

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FETULLAH GULEN, :
 :
 Plaintiff :
 : No. 07-CV-2148
 v. :
 : Judge Dalzell
 MICHAEL CHERTOFF, et al., :
 :
 Defendants :

ORDER

AND NOW, this _____ day of _____, 2008, on
consideration of Defendants' Motion for Partial Summary
Judgment and Plaintiff's response thereto, it is hereby
ORDERED that the Motion is GRANTED.

By the Court:

STEWART DALZELL
United States District Judge

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 :
 Defendants :

DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

Defendants, through their attorneys, Patrick L. Meehan, United States Attorney, and Mary Catherine Frye, Assistant U.S. Attorney, hereby move this Court for partial summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. A Memorandum in support of this motion is being filed simultaneously herewith.

Respectfully submitted,

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Dated: June 4, 2008

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 Plaintiff :
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 :
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DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Fetullah Gulen seeks this Court's review of the United States Citizenship and Immigration Services' final action on his application for a preference visa as an alien of extraordinary ability. Because the agency's decision was neither arbitrary nor capricious, nor contrary to law, this Court should grant summary judgment in favor of defendants with respect to plaintiff's visa petition.¹

1. Procedural Background

On or about May 25, 2007, plaintiff filed his Complaint Challenging Agency Action as *Ultra Vires* and to Compel Agency Action, and Petition for Writ of Mandamus. At that time, decisions were outstanding on plaintiff's I-131

¹ Plaintiff has also challenged the agency's actions with respect to his I-360 petition seeking classification as a religious worker. The parties have stipulated to deferral of consideration of plaintiff's I-360 claims. Doc. No. 23.

(Application for Travel Document), I-765 (Application for Employment Authorization), I-140 (Immigrant Visa Petition seeking classification as an alien of extraordinary ability), request for refund of premium processing fee and request for adjudication of I-485 (Application for Adjustment of Status) in conjunction with I-140 petition. Since this action was filed, defendants have acted favorably on plaintiff's I-131 and I-765 applications.

On or about November 19, 2007, the United States Citizenship and Immigration Services (USCIS) denied plaintiff's I-140 visa petition. On March 7, 2008, the Administrative Appeals Office of USCIS issued its final decision denying plaintiff's appeal of that denial. On April 29, 2008, plaintiff filed his Amended Complaint, challenging the agency's final decision denying his I-140 visa petition. By Order dated May 19, 2008, the Court directed the parties to file cross-motions for summary judgment on or before June 4, 2008.

2. Factual Background

The parties have submitted comprehensive stipulated facts, as well as the agency record. On or about November 21, 2006, plaintiff completed and filed Form I-140,

Immigrant Visa Petition for Alien Worker, seeking classification as an alien of extraordinary ability, under 8 U.S.C. § 1153(b)(1)(A). Administrative Record (A.R.) 00243-245. On November 19, 2007, USCIS, Vermont Service Center, denied plaintiff's I-140 petition. A.R. 00230-235. On December 18, 2007, plaintiff filed his appeal of the denial of the I-140 Petition to the USCIS Administrative Appeals Office ("AAO"). On March 7, 2008, the AAO denied plaintiff's appeal.

In support of his I-140 petition, plaintiff submitted the following evidence:

1. Letters of support from 26 academics, former government officials, clergy, and officials of non-profit organizations. A.R. 00174-192, 01082-1165.
2. Letters from two academics describing the connection between the clergy and the field of education, the role of the clergy in education, and the science of theology. A.R. 00031-34.
3. Correspondence to plaintiff from institutions, organizations and religious denominations. A.R. 00203-225.

4. Evidence that plaintiff met with Pope John Paul II and has collaborated with other religious figures. A.R. 00090-105, 00248-265, 01173-82.
5. Evidence that plaintiff's work is taught in academic courses. A.R. 00266-336.
6. Evidence that plaintiff is the author of numerous books and scores of articles. Joint Stipulation of Facts, ¶¶ 51-56.
7. Evidence that plaintiff's life and work have been the subject of or addressed at conferences. Joint Stipulation of Facts, ¶¶ 57-60.
8. Evidence that plaintiff has been the subject of numerous articles in the mainstream press and specialized publications, as well as broadcast journalism. Joint Stipulation of Facts, ¶¶ 63-66, 68-73.
9. Evidence that plaintiff has served as honorary president of two non-profit organizations, and has founded the Institute for Interfaith Dialog, the Gulen Movement, and the Journalists' and Writers' Foundation. Joint Stipulation of Facts, ¶¶ 48, 77-78; A.R. 01020-33.

10. Evidence that plaintiff has received several honors and awards. Joint Stipulation of Facts, ¶¶ 80-83.

3. Argument

A. Standard of Review

Summary judgment is appropriate where the moving party, through affidavits, depositions, admissions, and answers to interrogatories, demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Jalil v. Advel Corp., 873 F.2d 701, 706 (3d Cir. 1989), cert. denied, 110 S.Ct. 725 (1990); Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of genuine issues of fact, with all reasonable inferences from the record in favor of the nonmoving party. Jalil, 873 F.2d at 706; Anderson v. Liberty Lobby, 447 U.S. 242, 255 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Under the Administrative Procedures Act ("APA"), the court reviews agency action to determine whether it was arbitrary, capricious, an abuse of discretion, contrary to law, or unsupported by substantial evidence. 5 U.S.C. § 706; Camphill Soltane v. U.S. Department of Justice, 381

F.3d 143, 148 (3d Cir. 2004). The APA contemplates that judicial review of agency action will be undertaken on the basis of the record compiled by the agency in the course of informal proceedings in which a hearing has not been held.

Florida Power and Light v. Lorian, 470 U.S. 729, 743-44

(1985). The courts are to defer to both formal and informal agency interpretations of ambiguous regulations unless those interpretations are plainly erroneous or inconsistent with the regulations. Camphill Soltane, 381 F.3d at 148. The visa applicant bears the burden of proving that he qualifies under the statute. Id., at 151; 8 U.S.C. § 1361.

B. Statutory and Regulatory Framework

Congress has provided preferences for certain classes of aliens seeking visas. Section 203(b) of the Immigration and Nationalities Act ("INA") provides:

(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.

8 U.S.C. § 1153(b)(1).

The term "extraordinary ability" means a level of expertise indicating that the individual is one of the small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2); Yasar v. DHS, et al., 2006 WL 778623, *1 (S.D.Tex.) ("This type of visa . . . is the most preferential classification available for immigrants who are considered 'priority workers,' and so it is reserved for aliens whose credentials and accomplishments place them at the very top of their field.") To establish that he is an alien of extraordinary ability in one of the designated fields, a petitioner must show that he has achieved sustained national or international acclaim at the very top level. 8 C.F.R. § 204.5(h)(3). This can be shown by providing evidence of a one-time achievement (such as a major, internationally recognized award) or by providing evidence that the petitioner meets three of the ten criteria

listed in the regulation. Id.

C. The Agency's Decision was Neither Arbitrary nor Capricious and was Based on Substantial Evidence

- i. Plaintiff is not an alien of extraordinary ability in a field recognized by Congress.

In his I-140 petition seeking classification as an alien of extraordinary ability, plaintiff identified himself as a "clergyman."² A.R. 00244. Much of the difficulty in analyzing this case arises from plaintiff's effort at qualifying as a person of extraordinary ability in the field of education, when the evidence submitted in support of his application indicates that he is, in fact, a clergyman, not an educator.

Plaintiff submitted evidence describing the historic connection between the clergy and educational institutions, the field of religious education, and the study of plaintiff's religious views. See A.R. 00031-37. However, he did not submit evidence that he is an educator, or that he is one of the small percentage who have risen to the very

² As the AAO pointed out in its decision, plaintiff's description of his occupation as "clergyman" is independently grounds for denial of his petition, since religion is not one of the fields designated by Congress for visa preferences under 8 U.S.C. § 1153(b)(1)(A).

top of the field of education.³ On the contrary, he submitted evidence that he is the leader of a religious movement which has promoted itself as a subject of academic study. The evidence of record discloses that plaintiff has worked to encourage academics to study his religious views, but that he himself is not an expert in the field of education.

The transcript of an Australian radio program, which appears in the record at 00116 through 00131, and which was submitted by plaintiff in support of his petition, underscores plaintiff's religious, rather than academic, vocation. In this transcript, plaintiff is identified as "a preacher who has been described as contemporary Islam's Billy Graham," at the helm of the "hugely influential neo-Sufi movement." A.R. 00116.

The program transcript contains the following exchange

³ Defendants have been unable to locate any cases in this or other circuits applications by aliens of extraordinary ability in the field of education. Most of the cases reviewing applications under Section 203(b)(1)(A) involve the field of athletics. See, e.g., Jayne v. U.S. Department of Homeland Security, et al., 2008 WL 1885797 (S.D.Fl.) (dismissed for lack of subject matter jurisdiction); Tjin-A-Tam v. USDHS, 2007 WL 2377047 (S.D.Fl.); Lee v. Ziglar, 237 F.Supp.2d 914 (N.D.Ill. 2002); Russell v. INS, 1999 WL 675255 (N.D.Ill.); Matter of Price, 1994 WL 740986 (BIA).

between the moderator, Margaret Coffey, and Dale Eickelman, a professor of anthropology and human relations at Dartmouth College who also submitted a letter in support of plaintiff's petition (see A.R. 1107-08):

Margaret Coffey: I'm interested in other kinds of strategies that the [Gulen] movement uses. It seems to me very clever in the way that it inserts itself in institutions, in universities in Australia, the US, in European countries. It has around it, it seems to me, when I look through the website, a retinue of scholars who are happy to participate in a series of conferences. There is almost a caravan of conferences at particular times of the year.

* * * *

Dale Eickelman: There seem to be quite a number in the United States and elsewhere. Part of this is you know a series of efforts by various supporters of the movement. What they are trying to do is to communicate. They want to reach out and to say who they are and invite people to come in.

Margaret Coffey: I understand that but I want to get back to this academic strategy, the strategy of insertion, if I may use that description. I am interested in what it says about academic objectivity. The movement - well it sponsors university chairs, it encourages academics to write books that endow Gulen with intellectual status. I'm thinking of the book by Jill Carroll for example which inserts him into the great tradition, by comparing him to people like Kant and so on. So, there is something that is at work here that evades really serious intellectual consideration and challenge perhaps to Gulen's ideas.

* * * *

Dale Eickelman: I was approached at one point by the movement this was an event at Rice University that I helped organize which as you know is one of our very distinguished schools but they [the movement] were paying the bills entirely - and there was a certain tension between whom they wanted to invite - they're people ready to do what I would call hagiography - and then having people who would be critical of the movement and standing back and doing what academics should do.

A.R. 00128-29. In other words, the evidence submitted by plaintiff indicates that, far from being an academic, plaintiff seeks to cloak himself with academic status by commissioning academics to write about him and paying for conferences at which his work is studied. See also A.R. 00128 (acknowledgment by Jill Carroll, Executive Director of the Boniuk Centre for Religious Tolerance and adjunct associate professor in Religious Studies at Rice University, that the Gulen movement commissioned her book on Gulen.) Financing academic studies about himself does not make plaintiff an academic.

Plaintiff submitted extensive material which has been written about him, including newspaper accounts of his activities and journal articles about his work and the Gulen movement. These materials make it very clear that plaintiff is a person of influence in Islam and in Turkish politics

and civil society. They do not support his contention that he is an educator.

In "The Fethullah Gulen Movement and Its Politics of Representation in Turkey," one of the articles submitted by plaintiff in support of his petition, the author⁴ examines a civil foundation established by Gulen, the Journalists' and Writers' Foundation, and its role in making the Gulen movement part of the Turkish public agenda. A.R. 00488. He describes the Journalists' and Writers' Foundation as essentially a public relations institution for the Gulen movement. A.R. 00503. The author describes the Gulen movement's sources of influence:

The Gulen movement has three basic fields of interest and thus sources of power. These are (1) educational institutions (colleges and universities), (2) business and financial institutions (e.g., *ISHAD*, *Isik Sigorta*, *Asya Finans*) and (3) the media (*Zaman*, *STV*, *Aksiyon*, *Sizinti*, *Burc FM*, *CHA* and many other periodicals).

A.R. 501 (footnote omitted). The author further describes Gulen's acquisition of influence in Turkish civil society as follows:

The Gulen community movement also emphasizes

⁴ The author is identified as "Mucahit Bilici, University of Michigan, Ann Arbor, Michigan." A.R. 00488. No further information concerning the author is provided.

different strategies to pursue its interests and operates as a pressure group. The movement clearly has an awareness of the translatability of different forms of capital. The power in one field is translated into a field where there is a shortage of legitimacy. The Gulen movement acquired this ability thanks to new opportunity structures unveiled by the processes of globalization. This is best reflected in the words of the businessman who is Gulen's financial adviser: "If we had transferred the power we have abroad to Turkey we (as a movement) would have become a political giant." This modern rationalistic awareness appears to be a characteristic that makes the Gulen movement unique among other Islamic groups in Turkey. In this respect, Gulen is a translator who converts power into prestige, the social into the political, the global into the national, and the Islamic into the national.

A.R. 00500 (footnotes omitted).

The record in this case makes it clear that plaintiff is the leader of a major, politically influential religious movement. As the AAO explained in its decision, however, plaintiff's field is not one which Congress designated for visa preferences under Section 203(b)(1)(A). A.R. 00003 ("If Congress had intended all aliens of extraordinary ability, regardless of their field, to qualify under section 203(b)(1)(A), there would have been no purpose in including the phrase 'in the sciences, arts, education, business, or athletics.'")

In his letter brief supporting his appeal to the AAO,

plaintiff argues that the agency's "attempt to disqualify Mr. Gulen as an alien of extraordinary ability by disqualifying all clergyman [sic] and religious scholars is untenable." A.R. 00016. Defendant has not taken the position that all clergymen and religious scholars are disqualified from obtaining preferences under Section 203(b)(1)(A). It is defendant's position that this particular clergyman has not provided evidence to show that he is a person of extraordinary ability in the field of education.

When examined carefully, the evidence plaintiff cites in his letter brief does not actually support his claim of expertise in the field of education. For example, he cites a letter from an educator referencing the schools "associated with the movement that Mr. Gulen has inspired." A.R. 00018. See also A.R. 01104-05 (letter from John Obert Voll stating that plaintiff "has provided inspiration for schools in many countries"). However, none of these letters establishes that plaintiff himself established any schools, or taught in any schools, or is even qualified to teach in any schools. One of the books submitted in support of plaintiff's petition, Turkish Islam and the Secular State:

the Gulen Movement (Yavuz and Esposito, ed., Syracuse University Press, 2003), states, at page 69, that Gulen "has tried to make clear that he has no schools of his own." The introduction to Gulen's book, The Statue of Our Souls (The Light, Inc., 2005), states that he "was awarded a state preacher's license" in 1959, and that he "retired from formal teaching duties in 1981." Id., at vii-viii.⁵ Plaintiff has provided no evidence related to his own education; it is not clear that he has ever received any formal education at all. Thus, despite the many conclusory references to plaintiff as a scholar or an educator in the materials submitted, plaintiff has actually submitted no evidence of his own work or achievements as an educator.

Not only did plaintiff fail to establish that he is a person of exceptional ability in a field designated by Congress, such as education, he failed to establish that he seeks to remain in the United States to continue work in this field or that his continued presence in the United States will substantially benefit the United States, as

⁵ In this same introduction, at page viii, plaintiff's ideas on education are summarized as follows: "In the field of education, he has spearheaded the establishment of many charitable organizations to work for the welfare of the community, both within and without Turkey."

required by statute. See 8 U.S.C. § 1153(b)(1)(A)(ii) and (iii). In his petition, plaintiff provided no information whatsoever about his proposed prospective employment in the United States. A.R. 00244.

The relevant regulation provides that the alien's petition must be accompanied by clear evidence that the alien will continue to work in the area of his expertise. 8 C.F.R. § 204.5(h)(5). Such evidence may include letters from prospective employers, evidence of commitments such as contracts, or a statement detailing the alien's plans to continue his work. Id. As the AAO noted in its decision, plaintiff's statement (submitted in response to a request for additional evidence) that he has been working toward interfaith dialogue through authoring articles and providing guidance to "fellow scholars" does not constitute a detailed plan to work in the field of education. A.R. 00014. Nor has plaintiff provided evidence that his continued work will substantially benefit the United States prospectively.

The record in this case contains substantial evidence to support the agency's finding that plaintiff is not a person of exceptional ability in the field of education. The fields of religion and interfaith dialogue are not

fields Congress has designated as entitled to preferences for aliens of exceptional ability; accordingly, the agency's denial of plaintiff's application as a clergyman of extraordinary ability is not contrary to law. Finally, the agency's decision that plaintiff has not provided evidence that he will continue to work in the field of education was supported by substantial evidence. Accordingly, the agency's decision should be affirmed by this Court.

- ii. Plaintiff has not established that he is the subject of sustained national or international acclaim in the field of education.

The AAO also examined the evidence to determine whether plaintiff had established that he is the subject of sustained national or international acclaim in the sciences, arts, education, business or athletics. See 8 C.F.R. § 204.5(h)(3). An alien seeking a visa preference under Section 203(b)(1)(A) can establish that he is an alien of extraordinary ability by showing that he has sustained national or international acclaim at the very top of his field. Id. This acclaim can in turn be established either by providing evidence of a one-time achievement, such as a major, internationally recognized award, or by meeting three of ten criteria listed in the regulation.

Plaintiff attempted to meet the one-time achievement standard by submitting evidence that he received an Award of Merit from the Romanian Commission of UNESCO. The AAO looked to the legislative history of Section 203(b)(1)(A) to determine what type of award would constitute a one-time achievement sufficient to establish sustained national or international acclaim. The example provided by Congress was a Nobel Prize. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). The AAO determined that plaintiff had not provided evidence that UNESCO considers the award plaintiff received significant, evidence explaining the selection process, or evidence of media coverage outside Turkey. A.R. 00007. Accordingly, the AAO found that plaintiff had not demonstrated that he had received an award recognized internationally in the field of education.⁶ Id.

The evidence submitted to support plaintiff's claim that the Romanian Commission of UNESCO award was a major internationally recognized award appears in the record at A.R. 00040 to 00087. Nothing in this evidence indicates that this is a major, internationally recognized award

⁶ The award does not even appear to be in the field of education. The award itself says it is "for Contributions which led to dialogue and tolerance." A.R. 00041.

comparable to the Nobel Prize; nor does the evidence explain the selection process, indicate that UNESCO considers the award significant, or indicate that it received media attention outside Turkey. Because the AAO's determination was not arbitrary and capricious, and was based on the evidence of record, it should be affirmed.

The AAO also considered whether plaintiff had met three of the ten criteria set forth in 8 C.F.R. § 204.5(h)(3) to support his claim of sustained national or international acclaim. The agency found that plaintiff met the criteria for two subsections of the regulation by providing evidence of plaintiff's contribution to the establishment of Gulen movement-associated schools. See 8 C.F.R. §§ 204.5(h)(3)(iii) and (v). However, the agency found that plaintiff failed to meet the criteria for the other eight subsections.⁷ It found that plaintiff had not provided primary evidence to support his claims to have received lesser nationally or internationally recognized prizes in the field of education. See 8 C.F.R. § 204.5(h)(3)(i); see also 103.2(b)(2) (unavailability of primary evidence creates

⁷ Plaintiff did not attempt to meet the criteria set forth in subsections (ii), (ix) and (x).

a presumption of ineligibility). The AAO found that plaintiff did not meet the criterion of authorship of scholarly articles in the field (subsection (vi)), noting that there had been scholarly analyses of plaintiff's work, but that plaintiff's own writings were not scholarly treatises. A.R. at 00011. The AAO rejected plaintiff's argument that his speeches met the standard of "display of the alien's work in the field at artistic exhibitions or showcases," as set forth in subsection (vii). A.R. 00012. Finally, the agency found that plaintiff had not submitted evidence that he had performed in a leading or critical role for organizations with distinguished reputations in the field of education, as set forth in subsection (viii). A.R. 00012. Because the evidence of record supported only two of the ten criteria set forth in the regulation, the agency properly found that plaintiff did not establish that he is a person of sustained national or international acclaim in the field of education. Accordingly, the agency's denial of plaintiff's petition was not arbitrary or capricious and was based on substantial evidence.

4. Conclusion


The evidence of record discloses that plaintiff failed to carry his burden of providing evidence that he is a person of extraordinary ability in the sciences, arts, education, business, or athletics. He also failed to meet his burden of providing evidence that he seeks to continue work in the area of extraordinary ability while in the United States. As a result, the agency's denial of his visa application was neither arbitrary, nor capricious, nor contrary to law. Further, the decision was supported by substantial evidence, and should be affirmed.

Respectfully submitted,

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Dated: June 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and correct copy of the foregoing Motion for Partial Summary Judgment to be served by first class United States mail, postage prepaid, upon the following:

H. Ronald Klasko, Esquire
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Dated: June 4, 2008