engineering which confirm that he conducted a review in October 2016 and was recognized for his "outstanding contribution in reviewing" in June 2017. In addition, several emails demonstrate that

he conducted reviews of articles submitted to other journals as well. The evidence also includes evidence that he was recommended for appointment to a doctoral dissertation committee for a graduate student at [redacted] University, but does not establish that he was approved for and served in this capacity. The evidence of his peer review activity for scientific journals establishes that the Petitioner meets this criterion.

> Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field. 8 C.F.R. § 204.5(h)(3)(v)

"Contributions of major significance" connotes that the Petitioner's work has significantly impacted the field. See Visinscaia, 4 F. Supp. 3d at 134. For example, a petitioner may show that the contributions have been widely implemented throughout the field, have remarkably impacted or influenced the field, or have otherwise risen to a level of major significance in the field.

The record includes evidence regarding the Petitioner's contributions towards the [redacted] framework and software, specifically the addition of [redacted] interaction ([redacted]) modules which allow for simulation of tsunami effects on structures, as well as the creation of an "interpreter" [redacted] for this software for Python, a computer programming language. In his decision, the Director noted that the Petitioner had submitted evidence of "the number of site visits, posts, and emails directed towards the framework and software…" but found that this evidence had "no probative value" since it did not establish "who is accessing the software and for what purpose."

On appeal, the Petitioner submits additional evidence including email inquiries about the [redacted] software, programs for conferences and courses focusing on use of [redacted] and statistics showing the use of [redacted] in published research papers. Where, as here, a Petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988); Matter of Obaigbena, 19 I&N Dec. 533 (BIA 1988). We will therefore not consider these new materials, but will consider the similar materials submitted with the petition and the Petitioner's response to the Director's request for evidence (RFE).

The Petitioner asserts that the emails, as well as several reference letters and copies of papers published by others in the field, establishe that researchers around the world have implemented his improvements to the [redacted] platform. One of those reference letters was written by [redacted] principal research scientist at the [redacted] in [redacted] IL.[1] [redacted] explains that [redacted] is a critical component of the center's core product, the [redacted] software, since it provides the capability to perform structural analysis of infrastructure, and that it was the Petitioner's development of [redacted] which allowed [redacted] to be integrated into [redacted] A document that appears to be part of a program for the 2018 meeting of the Center for Risk-Based Community Resilience Planning confirms this integration, stating that [redacted] "is available for use by Center and NIST researchers."

[1] All of the reference letters in the record have been reviewed, including those not specifically mentioned in this decision.

Another reference letter which focuses on the Petitioner's development of [redacted] was submitted by [redacted] of the University [redacted] He explains that the Petitioner's work in allowing [redacted] to be used with the Python programming language allows it to be used with other computing tools developed in Python, "accelerating scientific advances." [redacted] states that [redacted] allowed him to conduct advanced analysis on roof "ponding," and that this work has "helped to guide deliberations" within a subcommittee of the American Society of Civil Engineers which is developing revised standards for snow and rain load on buildings.

Additional reference letters indicate that others researchers have also used [redacted] in their own research. [redacted] of [redacted] writes that he has used the software to analyze the behavior of tall buildings in earthquakes, as well as developing his own modules which have been incorporated into [redacted] In addition, [redacted] of the University [redacted] states that he uses the software in teaching graduate level courses, and that one of his graduate students used [redacted] to conduct his thesis research. He also indicates that he invited the Petitioner to make a presentation to his students at a weekly seminar.

Other reference letters in the record speak to the Petitioner's addition of [redacted] models to the [redacted] platform. [redacted] of the Technical University [redacted] who states that he originally developed the [redacted] approach for studying [redacted] notes that because of the Petitioner's work, "tsunami hazards are now combined with the earthquake hazards in a single computational platform, which is a great advance for civil engineers and researchers…" In addition, [redacted] of [redacted] University, who indicates that he has supervised the Petitioner since he began his doctoral studies in 2008, writes that the [redacted] modules developed by the Petitioner for [redacted] are used in a federally sponsored project to develop design guidelines for bridges in five states in the western United States.

The record also includes several emails from graduate students and other researchers from institutions around the world seeking advice on the use of [redacted] and other emails and additional evidence indicating that other research groups have incorporated the software into their existing platforms. While we note that the [redacted] platform was developed and in use several years prior to the Petitioner's contributions to it, the totality of the evidence described above demonstrates that his work has led to broader implementation of the platform and software in the field of civil engineering, and specifically to simulate earthquake and tsunami loads on structures. Accordingly, we disagree with the Director and find that the Petitioner meets this criterion.

> Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media. 8 C.F.R. § 204.5(h)(3)(vi)

The record includes evidence that the Petitioner authored seven articles which were published in scientific journals, and an additional paper which was presented at a scientific conference. We agree with the Director's determination that the Petitioner meets this criterion.

B. Final Merits Determination

As the Petitioner submitted the requisite initial evidence, we will evaluate whether he has demonstrated, by a preponderance of the evidence, his sustained national or international acclaim and that he is one of the small percentage at the very top of the field of endeavor, and that his achievements have been recognized in the field through extensive documentation. In a final merits determination, we analyze a petitioner's accomplishments and weigh the totality of the evidence to determine if their successes are sufficient to demonstrate that they have extraordinary ability in the field of endeavor. See section 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.[2] In this matter, we determine that the Petitioner has not shown his eligibility.

On appeal, the Petitioner does not address his qualification under the final merits determination as described in Kazarian, but instead refers to a previous district court decision, Buletini v. INS, 860 F. Supp. 1222 (E.D. Mich. 1994). However, we note that in contrast to the broad precedential authority of the case law of a United States circuit court, USCIS is generally not bound by the published decisions of United States district courts. 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. Regardless, we find that the Buletini decision does not conflict with but rather supports the Kazarian court's characterization of the adjudication process as including a final merits determination.[3]

As discussed above regarding the Petitioner's contributions to the field of civil engineering, the evidence shows that his work in adding a Python translator and [redacted] modules to the [redacted] computer software framework has been implemented by individual researchers and engineers as well as research groups and institutions. In addressing the final merits determination in his response to the Director's RFE, the Petitioner referred to the reference letters that were previously discussed, stating that through them "my influence in the field on an international scale is apparent." However, it is not "influence" that must be demonstrated in the final merits analysis, but acclaim. Although these letters, together with evidence of interest in and adoption of his work, establish the significance of his contribution to the field in implementing improvements to the [redacted] software and framework, they were prepared for the purposes of the instant petition and do not show that he has been praised for his work beyond its scope, or for a sustained period as required.

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[2] See also 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), https://www.uscis.gov/policymanual/HTML/PolicyManual.html (stating that USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established, by a preponderance of the evidence, the required high level of expertise for the immigrant classification).

[3] The Buletini court, referencing the 1992 Weinig letter, said: "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. 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.

On appeal, the Petitioner also refers to the total number of citations to his published work by other researchers, and notes that in previous non-precedent decisions we found that dozens of independent citations were found to be persuasive in establishing the significance of the contributions made by the petitioners in those cases. These decisions were not published as precedents and therefore do not bind USCIS officers in future adjudications. See 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. We note that both of these decisions precede Kazarian, and therefore did not apply the two step analysis from that decision. In addition, the petitioners in those cases performed research in different fields, and the Petitioner has not demonstrated that the number of citations deemed sufficient to show the major significance of contributions made in those fields is sufficient to show sustained acclaim or standing at the top of his field. Although we will consider the total number of citations to the Petitioner's work as one factor when determining whether he has received sustained national or international acclaim and is one of the very few at the top of his field, the record does not include comparative evidence which demonstrates that the Petitioner's citations place him as one of the small percentage at the top of his field.

The record also includes evidence of the Petitioner's participation as a peer reviewer for several scientific journals, as well as information regarding the impact factor of three of these journals. The emails include boilerplate language thanking the Petitioner for his time, but do not remark on the quality of the review or otherwise praise his work. In addition, while a certificate from Computer Methods in Applied Mechanics and Engineering was given to him for "Outstanding Contributions in Reviewing," the record does not include any explanation of the criteria used in awarding this certificate. Therefore, this evidence does not demonstrate that either the quality or quantity of the Petitioner's peer review activity is indicative of sustained national or international acclaim.

For all of the reasons stated above, we find that the Petitioner has not established that he has sustained acclaim in his field at the national or international level, or that he has standing in his field as one of the very few at the top.

III. CONCLUSION

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. 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, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.