U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-D-

DATE: DEC. 16, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a foreign language instructor, seeks classification as an individual of "extraordinary ability" in education. *See* § 203(b)(1)(A) of the Immigration and Nationality Act (Act); 8 U.S.C. § 1153(b)(1)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The classification the Petitioner seeks makes visas available to foreign nationals who can demonstrate extraordinary ability through sustained national or international acclaim and achievements that have been recognized in the area of expertise through extensive documentation. The Director determined that the Petitioner had not satisfied the initial evidentiary requirements set forth at 8 C.F.R § 204.5(h)(3), which necessitate a one-time achievement or evidence that meets at least three of ten regulatory criteria. On appeal, the Petitioner submits a statement.

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,
>
> (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 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 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).

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 evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination). *See also Rijal v. USCIS*, 772 F.Supp.2d 1339 (W.D. Wash. 2011) (affirming our proper application of *Kazarian*), *aff'd*, 683 F.3d. 1030 (9th Cir. 2012); *Visinscaia v. Beers*, 4 F.Supp.3d 126, 131-32 (D.D.C. 2013) (finding that U.S. Citizenship and Immigration Services (USCIS) appropriately applied the two-step review); *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").

II. ANALYSIS

The issue at hand is whether the Petitioner has demonstrated extraordinary ability in education. He does not rely on a one-time achievement (that is, a major, internationally recognized award), but states he has satisfied at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x). According to the Petitioner, he has submitted evidence that meets six of these regulatory criteria. On appeal, the Petitioner asserts that the Director did not specifically discuss any of his submissions other than the reference letters. We will address the entire record below.

A. Comparable Evidence

Before addressing the criteria, we note that the Petitioner has made both explicit and implicit requests for us to consider certain evidentiary submissions as "comparable evidence." The relevant regulation reads: "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." 8 C.F.R. § 204.5(h)(4) (referring to the ten criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) as the "above standards"). To rely on this provision, the Petitioner must explain why the regulatory criteria are not readily applicable to his occupation, as well as how the items provided are "comparable" to the documents required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

On appeal, the Petitioner explicitly requests that we consider a previous Form I-140 approval as comparable evidence. He states as follows:

> I believe that, in addition to the submitted evidence, my previously approved I-140 (COA: E16 – Alien of extraordinary ability) should serve as additional 'comparable evidence' as it proves that I had previously established eligibility as an alien of extraordinary ability. I have not lost my abilities since. I have continued to work successfully in the field of language training. I have not suffered from any medical problems that could potentially interfere with my skills or abilities . . . .

The Petitioner does not state which criteria do not readily apply to his occupation as a foreign language instructor and how the prior approval is comparable to a particular criterion. As a result, the Petitioner has not demonstrated that he may rely on 8 C.F.R § 204.5(h)(4), or that the previous Form I-140 approval is comparable to the criteria at 8 C.F.R § 204.5(h)(3)(i)-(x). *See* 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*, 22, (December 22, 2010), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf.

While USCIS previously granted an I-140 visa petition filed by the Petitioner, the prior approval from 2007 does not preclude us from denying future petitions several years later where eligibility and sustained acclaim has not been demonstrated, especially when prior approvals may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). We need not treat 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, which issued the approval, is comparable to the relationship between a court of appeals and a district court. We are not bound to follow an earlier determination made by a service center where that initial determination was based on a misapplication of the law. *Glara Fashion, Inc. v. Holder*, 11 CIV. 889 PAE, 2012 WL 352309 *7 (S.D.N.Y. Feb. 3, 2012); *Royal Siam v. Chertoff*, 484 F.3d 139, 148 (1st Cir.2007); *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 177 (D.Mass.2000)) (Dkt.10); *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp.2d 800, 803 (E.D.La.1999), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001). For these reasons, the Petitioner has not demonstrated that his previous Form I-140 approval constitutes comparable evidence. We discuss his specific reliance on this provision below.

B. Evidentiary Criteria[1]

> *Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.*

The plain language of this criterion requires evidence showing both 1) that the Petitioner's receipt of awards or prizes for excellence in the field of endeavor, and 2) that those prizes or awards are

[1] We have reviewed all of the evidence and will address those criteria the Petitioner asserts that he meets or for which the Petitioner has submitted relevant and probative evidence.

nationally or internationally recognized. The Petitioner does not maintain that he has himself received nationally or internationally recognized prizes or awards. Instead, the Petitioner, an instructor in the German and English languages, reasons that his accomplishments are apparent from the successes of his students. In his request for evidence (RFE) response, he stated: "As a language trainer, the quality of my work is not measured in awards I receive but in the accomplishments my students make due to the language skills they learn from me." With this explanation, the Petitioner suggests that the successes of his students are comparable to his own receipt of lesser nationally or internationally recognizes prizes or awards for excellence in the field of endeavor. As noted above, however, reliance on 8 C.F.R § 204.5(h)(4) must include an explanation as to why the regulatory criteria are not readily applicable, as well how the items provided are "comparable" to the documents otherwise required. In this case, the Petitioner does not provide support to demonstrate that nationally or internationally recognized awards are not readily applicable in his field.

In addition, the Petitioner has not established that the documentation provided is comparable to the evidence normally required by this criterion. The Petitioner submitted foreign language proficiency certifications received by his students from the an organization internationally recognized for teaching and evaluating German language ability. Two students, and studied with the Petitioner for three and a half months before taking and passing the in To satisfy this criterion the awards received must be "nationally or internationally recognized prizes or awards for excellence in the field of endeavor." The Petitioner asserts that the qualifies as such. Although assessments are indeed known worldwide, they are recognized as proof of a given proficiency with the German language. As explained by the Petitioner, passing the exams can assist non-native speakers in acquiring jobs in Germany or with German companies. It does not follow that such certifications represent nationally or internationally recognized awards for excellence.

The Petitioner also indicated that he considers the certifications to be awards for him personally due to the accomplishment they represent for him as an instructor. The Petitioner and his references assert that the certifications received by the are very prestigious and difficult to obtain. However, neither the Petitioner nor his references provide details or other documentation to corroborate these statements. Similarly, the Petitioner affirmed that preparing for the normally requires several years of training, but that due to his "accelerated training program, merely needed a few months for this achievement." The Petitioner did not provide evidence to corroborate the length of time generally required to prepare for certification tests or her overall period of German studies. An article in the record reflects that studied German for nine years, including a year at preparing for the In addition, although the Petitioner compares the three and a half months he worked with Ms. White to the years generally required, he does not address the nine years she studied German prior to working with him. As a result, the Petitioner has not demonstrated that his students' receipt of the is the equivalent of a nationally or internationally recognized award for excellence for him as a teacher.

In his RFE response, the Petitioner also identified comparable evidence of awards in the form of favorable reviews of his instruction from faculty at [redacted] and the [redacted] Head of the German Section in the Department of Languages at [redacted] discusses the shortage of German teachers with the Petitioner's skills. [redacted] an Instructor of German at the [redacted] favorably reviewed the Petitioner's course as part of an audit of [redacted] As noted above, the Petitioner did not demonstrate that this criterion is not readily applicable to his occupation, a necessary prerequisite for relying on comparable evidence. *See* 8 C.F.R. § 204.5(h)(4). In addition, the Petitioner did not show that these letters are comparable to the documentation required by the criterion, which focuses on recognition of excellence in a nationally recognized forum. Ultimately, he has not provided sufficient justification for considering the opinion of these faculty members as the equivalent of a nationally or internationally recognized award for excellence.

The Petitioner also provided two "Outstanding Achievement Awards" from [redacted] for his foreign language training dated January 4, 2005, and October 21, 2005. He did not explain, however, why the awards were given, nor did he show that they are nationally or internationally recognized or otherwise known beyond his employer. As a result, they do not satisfy this criterion. For all of the above reasons, the Petitioner has not met the plain language requirements of the criterion, nor has he submitted comparable evidence necessary to satisfy this criterion pursuant to 8 C.F.R. § 204.5(h)(4).

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.*

The Petitioner maintained he met this criterion by providing an article about his students in [redacted] internal publication, [redacted] As part of a prior petition, the Petitioner submitted a copy of a three sentence article, entitled [redacted] (TS-F-2) and [redacted] (TS-11)," which includes a picture of the two women and a statement regarding their passing the [redacted] In order to satisfy this criterion, the Petitioner must provide evidence of material published about him in a professional or major trade publication or other major media. The Petitioner has not demonstrated that [redacted] internal newsletter qualifies as such. Moreover, the material is not about the Petitioner. As a result, the Petitioner has not satisfied the plain language requirements of this criterion.

> *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 specification for which classification is sought.*

In his RFE response, the Petitioner maintained he satisfied this criterion by providing the following examiner licenses: telc German B1-B2, telc German C1-C2, and telc English B1-B2. The Petitioner asserted that, "[a]s a telc examiner, I judge, evaluate and grade language learners and people who want to work as a language teacher for the respective levels." While the Petitioner submitted

certification that he completed a "telc English B1-B2" examiner training workshop and was therefore qualified and licensed to act as an oral examiner, the Petitioner did not document that, once licensed, he then judged the work of others. Without confirmation from the entity that used his services as an examiner, the Petitioner's blanket statement that he acts as an examiner does not constitute evidence of his past participation. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Certifications that may allow the Petitioner to judge the work of others in the future do not satisfy this requirement. As a result, the Petitioner has not met the plain language of this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

In response to the Director's RFE, the Petitioner cited his participation in an event with the German President as evidence that satisfies this criterion:

> As one of only 100 Europeans, I was invited to [redacted] the official residence of the German President, [redacted] in [redacted] to talk about the future of Europe and to actively contribute to shaping that future. I was in a group of only 6 people who discussed the importance of language learning for the future of the European Union. This was not only a great honor. I was able to speak directly to the German President about the relevance and importance of language learning and the ideas that were gathered in the course of this special event were then also communicated to other politicians in the EU.

The Petitioner provided a picture of himself with the President and an article from the [redacted] website to corroborate his attendance. The article refers to the Petitioner as an English instructor at [redacted] The record does not confirm that the Petitioner's participation in this event was covered beyond his own employer. Regardless, his participation in the event does not, in and of itself, indicate a scientific, scholarly, artistic, athletic, or business-related contribution of major significance to the field. The plain language of the phrase "contributions of major significance in the field" requires evidence of an impact beyond one's employer and clients or customers. *See Visinscaia v. Beers*, 4 F. Supp. 3d 126, 134-35 (D.D.C. 2013) (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole). Other than emphasizing of the general importance of language learning, the Petitioner has not provided specifics regarding his discussions and how his participation in the meeting, or even the meeting itself, has already impacted the field as a whole. Discussions themselves cannot be considered a contribution of major significance without resulting in an articulable impact.

The Petitioner also provided numerous letters from former students who speak very highly of his talents as a language instructor. Nearly all of those who studied with the Petitioner remark that their language abilities improved dramatically as a result of their time with the Petitioner. The letters confirm that these students consider the Petitioner a very good teacher. However, this criterion requires that the Petitioner has made a contribution of major significance in the field as a whole,

beyond his particular students. *Id.* Neither the Petitioner nor those who support the petition affirm contributions that rise to that level of impact. Furthermore, letters that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *See Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). For these reasons, the Petitioner has not provided evidence of a contribution of major significant in the field of endeavor, and has not submitted sufficient documentation to satisfy this criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

The Petitioner indicates that he has performed a critical role for several organizations with distinguished reputations by performing language instruction for the employees of companies such as [redacted] We agree that these companies are organizations with distinguished reputations. However, the Petitioner must also have shown that he played a critical role for such an organization, i.e. one in which he was responsible for the company's success or standing.

In this case, the Petitioner provided several reference letters written by former students who were employees of the above mentioned companies. These former students attest to the role the Petitioner played in their language learning. The Petitioner stated: "As a language trainer, I was not a direct employee but my work did indirectly contribute to the success of these reputable companies . . . ." We do not doubt that the Petitioner assisted the students in his classes, which indirectly had a positive effect on the organizations for which they worked. However, to have played a critical role in the organization as a whole, the Petitioner must demonstrate a much stronger link between his actions and an establishment's successes. The companies the Petitioner cited are large multinational corporations with decades of history. The role of the Petitioner was as a temporary instructor to a small group of the companies' employees. The evidence provided does not establish that the Petitioner's role with these companies was critical such that his impact was significant. As a result, he has not satisfied this criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The Petitioner must demonstrate that he has commanded a high salary in relation to others in the field. The "others in the field" must have performed similar work during the same time period. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

The Petitioner provided his income tax report showing that he was paid 24,506.65 Euros by in 2014. The Petitioner also submitted "Invoice Details" from his freelance business, for that year. In his RFE response, the Petitioner implies all invoices for represent his salary. However, the invoice list provided contains no explanations regarding what goods or services the invoices reference. The record does not confirm that has no other employees or business expenses such that all of the company's gross income represents the Petitioner's salary. In addition, the record does not contain an income tax report reflecting income the Petitioner received from As a result, we will consider as salary only the income the Petitioner received from Moreover, the Petitioner has not established that comparing his consulting fees with the annual salaries of language teachers is a meaningful comparison. A print-out from shows the salaries for language teachers in (the German city in which the Petitioner worked) in 2014/2015. Language teachers earned annual salaries of a minimum of 9,480 Euros, an average of 16,452 Euros, and a maximum of 39,216 Euros.[2] The Petitioner's salary of 24,506.65 Euros for the year falls approximately halfway between the average and maximum salaries for teachers. An above-average salary is not sufficient to meet the plain language requirement of a high salary in relation to others in the field.

Lastly, the Petitioner provided a "Letter of Intent" from the German company dated February 2015 offering him an annual salary of $72,000 to employ him in the company's American subsidiary. First, the plain language of the regulation requires that the Petitioner have already commanded the high salary or significantly high other remuneration. A future commitment is insufficient. The job offer listed the Petitioner's duties as the following:

-language training of local employees
-translation of all correspondence and direct project management
-sales management and direct communication with our customers
-consulting services for local new hires
-procurement of parts and services from local suppliers
-reporting to the management team in Germany
-acquisition of new potential customers
-interpretation of services during official business functions

Although the letter specifically affirmed that the Petitioner will be paid "a significantly higher salary than what we would normally pay somebody in a similar position," the record contains no details or corroboration of this assertion. The letter did not indicate what would normally pay someone in a similar position, nor does the Petitioner provide other objective evidence to show what someone in a similar position would normally be paid in the field. We need not accept primarily conclusory assertions. *1756, Inc. v. U.S. Att'y Gen.*, 745 F.Supp. 9, 15 (D.C. Cir. 1990). Without data to demonstrate that he has already commanded a salary that is high, the Petitioner has not met

[2] The print-out shows salaries in terms of monthly amounts of a minimum 790 Euros, an average of 1,371 Euros, and a maximum of 3,268 Euros. These values were multiplied by 12 to determine the annual salaries.

this criterion. For the reasons stated above, the Petitioner has not met the plain language requirements of this criterion.

C. Summary

The documentation provided does not satisfy at least three criteria, either through their plain language meaning or the comparable evidence provision at 8 C.F.R. § 204.5(h)(4). As a result, the Petitioner has not submitted the required initial evidence of either a one-time achievement or at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must show that the individual has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of his or her field of endeavor. Had the Petitioner satisfied at least three evidentiary categories, the next step would be a final merits determination that considers all of the submissions in the context of whether or not the Petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor," and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2), (3); *see also Kazarian v. USCIS*, 596 F.3d 1115, 1119-20 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination). Although we need not provide the type of final merits determination referenced in *Kazarian*, a review of the record in the aggregate supports a finding that the Petitioner has not established the level of expertise required for the classification sought.

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. § 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S-D-*, ID# 14856 (AAO Dec. 16, 2015)