



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF B-L-

DATE: FEB. 28, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a painter and performance artist, seeks classification as an individual of extraordinary ability in the arts. *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, Texas Service Center, previously denied the Form I-140, Immigrant Petition for Alien Worker, concluding that the Petitioner had not satisfied at least three of the initial evidentiary criteria. The Petitioner filed an appeal, stating that the Director's decision had "an internal major error" because it discussed the sport of table tennis, a field unrelated to the submitted evidence. We agreed and withdrew the Director's decision, remanding the matter for issuance of a new decision. We further stated that the new decision, if adverse, "shall be certified to us for review."

The Director issued a second decision denying the petition without certifying it to us. The matter is now before us on a second appeal. In his appeal, the Petitioner presents additional documentation and a copy of the previously submitted brief.

Upon *de novo* review, we will withdraw the second decision and remand the matter to the Director.

I. LAW

Section 203(b) of the Act states in pertinent part:

(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

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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 sustained acclaim and the 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 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).

Satisfaction of at least three criteria, however, does not, in and of itself, establish eligibility for this classification. *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), *aff'd*, 683 F.3d 1030 (9th Cir. 2012); *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality" and that U.S. Citizenship and Immigration Services (USCIS) examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true"). Accordingly, where a petitioner submits qualifying evidence under at least three criteria, we will determine whether the totality of 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.

II. ANALYSIS

As stated previously, in his first decision, the Director referenced materials regarding a table tennis player, while the Petitioner asserted expertise in the arts. Specifically, although the Petitioner did not claim eligibility for the membership criterion under 8 C.F.R. § 204.5(h)(3)(ii), the Director stated that he presented evidence of his membership in the [REDACTED] and two [REDACTED]. A review of the record of proceedings did not support the Director's discussion. In his first appeal, the Petitioner noted that he was "an independent artist" and did "not belong to any associations." Furthermore, in his discussion of the published material criterion under 8 C.F.R. § 204.5(h)(3)(iii), the Director stated that the Petitioner had not "sustained or [*sic*] national or international acclaim reported in major sports media as a [REDACTED]."

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The Director's initial decision also contained conflicting discussions regarding the display criterion under 8 C.F.R. § 204.5(h)(3)(vii). On page 4 of the decision, the Director found "[i]n light of the above," that the Petitioner did not meet the display criterion without a discussion to support the conclusion. On page 7, however, the Director determined that the Petitioner did meet the criterion.

Accordingly, we withdrew the Director's decision and remanded the matter for further consideration and entry of a new decision.¹ In addition, we instructed the Director that, if he issued an adverse decision, it should be certified to us for review.² Although the Director has issued a second decision, it is identical to the first one with the exception of a new decision date. The decision contains the exact same references to the Petitioner as a [REDACTED] and the two contradictory conclusions regarding the display criterion. Moreover, the Director did not certify the decision to us for review; rather the Petitioner appealed the decision to us based on language in the decision informing him of his appeal rights.

The Director's re-issuance of an identical decision that does not address or rectify our concerns is not in compliance with our order.³ Therefore, we will withdraw the Director's second decision and remand the matter for further consideration and entry of a new decision based on our previous order. Moreover, the Director may consider refunding the Petitioner's second appeal fee as he erred by not certifying his decision to us and improperly including instructions to follow appellate procedures, including the payment of the fee.

III. CONCLUSION

This matter will be remanded to the Director for issuance of a new decision containing specific findings related to evidence in the record.

ORDER: The decision of the Director, Texas Service Center, is withdrawn. The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of B-L-*, ID# 148577 (AAO Feb. 28, 2017)

¹ We have the authority to withdraw a decision and remand the case for further action, with an order that it be certified back to us if the new decision is adverse to the affected party. USCIS Policy Memorandum PM-602-0087, *Certification of Decisions to the Administrative Appeals Office* (AAO) 4 (July 2, 2013), <https://www.uscis.gov/laws/policy-memoranda>, Adjudicator's Field Manual 3.5(c), 10.18(a)(3), <https://www.uscis.gov/ilink>.

² This order is not meant to compel approval of the remanded case, but is designed to preserve the affected party's ability to seek appellate review without payment of a second appeal fee. *Id.*

³ An officer may not disregard our order that is properly entered on appeal or certification. Adjudicator's Field Manual, *supra*, at 3.5(c).