U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30518656

Date: APR. 08, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an actor, 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 the Petitioner did not satisfy at least three of the initial evidentiary criteria. 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)(A) 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,
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> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
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> (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 sustained acclaim and the recognition of achievements in the field through a one-time achievement (that is, a major, internationally recognized award) or qualifying documentation that meets at least three of the ten categories 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

Because the Petitioner has not indicated or established receipt of a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). In denying the petition, the Director determined the Petitioner fulfilled only one (display at 8 C.F.R. § 204.5(h)(3)(vii)) of the seven claimed categories of evidence.

On appeal, the Petitioner maintains his qualification for five additional criteria. The Petitioner does not contest his previously claimed eligibility for the judging criterion under 8 C.F.R. § 204.5(h)(3)(iv). An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). In addition, the Petitioner submits new evidence. Because the Petitioner was put on notice and given a reasonable opportunity to provide this evidence, we will not consider it for the first time on appeal. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial"). For the reasons discussed below, the Petitioner did not establish he meets at least three categories of evidence.

A. Evidentiary Criteria

> *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. § 204.5(h)(3)(ii).

USCIS determines if the association for which the person claims membership requires that members have outstanding achievements in the field as judged by recognized experts in that field. [1] The

[1] *See generally* 6 USCIS Policy Manual F.2(B)(1), https://www.uscis.gov/policymanual.

petitioner must show that membership in the association requires outstanding achievements in the field for which classification is sought, as judged by recognized national or international experts.[2]

The Petitioner contends eligibility for this criterion based on his "Partner" membership with the National Association of Interpreters (ANDI). Associations may have multiple levels of membership.[3] The level of membership afforded to the person must show that in order to obtain that level of membership, recognized national or international experts judged the person as having attained outstanding achievements in the field for which classification is sought.[4]

According to ANDI's "Corporate Bylaws," partner membership "is that natural person who, having the quality of Performer, has registered with ANDI through an application and who receives income through of society, derived from the exploitation of the interpretation of it" (Article 8). Moreover, to be registered in any member status of ANDI, an interested party must "[p]rove your quality of Performer with any interpretation set in a material support or with a professional interpretation contract, as well as having generated royalties for the exploitation of the interpretations of it" (Article 9).

Although the Petitioner argues for a selective definition of "quality" from *Merriam-Webster Dictionary* as a "degree of excellence" or "superiority in kind," *Merriam-Webster Dictionary* contains other definitions of quality, such as "the character in a logical proposition of being affirmative or negative."[5] Furthermore, the plain language of the bylaws does not require membership to have a degree of excellence or superiority of kind, as claimed by the Petitioner. Instead, the bylaws indicate the Performer to have "any interpretation set in a material support or with a professional interpretation contract" and not an excellent or superior interpretation.

Similarly, the Petitioner provides a definition of "royalties" from *Merriam-Webster Dictionary* as "a payment to an author or composer for each copy of a work sold or to an inventor for each item sold under a patent" and claims that "[t]his is not simply received payment for services but, in fact, a financial arrangement in which a performer's creative contributions are deemed sufficiently significant to justify a periodical residual payment in relation to creative credit in a production." The Petitioner's assertions, however, are not supported by the plain language of ANDI's bylaws. The bylaws do not require a performer's royalties to be "sufficiently significant." Rather, the bylaws reflect that the performer to have only "generated royalties" and not sufficiently significant royalties.

For these reasons, the Petitioner has not established that partner membership mandates outstanding achievements as a condition for membership with ANDI, as required by this regulatory criterion.

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[2] *Id.*

[3] *See generally* 6 USCIS Policy Manual, *supra*, at F.2(B)(1).

[4] *Id.* (providing that as a possible example, general membership in an international organization for engineering and technology professionals may not meet the requirements of the criterion; however, if that same organization at the fellow level requires, in part, that a nominee have accomplishments that have, for example, contributed importantly to the advancement or application of engineering, science, and technology, and that a council of experts and a committee of current fellows judges the nominations for fellows, that higher, fellow level may be qualifying.)

[5] *See* www.merriam-webster.com.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii).

USCIS first determines whether the published material was related to the person and the person's specific work in the field for which classification is sought.[6] The published material should be about the person, relating to the person's work in the field, not just about the person's employer and the employer's work or another organization and that organization's work.[7] USCIS then determines whether the publication qualifies as a professional publication, major trade publication, or other major media publication.[8]

The record reflects the Petitioner provided 16 articles either posted online or printed in publications. At the outset, the Petitioner submitted an article posted on gather.com that is illegible and blurry, and we are unable to determine whether the article meets the regulatory criterion. In addition, 12 of the articles do not contain the regulatory requirement of the "title, date, and author of the material." Specifically, articles posted on hollwood411.medium.com, cnfmag.com, writerscafe.org, medium.com, reeltalkblogdotcom.wordpress.com, entertainmenthotspot.tumblr.com, realtyfilms.com, and metronoticias.com(2) do not include the required authors of the material.[9] Furthermore, the articles posted on moviebegins.com and celebritytalkautstralia.wordpress.com (2) do not contain both the dates and authors of the material.

Of the 3 remaining items, the *La Razon* article does not reflect published material about the Petitioner relating to his work. Instead, the article is about an adaptation of [redacted] at the [redacted] In fact, the Petitioner is never mentioned in the article. The person and the person's work need not be the only subject of the material; published material that covers a broader topic but includes a substantial discussion of the person's work in the field and mentions the person in connection to the work may be considered material about the person relating to the person's work.[10] *See also, e.g., Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles regarding a show are not about the actor). Likewise, the two articles posted on metronoticias.com, indicated above, report on the show without any mention of the Petitioner; and therefore, do not show published material about the Petitioner.

Thus, the Petitioner submitted 2 articles (27prmedia.com and examiner.com) reflecting published material about the Petitioner relating to his work and including the required title, date, and author. However, the Petitioner did not demonstrate the articles were published in professional or major trade publications or other major media. In evaluating whether a submitted publication is a professional publication, major trade publication, or major media, relevant factors include the intended audience (for professional and major trade publications) and the relative circulation, readership, or viewership (for major trade publications and other major media).[11] The Petitioner submitted online traffic and

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[6] *See generally* 6 *USCIS Policy Manual* F.2(B)(1), https://www.uscis.gov/policy-manual.
[7] *Id.*
[8] *Id.*
[9] In some instances, the articles indicated the publications without identifying the actual authors.
[10] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(1).
[11] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(1).

rankings reflecting the websites garnered 50 unique users each day with a global ranking of 2.27M (27prmedia.com) and 2.1K estimated traffic with a global ranking of 16.7K. Here, the Petitioner did not demonstrate the significance or relevance of these readership or viewership numbers to establish the major status of the websites.

For the reasons discussed above, the Petitioner did not show he meets every element of this criterion.

> *Evidence that the alien 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).

USCIS determines whether the person's salary or remuneration is high relative to the compensation paid to others working the field.[12] The Petitioner provided evidence of his compensation and offered comparative yearly and hourly salary information. However, the Petitioner did not submit the proper comparative data based on his type of compensation. Specifically, the Petitioner's earnings are based on remunerations from projects rather than receiving traditional hourly wages. This is confirmed based on the Petitioner's submission of an "Agent Statement" from [redacted] which states "[the Petitioner's] earnings are not wages; rather, as a person who is primarily self-employed they consist of fees, commissions and other compensation estimated to be earned from various projects during the visa period." Likewise, an "Artistic Performance Agreement" from [redacted] indicates that "the Company hires Actor to provide artistic services for various projects and productions of Company through performances where he will be filmed portraying diverse characters in different roles and various capacities, and also as a voice actor for voiceovers." Thus, in order to demonstrate eligibility for this criterion, the Petitioner must show that he has commanded significantly high remuneration for services rather than commanding a high salary since he does not receive an hourly or yearly salary.

On appeal, the Petitioner claims he "provided evidence that the going rate for his voiceover acting work ranged from to [sic] $62 per hour to $1,000 per hour, with the rate of $500 per hour being the most prevalent." The record reflects the Petitioner submitted "VO Release" documents for various projects stipulating flat fees for project services, such as a session fee and usage fee received by the Petitioner. The documentation does not indicate the Petitioner would earn a per hour fee for each project. Again, the Petitioner's documentation shows a set fee amount for each project in which the Petitioner provides his services. For example, for the project entitled, [redacted] the Petitioner secured a flat $500 "Session Fee" and a $1,000 "Usage Fee" and did not earn a $500 or $1,000 per hour wage amount.

Although the Petitioner submitted hourly and yearly salaries for actors from various sources, such as ZipRecruiter, Payscale, and bls.gov, the Petitioner did not compare his fees for services to other actors' fees for services. The comparison of hourly and yearly salaries is not the appropriate comparison when the Petitioner does not command an hourly and yearly salary. The Petitioner, for instance, did not submit evidence comparing his $500 session fee or $1,000 usage fee to others who receive compensation through fees for their services to show that he commands a significantly high remuneration for services.

[12] *See* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(2).

Even if we compared his yearly earnings to others based on his documentation, the Petitioner did not demonstrate he commanded a high salary. The Petitioner submitted IRS Form W-2, Wage and Tax Statement, for 2017, 2018, and 2019 reflecting yearly earnings of $2,200, $7,800, and $19,600, respectively.[13] According to Ziprecruiter, the average salary for actors in California was $26,989, which is significantly more than the Petitioner earned.

Accordingly, the Petitioner did not establish eligibility for this criterion.

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk or video sales.* 8 C.F.R. § 204.5(h)(3)(x).

USCIS determines whether the person has enjoyed commercial successes in the performing arts.[14] The Petitioner claims eligibility for this criterion based on his roles in [redacted] and [redacted].[15] The Petitioner's RFE documentation reflects [redacted] grossed $1.49M, [redacted] grossed $51K with an additional $244K in video sales, and [redacted] grossed $34K with an additional $71K in video sales.

This criterion focuses on volume of sales and box office receipts as a measure of the person's commercial success in the performing arts.[16] Therefore, the mere fact that a person has recorded and released musical compilations or performed in theatrical, motion picture, or television productions would be insufficient, in and of itself, to meet this criterion.[17] The evidence must show that the volume of sales and box office receipts reflect the person's commercial success relative to others involved in similar pursuits in the performing arts.[18]

In this case, the Petitioner provided evidence of gross receipts for a movie released in the same year. Specifically, [redacted] - $1.49M v. *The Angriest Man in Brooklyn* (2014) - $127K and [redacted] - $51K v. *Hank and Asha* (2013) - $17K. The Petitioner did not make such a comparison for [redacted] (2017). The Petitioner's comparison of a single movie, which so happens to have lower gross sales, misconstrues the determination on whether his movies were commercially successful. A more accurate comparison, for instance, would be to compare the gross receipts of all movies released in a particular year or to compare a wide variety of films or even to compare the gross sales of movies in a certain category. In addition, the Petitioner did not offer any further information regarding his movies, such as operating costs or budgets, which may factor into whether a movie is commercially successful. For example, if a movie's budget was $1M but only grossed $500K, the movie may not be viewed as a commercial success.

Without additional evidence, the Petitioner did not establish he has achieved commercial successes.

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[13] The Petitioner also submitted a document indicating he earned $1,275 in 2020 and $1,125 in 2021 from [redacted] which is also substantially below the average yearly salaries for actors in California.

[14] *See* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(2).

[15] In a supplemental brief on appeal, the Petitioner also claims, for the first time, eligibility based on his work in [redacted] commercials and submits new evidence. We will not consider new eligibility claims and evidence that were not previously brought before the Director. *See* 8 C.F.R. § 103.2(b)(11); *Soriano*, 19 I&N Dec. at 766.

[16] *See* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(2).

[17] *Id.*

[18] *Id.*

B. O-1 Nonimmigrant Status

We note that the record reflects that the Petitioner received O-1 status, a classification reserved for nonimmigrants of extraordinary ability. Although USCIS has approved O-1 nonimmigrant visa petitions 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 (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). Furthermore, 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 immigration petition. *See La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).[19]

III. CONCLUSION

The Petitioner did not establish he satisfies four additional categories of evidence, discussed above. Although the Petitioner also argues eligibility for the leading or critical role criterion under 8 C.F.R. § 204.5(h)(3)(viii), we need not reach this additional ground because the Petitioner cannot fulfill the initial evidentiary requirement of three under 8 C.F.R. § 204.5(h)(3). We also need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Accordingly, we reserve these issues.[20]

Nevertheless, we have reviewed the record in the aggregate, concluding it does not support a conclusion 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 those progressing toward the top. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (concluding that even major league level athletes do not automatically meet the statutory standards for classification as an individual of "extraordinary ability,"); *Visinscaia*, 4 F. Supp. 3d at 131 (internal quotation marks omitted) (finding that the extraordinary ability designation is "extremely restrictive by design,"); *Hamal v. Dep't of Homeland Sec. (Hamal II)*, No. 19-cv-2534, 2021 WL 2338316, at *5 (D.D.C. June 8, 2021), *aff'd*, 2023 WL 1156801 (D.C. Cir. Jan. 31, 2023) (determining that EB-1 visas are "reserved for a very small percentage of prospective immigrants"). *See also Hamal v. Dep't of Homeland Sec. (Hamal I)*, No. 19-cv-2534, 2020 WL 2934954, at *1 (D.D.C. June 3, 2020) (citing *Kazarian,* 596 at 1122 (upholding denial of petition of a published theoretical physicist specializing in non-Einsteinian theories of gravitation) (stating that "[c]ourts have found that even highly accomplished individuals fail to win this designation")); *Lee v. Ziglar*, 237 F. Supp. 2d 914, 918 (N.D. Ill. 2002) (finding that "arguably one of the most famous baseball players in Korean history" did not qualify for visa as a baseball

[19] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(3).

[20] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, n.7 (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

coach). Here, the Petitioner has not shown the significance of his work is indicative of the required sustained national or international acclaim or 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 the Petitioner has garnered national or international acclaim in the field, and he 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). The record does not contain sufficient evidence establishing the Petitioner among the upper echelon in his field.

For the reasons discussed above, the Petitioner has not demonstrated his 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.