U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26987590

Date: SEP. 23, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Outstanding Professors/Researchers)

The Petitioner, a manufacturer of construction and mining equipment, seeks to classify the Beneficiary as an outstanding researcher. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(B), 8 U.S.C. § 1153(b)(1)(B). This first preference classification makes immigrant visas available to noncitizens who are internationally recognized as outstanding in their academic field.

The Director of the Nebraska Service Center denied the petition, concluding that while the Beneficiary met the initial evidence requirements for the requested classification, the record did not establish that his overall eligibility as an outstanding researcher. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Section 203(b)(1)(B)(i) of the Act provides that a foreign national is an outstanding professor or researcher if:

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States [for a qualifying position with a university, institution of higher education, or certain private employers].

To establish a professor or researcher's eligibility, a petitioner must provide initial qualifying documentation that meets at least two of six categories of specific objective evidence set forth at 8 C.F.R § 204.5(i)(3)(i)(A)-(F). This, however, is only the first step, and the successful submission of evidence meeting at least two criteria does not, in and of itself, establish eligibility for this

classification.[1] When a petitioner submits sufficient evidence at the first step, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the beneficiary is recognized as outstanding in his or her academic field. 8 C.F.R. § 204.5(i)(3)(i).

In addition, the regulation at 8 C.F.R. § 204.5(i)(3)(ii) provides that a petition for an outstanding professor or researcher must be accompanied evidence that the foreign national has at least three years of experience in teaching and/or research in the academic field.

II. ANALYSIS

The Petitioner seeks to employ the Beneficiary as an engineer, focusing on the development of simulation tools for high efficiency diesel engine analysis. In his decision, the Director determined that the Beneficiary met three of the evidentiary criteria under 8 C.F.R. § 204.5(i)(3)(i) pertaining to his authorship of scholarly books and articles, original scientific research contributions,[2] and participation as a judge of the work of others in his field of mechanical engineering. However, after reviewing the totality of the evidence in a final merits determination, he concluded that the record did not establish that the Beneficiary is internationally recognized as an outstanding researcher in his field.

On appeal, the Petitioner challenges several aspects of the Director's decision. After reviewing the Petitioner's brief and the totality of the record, we conclude that it has not established the Beneficiary's eligibility for the first preference classification as an outstanding researcher.

A. The Two-Part *Kazarian* Analysis

The Petitioner first challenges the two-part adjudication framework used in the Director's analysis, arguing that the USCIS policy memorandum (the *Kazarian* memo) which introduced this analysis for the adjudication of petitions for this classification and two others constituted the adoption of a failed proposed rule in violation of the Act and the Administrative Procedure Act and a legislative rule requiring notice and comment. It argues instead that the Director should have applied the analysis found in *Buletini v. INS*, 860 F.Supp. 1224, 1234 (E.D. Mich. 1994), in which once the Petitioner shows that the requisite number of criteria have been met, they are deemed to have met the classification's eligibility requirements unless USCIS sets forth specific reasons for finding otherwise.

We first note that several federal courts have recently considered the administrative procedure arguments against the *Kazarian* analysis raised by the Petitioner and found them wanting. The Fifth Circuit considered the application of the *Kazarian* analysis to another first preference classification,

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of outstanding professors and researchers. USCIS Policy Memorandum, *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*, PM-602-0005.1 (Dec. 22, 2010). This memorandum, which stemmed from the 9th Circuit's decision in *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), has been incorporated into the USCIS Policy Manual at 6 *USCIS Policy Manual* F.3(B), www.uscis.gov/policy-manual.

[2] The Director's discussion of the criterion at 8 C.F.R. § 204.5(i)(3)(i)(E) regarding the Beneficiary's original scientific contributions to his academic field begins by stating that his research has not contributed to the field, and then mentions reference letters in the record but provides no analysis, but concludes by stating that the evidence meets the criterion. As the Director indicated in his NOID that this criterion was met, and our review confirms this, we will not disturb the Director's conclusion regarding this criterion.

for individuals of extraordinary ability, and found that USCIS was not required to go through the notice and comment procedure before issuing the *Kazarian* memo, as the Petitioner argues here. *Amin v. Mayorkas*, 24 F.4th 383, 391-2 (5th Cir. 2022). Specifically, it found that like manuals issued by other federal agencies as well as other parts of the USCIS Policy Manual, it is not a legislative rule subject to the notice and comment requirement of the Administrative Procedure Act. The court also found that the two-step analysis was not inconsistent with the regulations for the extraordinary ability classification, which, like those pertaining to the outstanding professor or researcher classification, includes a heading which labels the evidentiary criteria as "initial evidence." This, and the requirement of meeting "at least three" criteria ("at least two" in the outstanding professor or researcher regulations), "contemplates another step beyond submitting the enumerated evidence." *Id.*[3]

Regarding the Petitioner's argument that the *Kazarian* memo constituted the adoption of failed formal rulemaking, a district court recently found that this lacked legal merit. *Etsy, Inc. v. Jaddou*, 2023 WL 3689555 D. Nebraska May 25, 2023 4:22CV3022. As here, this argument is based upon language included in the preamble to a rule proposed by legacy INS in 1995 which would have amended the regulations to state that meeting three of the evidentiary standards (for individuals of extraordinary ability) "is not dispositive of whether the beneficiary is an alien of extraordinary ability." 60 Fed. Reg. 29771 (Jun. 6, 1995). The court in that case found, while considering nearly identical arguments as those put forth in this appeal, that this proposed rule was simply withdrawn as part a package of amendments, and that there was no support for the premise that initially including a rule in a package of amendments constitutes a concession that it is legislative and requires notice and comment procedures. *Id.* at 14.

Further, it is important to note that the controlling purpose of the regulation at 8 C.F.R. § 204.5(i)(3)(i) is to establish a beneficiary's international recognition, and any evidence submitted to meet these criteria must therefore be to some extent indicative of international recognition. More specifically, outstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition. The regulation at issue provides criteria to be used in evaluating whether a professor or researcher is deemed outstanding. *Employment-Based Immigrants*, 56 Fed. Reg. 30703, 30705 (July 5, 1991). Therefore, to the extent that the Director first determined that the evidence satisfied the plain language requirements of specific evidentiary criteria, and then evaluated whether that evidence, as part of the entirety of the record, was sufficient to demonstrate the Beneficiary's recognition as outstanding at the international level, we conclude that his analysis was in keeping with the statute, regulations, and policy pertaining to the requested immigrant visa classification.

B. Final Merits Determination

As stated above, the Director found that the Beneficiary met at least two of the evidentiary criteria. The Petitioner argues on appeal that the Beneficiary also meets another criterion, which requires evidence of published material in professional publications written by others about his work in the academic field. However, as the Petitioner has already established that the Beneficiary meets the

[3] In *Viswanadha v. Mayorkas*, 2023 WL 2424842, 3:22-CV-75JD, (N.D. Indiana, March 8, 2023), the court agreed with and applied the Fifth Circuit's reasoning on these same issues to the outstanding professor or researcher classification.

initial evidence requirements for this classification, we need not consider whether he also meets additional criteria. Rather, we will consider that evidence as part of the totality of the record.[4]

In a final merits determination, we examine and weigh the totality of the evidence to determine whether the Petitioner has shown that the Beneficiary is internationally recognized as outstanding in their academic field. Here, the Petitioner has not offered sufficient evidence that he meets that standard.

On appeal, the Petitioner first addresses the Director's analysis of the evidence concerning the Beneficiary's service as a peer reviewer in his academic field, noting that this included his work for 28 journals and conferences. While the Petitioner's counsel criticizes the Director's final merits determination as "a set of unsupported assumptions, subjective analysis, and conclusory statements," it makes several broad and unsupported statements before declaring that "It follows that being a peer reviewer for close to 30 top publications is equivalent to being outstanding in the field." This includes the statement that "the scientific community relies on the *foremost experts* in each respective field to provide objective reviews of new scientific discoveries" (emphasis added). But counsel does not refer to evidence in the record showing that only the top experts in their respective fields conduct initial peer review. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence. It is the Petitioner's burden to establish that the Beneficiary has been internationally recognized as outstanding in his field, and such unsupported assertions do not sufficiently show that the Beneficiary's peer review activity reflect that level of recognition. In addition, it is the quality of the evidence that is of importance in the final merits determination, not the quantity. *See generally* 6 *USCIS Policy Manual* F.3(B)(2), www.uscis.gov/policy-manual.

The Petitioner also refers in general to the reference letters submitted by experts in the Beneficiary's field, which it states attest to the value and international acclaim of his credentials, peer review activities and conference presentations. One of the writers who discusses his peer review work is [redacted] of the University [redacted] who served as the Beneficiary's supervisor during his post-doctoral work. [redacted] singles out three journals for which the Beneficiary has acted as a reviewer on multiple occasions, and states that this is "a testament to his expertise as a mechanical engineer." This letter and other evidence in the record shows that reviewing and judging the work of other researchers requires a certain level of expertise, but in order to meet the high standards of this classification, the Petitioner must show that the Beneficiary is internationally recognized as outstanding in his field. The emails which confirm the Beneficiary's service as a peer reviewer, and one in particular from SAE International, indicate that the reviews conducted by the Beneficiary are "the first step in a series of quality control checks" conducted prior to approval for publishing, and thus that he did not have the final say as to whether an article should be published.

Another reference letter which addresses the Beneficiary's service as a peer reviewer was written by [redacted] University of Technology (Netherlands). He lists 21 peer-reviewed

[4] However, we note that articles that cite a beneficiary's work as one of multiple footnotes or endnotes, the type of evidence on which the Petitioner relies in its claim, are not generally "about" the beneficiary's work. *See generally* 6 *USCIS Policy Manual* F.3, Appendices Tab, www.uscis.gov/policy-manual.

journals for which the Petitioner has reviewed manuscripts, and states that these are "leading research journals" that "normally have a very strict process in selecting reviewers, with limited invitations only given out to highly recognized researchers with well-documented achievements." He goes on to state that the Beneficiary's service as a reviewer for these journals "is a strong recognition from the international community in [the Beneficiary's] field of expertise." However, [redacted] provides no basis for his assessment that each of the journals on this list is a leading research journal. While he includes an impact factor for less than half of the journals, he does not further support this statement with comparative figures showing that these are leading journals in the field of mechanical engineering. In addition, he does not support his statement that only highly-recognized researchers are selected to serve as reviewers for these journals, nor does he indicate that he is aware of the process for selecting reviewers for any of these journals through serving on their editorial boards or in high-level administrative positions.

Further, [redacted] statements are also contradicted by evidence elsewhere in the record. The Petitioner submitted a variety of metrics regarding these journals which bely the statements that all of those for which the Beneficiary conducted peer review are leading journals in the field. Notably, the "h-index" figures range from 19 to 181,[5] and there is a similarly broad range in the impact factors of these journals, figures which are derived from multiple sources. This collection of data is inconsistent and incomplete, as it does not provide sufficient context to determine which, if any, of the journals for which the Petitioner provided peer review are leading journals in his academic field.

The Petitioner also discusses the Beneficiary's research contributions on appeal, and asserts that the Director did not give proper consideration to the reference letters submitted which describe these contributions and their recognition in the field of mechanical engineering. Specifically, it argues that there was no ground for the letters to be given less evidentiary weight, and that these should have been given greater consideration in the analysis of the Beneficiary's contributions. While we agree that the reference letters are not internally inconsistent and do not generally conflict with each other, they remain advisory opinions, and when considered as part of the totality of the record, they do not establish that the Beneficiary meets the standards of the requested classification.[6]

Some of the reference letters in the record were submitted by researchers who have cited to the Beneficiary's published work in their own. For example, a letter from [redacted] states that while she has never collaborated with the Beneficiary, she has cited to two of the papers he co-authored. She writes that the Beneficiary's paper published in the *Journal of Combustion and Flame* in 2017 "was the first to establish a new ignition time correlation method for a variety of fuels," and that she used this research as a validation target in her own work. [redacted] also states that she cited another paper co-authored by the Beneficiary "to attest to work done on combustion of cyclic ethers." We note that a copy of [redacted] lengthy article is included in the record, showing that she and her colleagues cited to nearly 800 articles. While she states that the Petitioner's work is important to solving the problems related to emissions from combustion engines, and verifies

[5] We note that updated h-index and impact factor figures for several journals were submitted in response to the Director's notice of intent to deny (NOID). As these figures did not reflect the relative citation metrics for these journals either at the time the petition was filed or at the time the Beneficiary either published an article in or reviewed an article for these journals, the updated figures will not be considered.

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

that she has used it in her own research, she does not indicate that his contribution to her work stood out from that of the thousands of other researchers whom she also cited in this work.

[redacted] of the University [redacted] (Ireland) also writes that he cited to the Beneficiary's paper which was published in *Journal of Combustion and Flame* in 2017, and also used this work as a validation target. Although he goes on to state that the Beneficiary's work "has obtained national and international acclaim," he explains this statement by focusing on the importance of this area of research to the field rather than specifically speaking to the impact and recognition of the Beneficiary's work. As with [redacted] similar statement, we do not question [redacted] evaluation of the importance of the Beneficiary's area of research to his overall academic field, but this does not support his statements regarding any acclaim received by the Beneficiary as a result of that work.

Other reference letters discuss in part the number of citations to the Beneficiary's published research. [redacted] of the [redacted] Laboratory describes in detail the Beneficiary's research on the emissions of biodiesels with high cetane numbers, despite not having worked with the Beneficiary or applied the Beneficiary's work to his own research, and like the letters discussed above stresses the importance of this area of research to environmental and other issues. Again, it is not the importance of the subject of the research to national and international problems that must be established, but the recognition of the Beneficiary's contributions to such research and his overall standing within the academic field. [redacted] concludes by stating that the total number of citations to the Beneficiary's work (56 at the time he wrote his letter) shows "the significance of his work on other researchers," and describes the Beneficiary's citation record as "notable." While we agree that the number and rate of citations to the Beneficiary's work is one measure of the extent to which it has been recognized in the academic field, [redacted] statements do not shed light on the level of significance of the Beneficiary's research or in what context his citations are notable.

Another letter which discusses the citations by other researchers to the Beneficiary's published work was submitted by [redacted] University. [redacted] notes the Beneficiary's publication of eight articles, which he considers recognition of the Beneficiary's "ability to produce research of the highest quality," and characterizes the Beneficiary's number of citations as "impressive" and signifying that "his work is necessary for the advancement of the mechanical engineering field." As noted by the Director and acknowledged by the Petitioner, the publication of a the results of a researcher's work, and the use of that work by other researchers to further their own research, shows the collaborative nature of scientific research in general. While [redacted] goes on to summarize some of the Beneficiary's research projects, he does not elaborate on why he considers the number of citations to the Beneficiary's papers to be impressive or provide any basis for comparison. In addition, we note that the record lacks comparative data to show that the rate or total number of citations to the Beneficiary's published work equates to or is indicative of international recognition as outstanding. *See generally* 6 *USCIS Policy Manual* B.2, www.uscis.gov/policy-manual.

The Petitioner also asserts on appeal that the Director erred by imposing their own standard for the number of citations deemed to be sufficient to show that the Beneficiary is recognized on an international basis as outstanding in his academic field. USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *See Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008). We agree that the Director's

conclusion that the total number of citations to the Beneficiary's published research was insufficient to meet the overall standards for the requested classification suggests a minimum citation standard which does not appear in the statute or regulations. However, the burden is on the Petitioner to establish, by a preponderance of the evidence, the Beneficiary's eligibility as an outstanding researcher. For the reasons given above, we conclude that it has not met that burden.

The totality of the reference letters and other supporting evidence regarding the Beneficiary's work in the field of mechanical engineering shows that through the publication of his research, he has made original contributions to the field which other researchers have built upon and cited to validate their own research results. In addition, the record shows that he has frequently served as a reviewer of manuscripts submitted to scientific journals, some of which have higher impact ratings than others. However, the record does not establish that as a result of these activities, he has been internationally recognized as standing above other researchers in his academic field. Accordingly, the petition remains denied.

ORDER: The appeal is dismissed.