U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12709174

Date: JAN. 29, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a senior user experience (UX) designer, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition concluding that the Petitioner did not establish, as required, that she meets at least three of the ten initial evidentiary criteria for this classification. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, the Petitioner has not met this burden. Accordingly, we will dismiss the appeal.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability 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 implementing regulation

at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner indicates that she has been employed as a UI/UX Lead Designer for [redacted] since 2016. She received her bachelor's degree in graphic design from [redacted] in Venezuela in 2004 and a master's degree in design and applied arts, specializing in 3D animation and post-production, from [redacted] in Spain in 2007. The Petitioner's résumé reflects that she has approximately 15 years of professional experience as a web designer, multimedia director, and senior UI/UX designer.

A. Evidentiary Criteria

Because the Petitioner did not establish that she has received a major, internationally recognized award,[1] she must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Petitioner initially claimed to meet five of the ten criteria, summarized below:

- (i), Receipt of lesser nationally or internationally recognized prizes or awards;
- (iii), Published materials in professional or major trade publications or other major media;
- (vii), Display of her work at artistic exhibitions or showcases;
- (viii), Leading or critical role for organizations that have a distinguished reputation; and
- (ix), High salary or other significantly high remuneration in relation to others in the field.

The Director determined that the Petitioner met two of the criteria, relating to awards and leading or critical roles with distinguished organizations. On appeal, the Petitioner asserts that the Director erred in determining that she did not also satisfy the display criterion at 8 C.F.R. § 204.5(h)(3)(vii) and the high

[1] The Petitioner initially claimed that the Silver [redacted] Award she received in 2011 is a major, internationally recognized award, but does not contest the Director's determination that the award does not satisfy the requirements of a qualifying one-time achievement pursuant to 8 C.F.R. § 204.5(h)(3).

salary criterion at 8 C.F.R. § 204.5(h)(3)(ix).[2] Upon review, we conclude that the record does not support a finding that the Petitioner meets at least three criteria.

> *Documentation of the individual's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.* 8 C.F.R. § 204.5(h)(3)(i).

The Director concluded that the Petitioner satisfied this criterion without explaining his determination. In order to fulfill this criterion, the Petitioner must demonstrate that her prizes or awards are nationally or internationally recognized for excellence in the field of endeavor.[3] Relevant considerations regarding whether the basis for granting the prizes or awards was excellence in the field including, but are not limited to, the criteria used to grant the prizes or awards, the national or international significance of the prizes or awards in the field, and the number of awardees or prize recipients as well as any limitations on competitors.[4] Although the Director determined that the Petitioner satisfied this criterion, we will withdraw that determination.

The Petitioner provided evidence that she and five of her coworkers at [redacted]'s [redacted] office received a silver [redacted] Award in 2011 for an [redacted] piece entered under the Health Services and Communications' [redacted] medium in the [redacted] category.[5] The record includes information about the [redacted] Awards and [redacted] Awards from the awarding entity's website and *Wikipedia*. The Petitioner also provided: a 2019 *Variety* article about the [redacted] Awards' launching of a new [redacted] awards program; a 2010 *New York Post* article about the return of the main [redacted] Awards ceremony to [redacted][6]; a *Forbes* article about the 2017 [redacted] Awards ceremony, identifying some of the notable winners; and evidence that [redacted] issued a press release announcing the company's receipt of the 2011 Silver [redacted] award. This evidence does not address the significance of the Petitioner's Silver [redacted] award, and does demonstrate, for example, that the [redacted] Awards program enjoys the major media coverage or same recognition as that documented for the main [redacted] awards. Further, the evidence does not demonstrate that all [redacted] Awards across all different programs, categories and award levels are nationally or internationally recognized prizes or awards for excellence in the field.[7]

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[2] On appeal, the Petitioner does not address the Director's determination that she did not satisfy the published materials criterion at 8 C.F.R. § 204.5(h)(3)(iii). Issues or claims that are not raised on appeal are deemed to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court determined the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

[3] *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* 6 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[4] *Id.*

[5] The evidence indicates that the [redacted] Awards has six separate recognition programs for creative businesses in advertising, sports, fashion, music, entertainment, and healthcare. In addition, the record reflects that multiple gold, silver, and bronze [redacted] awards may be presented in each specific category within each of the awards programs, with the highest honor being the [redacted] award.

[6] The referenced *Variety* article mentions that the [redacted] Awards are online only and do not have an awards ceremony.

The Petitioner also provided evidence that she received a 2018-2019 "Iron [redacted] Award" in the [redacted] Category" for her work on [redacted] educational app. According to information provided on the award certificate, the "Iron" level award is given to designs judged to be in the top 20th percentile of entries to the [redacted] Award & Competition. The Petitioner submitted two online articles regarding the 2017-2018 edition of this awards program, from *Design Boom* (designboom.com) and *Design Curial* (designcurial.com). The articles indicate that in 2017-2018, the [redacted] competition announced over 1900 award winners in in 99 design disciplines with five levels of distinction – platinum, gold, silver, bronze and iron - and featured some of the winning work. The Petitioner did not submit any press or media coverage related to the 2018-2019 edition of the competition in which she participated. The record does not include sufficient independent evidence of the national or international recognition associated with this award in general or with the "Iron" award received by the Petitioner.[8]

For the reasons discussed above, the Petitioner has not established that she satisfies this criterion.

> *Evidence of the display of the individual's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii)

The Petitioner maintains that the Director erred in determining that she did not submit evidence that she meets this criterion.

As a preliminary matter we note that, after evaluating the Petitioner's evidence related to the display of her work, the Director also observed that this criterion is limited to the "visual arts" and that the Petitioner is "not a visual artist" who has created "tangible pieces of art that were on display at exhibitions or showcases." We disagree with the Director's conclusion that the Petitioner, whose work products as a multimedia artist and UX/UI designer include artistic elements, is not a "visual artist." Nevertheless, for the reasons discussed below, we conclude that the Petitioner has not established that she meets this criterion.

The Director acknowledged that the Petitioner provided evidence that her portfolio be found online at several websites in the design field, including the website of the American Institute of Graphic Artists (AIGA) (aiga.org), Behance (behance.net) and The One Club (oneclub.org). The Director determined that the online member galleries and portfolios that reside on these websites are intended to serve as marketing and promotional platforms for participating/member artists and do not qualify as "artistic exhibitions or showcases" within the meaning of 8 C.F.R. § 204.5(h)(3)(vii). On appeal, the Petitioner has not pursued her claim that she meets the display criterion based on this evidence.

Rather, the Petitioner's claims on appeal solely focus on the display of the [redacted] app and its graphic artwork at [redacted].'s exhibition at the 2016 [redacted] Festival in [redacted] Texas. The evidence in the record confirms that the Petitioner contributed to the

[8] The record also reflects the Petitioner's receipt of an [redacted] award as part of an [redacted] team, and [redacted]'s receipt of a [redacted] 2018 [redacted] Silver Award for [redacted]. We note that the Petitioner did not claim that the [redacted] award was a qualifying award under 8 C.F.R. § 204.5(h)(3)(i). Further, when responding to the Director's request for evidence, she did not pursue her initial claim that she meets this criterion based on the [redacted] award after the Director observed that she was not the direct recipient of this award.

creation of the [redacted] mobile app while employed as Lead UI/UX Designer for [redacted] in Taiwan from 2012 to 2013. The record reflects that the app was featured as part of an exhibit promoting the 2016 [redacted] festival's [redacted] concert, and as a way for fans to track and interact with the [redacted] music artists who performed at the concert. The Director, in determining that the Petitioner did not establish her eligibility under this criterion, observed that the purpose of the display at [redacted] was not to display the Petitioner's design work, but rather to display the features of the software app and to promote the product. He emphasized that the Petitioner's name did not appear in any of the submitted promotional materials or media reports for the festival.

On appeal, the Petitioner emphasizes that the [redacted] app was featured at [redacted] as an emerging technology, noting that "[a]rt can take many forms and in this case, it was used to design a software app." In support of the appeal, she submits a letter from [redacted], a representative of [redacted] confirming that she worked for this company as a freelancer from 2015 to 2016 to help "rebrand the previous [redacted] App to a Music band location-based app for [redacted]," noting that "she handled the iOS design as well as web design and illustrations." [redacted] confirms that she contributed to the [redacted] exhibition by creating illustrations for the [redacted] artists who performed at the music festival and brought attention to the mobile app features and the music bands. The Petitioner also provides an e-mail from a [redacted] representative verifying that [redacted] was an exhibitor at [redacted] 2016.

The Petitioner does not address, however, the fact that she did not provide evidence that her contributions to the [redacted] display booth at [redacted] were publicly credited or attributed to her. We cannot determine that the [redacted] booth at festival qualifies as an "artistic exhibition or showcase" of her work if she was not identified as the artist responsible for creating the work.

For the foregoing reasons, the Petitioner has not submitted sufficient evidence to establish that she meets this criterion.

> *Evidence that the individual has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix)

The Petitioner claims that she meets this criterion based on her earnings as a UI/UX Lead Designer for [redacted] The Petitioner states that her annual salary is $130,000. Her latest IRS Form W-2 indicates that she earned $124,107.84 in 2019.

To establish that she has a commanded a "high salary" in relation to others, the Petitioner submitted comparative wage data for "Graphic Designers." The initial evidence, obtained from the U.S. Department of Labor (DOL) Federal Labor Certification Data Center (www.flcdatacenter.com), shows a "Level 4 Wage" of $85,197 for graphic designers in the [redacted] area where the Petitioner works.

In response to a request for evidence, the Petitioner provided national salary data for "Senior Graphic Designers" from *Glassdoor*, indicating an average base pay of $55,421 and a high base pay of $79,000. The Petitioner also submitted evidence from the DOL's Bureau of Labor Statistics, showing that the mean annual wage for graphic designers in the United States is $54,680, with a 90th percentile wage of $85,760.

The Director observed that the evidence shows that Petitioner's salary "is at the higher end of the spectrum for median wages of fully competent graphic designers, but she did not establish that she commands a 'high salary' compared to other graphic designers, nor did she provide enough information about the top earners in her field." On appeal, the Petitioner maintains that the previously provided evidence establishes that her earnings are high compared to others in the field, whether that comparison is made nationally or to others working in the same geographic area. The Petitioner also submits additional data wage from the DOL's Career OneStop website, indicating that a high wage for graphic designer in the Petitioner's geographic area is $110,420.

The DOL's description of the Graphic Designer occupation states that this position will "design or create graphics to meet specific commercial or promotional needs, such as packaging, displays or logos, and "may use a variety of mediums to achieve artistic or decorative effects." The evidence in the record does not establish that the Petitioner's duties as a lead UX/UI designer for [redacted] are the same as those of a graphic designer. The recommendation letters submitted in support of the petition also specify the Petitioner's area of specialization as UX/UI, interactive, web, and/or multimedia design, rather than "graphic design."[9] A letter from [redacted] indicates that the Petitioner hired and trained a team of designers who work under her leadership, but it does not indicate that she herself has been performing in a graphic designer position for the company. In her own statement, the Petitioner emphasizes that a "UX designer is concerned with the entire process of acquiring and integrating a product, including aspects of branding, design, usability and function." The Petitioner did not submit an explanation for submitting comparative data for graphic designers.

Therefore, we conclude that the salary data provided for graphic designers did not allow for a comparison of the Petitioner's salary as a UX/UI lead designer "in relation to others in the field." *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). While her work may include elements of "graphic design," the record does not establish that her documented earnings are based on her performance of the duties of the "graphic designer" position described in the submitted DOL wage surveys.

For the reasons discussed, the Petitioner did not establish that she receives a high salary in relation to others in her field.

B. O-1 Nonimmigrant Status

We note that the record reflects that the Petitioner has been granted O-1 status, a classification reserved for nonimmigrants of extraordinary ability. Although USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the Petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different standard – statute, regulations, and case law. Many Form I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25

[9] We note that the DOL collects and reports independent salary data for Multimedia Artists and for Web Developers and Digital Interface Designers.

(D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990).

Further, it must be emphasized that each petition filing is a separate proceeding with a separate record. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceedings. 8 C.F.R. § 103.2(b)(16)(ii). We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

Finally, our authority over the USCIS service centers, the office adjudicating the nonimmigrant visa petition, is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of an individual, we are not bound to follow that finding in the adjudication of another petition. *See La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

III. CONCLUSION

The Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria. As a result, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown that the significance of her work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and she is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated her eligibility as an individual of extraordinary ability. 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.