U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 4839843

Date: NOV. 27, 2019

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (Extraordinary Ability – O)

The Petitioner, a digital marketing company, seeks to classify the Beneficiary as a foreign national of extraordinary ability in business. To do so, the Petitioner seeks O-1 nonimmigrant classification, available to foreign nationals who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i).

The Director of the California Service Center denied the petition, concluding that the Petitioner did not satisfy, as required, the alternative evidentiary criteria applicable to individuals of extraordinary ability in business, either a major, internationally recognized award or at least three of eight possible forms of documentation. 8 C.F.R. § 214.2(o)(3)(iii)(A)-(B).

On appeal, the Petitioner maintains that the evidence satisfies at least three of the eight regulatory categories of evidence at 8 C.F.R. § 214.2(o)(3)(iii)(B), and that the Petitioner submitted comparable evidence of the Beneficiary's extraordinary ability pursuant to the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C).

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

I. LAW

As relevant here, section 101(a)(15)(O)(i) of the Act establishes O-1 classification for an individual who has extraordinary ability in the sciences, arts, education, business, or athletics that has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. Department of Homeland Security (DHS) regulations define "extraordinary ability in the field of science, education, business, or athletics" as "a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor." 8 C.F.R. § 214.2(o)(3)(ii).

Next, DHS regulations set forth alternative evidentiary criteria for establishing a beneficiary's sustained acclaim and the recognition of achievements. A petitioner may submit evidence either of "a major, internationally recognized award, such as a Nobel Prize," or of at least three of eight listed categories of documents. 8 C.F.R. § 214.2(o)(3)(iii)(A)-(B). If the petitioner demonstrates that the listed criteria do not readily apply to the beneficiary's occupation, it may submit comparable evidence to establish eligibility. 8 C.F.R. § 214.2(o)(iii)(C).

The submission of documents satisfying the initial evidentiary criteria does not, in and of itself, establish eligibility for O-1 classification. *See* 59 Fed. Reg. 41818, 41820 (Aug. 15, 1994)("The evidence submitted by the petitioner is not the standard for the classification, but merely the mechanism to establish whether the standard has been met.") Accordingly, where a petitioner provides qualifying evidence satisfying the initial evidentiary criteria, we will determine whether the totality of the record and the quality of the evidence shows sustained national or international acclaim such that the individual is among the small percentage at the very top of the field of endeavor. *See* section 101(a)(15)(o)(i) of the Act and 8 C.F.R. § 214.2(o)(3)(ii), (iii).[1]

II. ANALYSIS

The evidence indicates that in 2017 the Beneficiary was awarded a Master of Science in Technology from [redacted] University [redacted]. Between 2016 and the date when the instant petition was filed on September 6, 2018, the Beneficiary was employed as the co-owner and CEO of the petitioning organization. The Petitioner asserts that the Beneficiary is a digital marketing executive of extraordinary ability.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that the Beneficiary has received a major, internationally recognized award, it must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*1*)-(*8*). The Director found that the Petitioner did not meet any of the evidentiary criteria at 8 C.F.R § 214.2(o)(3)(iii)(B). On appeal, the Petitioner maintains that the exhibits satisfy four of those criteria and, alternately, that it has established the Beneficiary's eligibility under the "comparable evidence" regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C). After reviewing all of the evidence in the record, we find that the exhibits do not satisfy any of the evidentiary categories described at 8 C.F.R. § 214.2(o)(3)(iii)(B)-(C). We will analyze the evidence submitted under each of those criteria below. [2]

> *Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(4).

The Director determined that the evidence did not sufficiently establish that the Beneficiary has judged the work of others in the field. The Petitioner asserts that the Beneficiary taught, reviewed and

[1] *See also Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010), in which we held that "truth is to be determined not by the quantity of evidence alone but by its quality."

[2] On appeal, the Petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

mentored other individuals in the field. It provided a letter from [redacted], a lecturer in technological entrepreneurship at [redacted]. He states the Beneficiary worked as a course grader for one of his courses, based upon his "in-depth and advanced" understanding of the topic." He also indicates that the Beneficiary "supervised and mentored" dozens of undergraduate and graduate students, including [redacted] and [redacted], in [redacted]'s [redacted] entrepreneurial programs. He describes the Beneficiary's mentoring duties in these programs as including critiquing startup ideas, business plans, and funding sources.

The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified in the regulation. Here, the evidence submitted does not demonstrate how informal instances of student evaluation in an educational setting equates to participation as "a judge" of the work of others in the field. Similarly, the Petitioner has not established that the Beneficiary's instances of student business mentoring at [redacted] entrepreneurial programs, which appear to involve presiding over presentations and providing informal feedback to students, satisfy this criterion. Accordingly, the Petitioner has not demonstrated that providing services as a grader and mentor in a university educational setting equates to participation as "a judge" of the work of others in the field.

In light of the foregoing, we agree with the Director's determination that the Petitioner has not satisfied the requirements of this regulatory criterion.

> *Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*5*).

In support of its assertion that the Beneficiary has made significant original contributions to the field, the Petitioner submitted several testimonial letters from his clients, mentors, and colleagues. [redacted] CEO of [redacted] a manufacturer of biodegradable packaging, states that he employed the Beneficiary's services on "very technical digital intelligence topics." He claims that the Beneficiary has educated himself in the fields of business intelligence, data analytics, computer science, and digital marketing "to advanced levels . . . attained by less than the top 0.1% of executives." He praises the Beneficiary's knowledge of such digital intelligence topics as funnel stacking, sales funnels, algorithms, sensitivity analyses, and coding.

[redacted], a retired PGA golfer, states that the Beneficiary helped create an online academy to market his educational golfing videos, and performed a successful launch and subsequent monetization of his book. He asserts that the Beneficiary's "unique combination" of knowledge in technology and marketing easily place him "within the top 1% of executives and leaders." [redacted] chair of the Beneficiary's academic department at [redacted] states that his company was pleased with the advice the Beneficiary provided on search engine optimization and digital marketing strategy. [redacted] CEO of a video production company, credits the Beneficiary with helping to grow her business, and describes him as "within the top 1% of executives, internationally." [redacted], a retired investment professional, indicates that the Beneficiary is a highly respected marketing expert, but he does not state how he first became aware of the Beneficiary's work.

The Petitioner also submitted letters from the Beneficiary's mentors and colleagues from [redacted] [redacted] the Beneficiary's master's thesis advisor, describes him as "a strategic visionary with

technical skills and competencies, and extraordinary communication and leadership skills." [redacted] an employee of the social entrepreneur network [redacted] praises the Beneficiary's ability to grow and expand the petitioning company. The aforementioned letter from [redacted] indicates that the Beneficiary mentored [redacted] through his work with the [redacted] entrepreneurial programs at [redacted].

In order to satisfy this criterion, the petitioner must establish not only that the beneficiary has made original contributions but that they have been of major significance in the field. For example, it may support the record with evidence that a beneficiary's contributions have been widely implemented, have remarkably impacted or influenced the field, or have otherwise risen to a level of major significance in the field. Demonstrating ability as a skilled digital entrepreneur is not itself a contribution of major significance; rather, the Petitioner must demonstrate that the Beneficiary has impacted the field as a whole. *Cf. Visinscaia v. Beers*, 4 F. Supp. 3d 126, 134-135 (D.D.C. 2013) (upholding a finding that a ballroom dancer had not met a similar criterion in the regulations pertaining to immigrants of extraordinary ability because she did not demonstrate her impact in the field as a whole).

The record does not include documentary evidence showing the widespread implementation of the Beneficiary's work, that it has been seminal, or that it otherwise equates to an original contribution of major significance in the field. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International,* 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought. *Id.* Here, the preceding letters of recommendation demonstrate that the Beneficiary is admired for his skills in the fields of business intelligence, data analytics, computer science, and digital marketing, and that his work on projects has benefited his clients and the petitioning company, and earned the respect and admiration of those with whom he has collaborated and consulted. However, those letters do not establish that he has made original business-related contributions of major significance in his field.

On appeal, the Petitioner highlights a video podcast interview with the Beneficiary posted on [redacted] and evidence that he spoke at the [redacted] Summit Spring 2018.[3] It asserts that these items constitute "corroborating evidence of the contributions to the field made by the [B]eneficiary." First, the Petitioner has not shown what impact the Beneficiary's interview has had in the field of digital marketing, such as evidence that others in the field have cited his interview or relied on his interview in their own work. The reference letters in the record also do not mention the Beneficiary's interview or its impact in the field. Without evidence of impact, the Petitioner has not shown that his interview constitutes a contribution of major significance in the field. The Petitioner has also not shown what impact the Beneficiary's public engagements have had in the field. Although the record includes letters that praise the Beneficiary's work as a speaker and presenter, the letters do not establish that the Beneficiary's impact in the field is consistent with contributions of major significance in the field. These items show that the Beneficiary has been disseminating his ideas to

[3] The Petitioner also provided evidence of the Beneficiary's receipt of an invitation to speak at [redacted]' in October 2018, an interview request in November 2018 from [redacted] and digital marketing services he performed in November 2018 for insoles manufacturer [redacted] However, these events took place after the date when the petition was filed on September 6, 2018. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

the public and in the field. They do not show, however, that the Beneficiary has had any impact in the field after the dissemination.

Based on the foregoing, the Petitioner has not established eligibility under the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*5*).

> *Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*7*).

On appeal, the Petitioner maintains that it has employed the Beneficiary in a critical or essential capacity. The Director determined that although the record shows that the Beneficiary has been employed in a critical or essential capacity for the petitioning company as its CEO and co-founder, the Petitioner did not establish that it is or was a company with a distinguished reputation, as required by this criterion. We agree with the Director's determination.

The Petitioner provided two letters from [redacted] a professor at [redacted] and the Petitioner's president. He confirms that the Beneficiary has been CEO of the Petitioner since its inception in 2016, and that the Beneficiary owns 25% of the company. He asserts that as a direct result of the Beneficiary's "outstanding abilities" the Petitioner has grown "from zero to a projected annual income of over $500,000 in 2018." [redacted] a professor at [redacted] and the Petitioner's COO, states that the Beneficiary grew the Petitioner's "sales pipeline from $9,000 per year to over $360,000 per year within a time frame from May 2017 to May 2018." On appeal, the Petitioner provides a 2018 profit and loss statement indicating the company has gross income in excess of $470,000.

While the aforementioned documentation indicates the current stage of development of the petitioning company, it does not establish that it has a distinguished reputation in the field. Based on the foregoing, the Petitioner has not established the Beneficiary's eligibility under this criterion.

> *Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*8*).

The record contains a paystub confirming that in 2018 Petitioner paid the Beneficiary a salary of $19,231. Assuming that the Beneficiary will be paid a salary of $70,000 per year and other compensation in the form of "equity in the company," as stated on the Form I-129, we agree with the Director's conclusion that the Petitioner has not established the Beneficiary's past or future salary is high in relation to others in the field.

Within the Petitioner's response to the Director's request for evidence, the Petitioner submitted, as a point of comparison, an O*Net printout from the Department of Labor, Office of Foreign Labor Certification, reflecting that the Level 4 prevailing wage for market research analysts and marketing specialists in the Beneficiary's geographic area is $80,766 per year. The Beneficiary's salary does not exceed the Level 4 prevailing wage for the Petitioner's area.

Additionally, the prevailing wage only reflects the *average* wage paid to all similarly employed workers in the same occupation in the same area. 20 C.F.R. § 655.10. The prevailing wage, alone, is insufficient to establish whether a salary is high in relation to others in the field, as required by the plain language of the regulation. The salary screenshot mentioned above only provided average and median salary data for market research analysts and marketing specialists and did not identify the high-end salaries for those performing work with similar responsibilities as the Beneficiary. Therefore, the Petitioner has not shown the proposed salary on the Form I-129 constitutes a high salary consistent with the plain language of the regulation.

Further, while the regulatory language of the criterion also allows for evidence of "other remuneration for services," the Petitioner did not provide evidence showing these other incentives, and that they are high in relation to others in the field. Finally, as mentioned by the Director, according to the Petitioner's signed employment agreement dated May 8, 2017, the Beneficiary will be paid $42,000 per year, and other compensation. The inconsistency between the wage stated on Form I-129, and that in the employment agreement prevents us from determining the Beneficiary's salary and whether it is considered high in relation to others in the field.

Based on the foregoing, the Petitioner has not established that the Beneficiary satisfies the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*8*).

In summary, the Petitioner has not established that the Beneficiary satisfies the antecedent regulatory requirement of three types of evidence.

B. Comparable Evidence under 8 C.F.R. § 214.2(o)(3)(iii)(C)

On appeal, for the first time, the Petitioner asserts that it has previously submitted qualifying comparable evidence of the Beneficiary's eligibility under the "comparable evidence" provision at 8 C.F.R. § 214.2(o)(3)(iii)(C). The Petitioner's appeal statement provides that the Director's decision did not "evaluate the evidence except through the listed criteria provided in the regulations" and "consider how, given the cutting-edge nature of the field, the evidence fits into alternative categories." Within its appellate brief, the Petitioner states that the Director did not consider as "alternate evidence" the submitted "letters from multiple clients attesting to the incredible effectiveness of the techniques developed by the [B]eneficiary" and "[i]ncome information showing explosive revenue growth for the [P]etitioner."

The regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C) provides that comparable evidence "may" be submitted if certain criteria in 8 C.F.R. § 214.2(o)(3)(iii)(B) do not readily apply to the beneficiary's occupation. It is clear from the use of the word "must" in 8 C.F.R. § 214.2(o)(3)(iii), as opposed to the word "may" in 8 C.F.R. § 214.2(o)(3)(iii)(C), that the rule, not the exception, is that the petitioner is required to submit evidence to meet at least three of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). Thus, the use of comparable evidence does not change the standard for the classification; a petitioner relying upon comparable evidence must still establish the beneficiary's eligibility by satisfying at least three separate evidentiary criteria as required under the regulations. In addition, as previously stated, section 291 of the Act, 8 U.S.C. § 1361, places the burden of proof on the party seeking benefits. Thus the petitioner has the burden to demonstrate why the regulatory criterion does not readily apply and

how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 214.2(o)(3)(iii).

Here, the Petitioner does not explain why the regulatory criteria are not readily applicable to the Beneficiary's occupation of digital marketing. The Petitioner claims that "given the cutting-edge nature of the field, the evidence fits into alternative categories," however, it did not support its assertions with documentation. An inability to meet a regulatory criterion is not necessarily evidence that it does not readily apply to the beneficiary's occupation. Further, the record does not establish that the evidence the Petitioner requests us to consider as comparable is, in fact, comparable to the evidence discussed in the criteria. The Petitioner references the testimonial letters and documentation regarding the Petitioner's revenue growth, which we have already considered under the criteria. The Petitioner does not explain why the fact that members of the Beneficiary's field support the petition with letters that praise the Beneficiary but do not sufficiently demonstrate that he meets specific criteria are comparable evidence in and of themselves.

In light of the above, the evidence submitted does it meet the requirements of the comparable evidence provision at 8 C.F.R. § 214.2(o)(iii)(C).

III. CONCLUSION

The record does not satisfy, as required, the evidentiary criteria applicable to individuals of extraordinary ability in business: a major, internationally recognized award, at least three of eight possible forms of documentation, or comparable evidence. 8 C.F.R. § 214.2(o)(3)(iii)(A)-(C). Consequently, the Petitioner has not established that the Beneficiary is eligible for the O-1 visa classification as an individual of extraordinary. 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.