U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-K-S-P-

DATE: NOV. 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a sole proprietorship, seeks to temporarily employ the Beneficiary as an executive assistant and a physics researcher. To do so, the Petitioner seeks O-1 nonimmigrant visa 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 Vermont Service Center denied the petition, concluding that the Petitioner did not satisfy the evidentiary criteria applicable to individuals of extraordinary ability in the sciences, 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 provides additional evidence and asserts that the Beneficiary meets the regulatory requirements for O-1 classification.

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). And 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). In *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010), we held that, "truth is to be determined not by the quantity of evidence alone but by its quality." That decision explains that, pursuant to the preponderance of the evidence standard, we "must 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." *Id.* Accordingly, where a petitioner provides qualifying evidence under 8 C.F.R. § 214.2(o)(3)(iii), we will determine whether the totality of the record shows eligibility under section 101(a)(15)(o)(i) of the Act and 8 C.F.R. § 214.2(o)(1)(ii).[1]

II. ANALYSIS

Absent evidence of a major, internationally recognized award, the Petitioner seeks to demonstrate the Beneficiary's sustained acclaim and recognition of achievements through evidence corresponding to the eight regulatory criteria. The Director determined that the Beneficiary did not satisfy any of the evidentiary criteria described at 8 C.F.R § 214.2(o)(3)(iii)(B). The Petitioner maintains that the documentation satisfies at least three of those criteria. As discussed below, we find that the exhibits satisfy only one of the evidentiary categories described at 8 C.F.R. § 214.2(o)(3)(iii)(B).

> *Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*1*).

The Petitioner's proprietor, [redacted] contends that he was presented with a [redacted] in 2008 by the [redacted] and he states: "In accepting this award, I was clear in stating that [the Beneficiary] deserved equal credit, since his work made everything possible, but [the Beneficiary], as always, being modest, declined to have his name on the medal." The documentation offered does not include evidence from the [redacted] reflecting the *Beneficiary*'s receipt of this award, as required by the plain language of the regulations, or documentation showing that a [redacted] medal constitutes a nationally or internationally recognized prize or award for excellence in the field.[2] The Petitioner has not established therefore that the Beneficiary meets this criterion.

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[1] While not at issue here, there are other evidentiary requirements for O foreign nationals, including documentation relating to the terms of the proposed employment and the nature of the activities and events in which the beneficiary will participate. 8 C.F.R. § 214.2(o)(2)(ii).

[2] In addition, as the record indicates the Beneficiary was working in Japan in the years leading up to 2008, the specific nature of his claimed role in the award is not sufficiently documented. A summary of the Beneficiary's employment history states that he served as chairman of the Science Department at [redacted] of Japan from 1997 until 2011, when he left this position to come to the United States to work with the Petitioner and accept "a temporary

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*2*).

The Petitioner asserts that the Beneficiary is a member of [redacted] but does not provide evidence of his membership.[3] This unsupported testimonial evidence is insufficient to establish the Beneficiary's [redacted] membership. In addition, while [redacted] contends that he "will be formally recommending [the Beneficiary] for membership as a Fellow" in [redacted] the record does not show that he has attained this membership classification. With respect to the Beneficiary's potential election as an [redacted] fellow in the future, we note that his eligibility under this criterion must be established at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12). Lastly, without documentation from the [redacted] showing that it requires outstanding achievements of its members, as judged by recognized national or international experts, the Petitioner has not established that the Beneficiary's alleged membership in the society meets this regulatory criterion.

> *Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*3*).

The Petitioner contends that research publications authored by the Beneficiary which "analyzed the scattering of sub-atomic particles" meet this regulatory criterion. For example, the record includes articles authored by the Beneficiary in the 1990s in journals such as [redacted] and [redacted] As these articles are not about the Beneficiary, they do not meet this regulatory criterion. The regulations contain a separate and distinct criterion relating to authorship of scholarly articles in professional journals at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*6*). The Beneficiary's articles are further addressed in our discussion of that criterion. The plain language of the regulation requires "published material . . . about the alien." *Cf. Negro-Plumpe v. Okin*, 2:07-CV-00820 at *1, *7 (D. Nev. Sept. 2008) (upholding a finding that articles about a show are not about the actor). Without evidence that the Beneficiary has been the subject of published material in professional or major trade publications or major media, the Petitioner has not established that he satisfies this criterion.

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position at the [redacted]" According to a letter from [redacted] professor of physics at the [redacted] the Beneficiary "was a visiting professor of high energy at the [redacted] from 2010 to 2012, and then and adjunct professor of physics at [redacted] from 2012 to 2016."

[3] On appeal, the Petitioner states that "all you have to do to see that [the Beneficiary] is a member is go to the [redacted] website www.[redacted] and look up the directory of members." The Petitioner does not, however, provide supporting evidence such as a screenshot of the relevant webpage, nor is the online member directory accessible without an [redacted] account. *See* [redacted] https://www [redacted] (visited on November 20, 2017, and incorporated into the record).

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*).

initially stated: "[The Beneficiary] has been invaluable in helping to proof read, research, and edit my articles and books." In response to the Director's request for evidence, indicated that he "regularly gets articles from other physics journals to judge and review for publication" and that "[h]e quickly hands them over to [the Beneficiary]" for joint discussion and review. In addition, asserts that they have jointly reviewed articles for and but does not offer documentary evidence from these journals to support the claim.[4] This unsupported testimonial evidence is not sufficient to establish the Beneficiary's participation as a peer reviewer of scientific manuscripts.

This regulatory criterion requires evidence that the Beneficiary has served as "a judge" of the work of others. The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 214.2(o)(3)(iii)(B)(*4*). We do not find this to encompass informal instances of requesting input on his own drafts, or of the Beneficiary helping review journal manuscripts specifically sent to for peer review. As the record does not contain evidence demonstrating that the Beneficiary has served as part of a formal judging process as peer reviewer for the aforementioned journals, the Petitioner has not submitted qualifying evidence that meets the plain language 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*).

asserts that journal articles authored by the Beneficiary in the 1990s and an unpublished research paper that they have prepared for submission "to either magazine, or meet this regulatory criterion. Regarding their unpublished gravity theory paper and its implications in the field, eligibility must be established at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12). According to this paper has not yet been subjected to the intended journal's peer review process or disseminated in the field. The record therefore does not show that their proposed theory has influenced the field or has otherwise risen to the level of an original scientific contribution of major significance in the field.

With respect to the research articles from the 1990s, the Petitioner must establish not only that the Beneficiary made original contributions but that they have been of major significance in the field. There is no presumption that every published article is a contribution of major significance in the

[4] For example, the Petitioner has not provided letters from the journals' editorial staff listing the papers the Beneficiary reviewed, emails from the editors thanking the Beneficiary for reviewing specific manuscripts, online peer review system confirmations identifying the articles he reviewed, or other supporting evidence of his actual selection and formal participation as a peer reviewer.

field; rather, a petitioner must document its actual impact. In this case, the Petitioner has not offered evidence demonstrating that the Beneficiary's journal articles are cited at a level commensurate with contributions "of major significance in the field," nor does the record include other documentation showing the articles' influence or importance.

As another form of evidence under this criterion, the record includes a letter from stating that and the Beneficiary have been working together on string field theory. explains that the Beneficiary "has been doing the complex tensor algebra of 11-dimensional supersymmetry, which is necessary to create a non-polynomial expression of strings and membranes. The goal is to use supersymmetry of the non-polynomial series to create a unified description of strings and membranes . . . ." The record, however, does not show the Beneficiary's work on this project has substantially affected the high energy physics field, that his research has been widely utilized or heavily cited, or that it otherwise constitutes a contribution of major significance in the field. Accordingly, the Petitioner has not established that the Beneficiary meets this regulatory criterion.

> *Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media.* 8 C.F.R. § 214.2(o)(3)(iii)(B)(*6*).

The record includes articles authored by the Beneficiary in professional journals such as and Therefore, the Petitioner has established that the Beneficiary meets this regulatory criterion.

> *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*).

In his letter, states that the Beneficiary has served as a visiting professor of high energy physics at and as an adjunct professor of physics at notes that the Beneficiary is conducting high energy physics research and assisting the Petitioner, but his statements do not demonstrate that the Beneficiary has been employed in a critical or essential capacity for the aforementioned colleges. In addition, while the Petitioner indicates that the Beneficiary taught general physics laboratory, astronomy, general physics, and college physics to undergraduate students at and the record does not include adequate documentation to show that the Beneficiary's duties and responsibilities were critical or essential for these organizations as a whole. On appeal, the Petitioner emphasizes the highly competitive hiring process for professors generally, and states that a university will only hire a professor if it believes that individual will improve the institution's reputation. The evidence, however, does not differentiate the Beneficiary from the colleges' other professors, and is insufficient to establish that his specific role has contributed to those organizations in a way that was of substantial importance to their success or standing. Furthermore, although the Petitioner asserts that "has a reputation for being among the elite schools," the record does not include supporting evidence demonstrating its distinguished reputation in the field.

In addition, the Petitioner asserts that the Beneficiary satisfies this criterion through his work as a Ph.D. student at , as a researcher with and as chairman of the Science Department at of Japan. The record, however, does not include reference letters or other documentation from these organizations describing the capacity in which they employed the Beneficiary. Nor is there supporting evidence demonstrating their distinguished reputations. The Petitioner's unsupported claims are insufficient to establish that the Beneficiary was employed in a critical or essential capacity for the aforementioned organizations or that they have distinguished reputations. As a result, the Petitioner has not provided sufficient material to meet 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 Petitioner asserts it will pay the Beneficiary $90,000 per year and that "[a]ccording to government guidelines, a Ph.D. research physicist should command about $90,000 per year in income." The Petitioner, however, does not specifically identify the source of this information or provide a copy of the aforementioned income guidelines. Furthermore, the Petitioner does not offer a basis for comparison showing that the Beneficiary has commanded or will command a high salary relative to others in his field. The Petitioner must present evidence demonstrating a high salary or significantly high remuneration in comparison with those performing similar services in the field. *Cf. 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 Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding average salary information for those performing lesser duties is not a comparison to others in the field); *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). We find that the Petitioner has not offered sufficient evidence to establish that the Beneficiary meets this regulatory criterion.

III. CONCLUSION

The record does not satisfy at least three of the eight evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). Consequently, the Petitioner has not established that the Beneficiary is eligible for the O-1 visa classification as a foreign national with extraordinary ability in the sciences.

ORDER: The appeal is dismissed.

Cite as *Matter of M-K-S-P-*, ID# 704818 (AAO Nov. 28, 2017)