U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6409338

Date: APR. 23, 2020

Appeal of Texas Service Center Decision

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

The Petitioner, a singer, seeks classification as an alien 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to aliens 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 sustained acclaim and the recognition of their 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 they 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). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if they are able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)–(x) do not readily apply to the individual's occupation.

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). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "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." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

At the time of filing, the Petitioner had released 12 singles and 3 extended play records. She had also recorded an album for [redacted], but that album had not yet been released when the Petitioner filed the petition.

Before addressing the merits of the case, the Petitioner contends that the Director applied the wrong standard of proof. In this proceeding, the correct standard of proof is a preponderance of the evidence, meaning that the Petitioner must show that her claims are "more likely than not" or "probably" true. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010).

The Petitioner contends that the Director improperly imposed the higher standard of clear and convincing evidence. But the only example that the Petitioner provides is that the Director relied on "spurious reasoning" to discount media coverage about the Petitioner. The Petitioner does not explain how this shows that the Director required clear and convincing evidence.

A. Evidentiary Criteria

The Petitioner must establish that she has received a major, internationally recognized award, or, in the alternative, 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 have met seven criteria, summarized below:

- (i), Lesser nationally or internationally recognized prizes or awards;
- (ii), Membership in associations that require outstanding achievements;
- (iii), Published material about the alien in professional or major media;
- (iv), Participation as a judge of the work of others;
- (vii), Display at artistic exhibitions or showcases;
- (viii), Leading or critical role for distinguished organizations or establishments; and
- (x), Commercial success in the performing arts.

The Director found that the Petitioner met only one of the evidentiary criteria, relating to display. We will not disturb the finding relating to display.

On appeal, the Petitioner asserts that she also meets the first four criteria. After reviewing all of the evidence in the record, we find that the Petitioner meets three of the criteria, numbered (iii), (iv), and (vii). Below, we will explain why we are reversing the Director's conclusions regarding the third and fourth criteria.

> *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)

The Petitioner submitted several online articles and documented a number of television and radio appearances. Not all of these materials meet the requirements of the regulation, but some of them do meet them, and thus the Petitioner has satisfied the criterion relating to media coverage.

The Petitioner disputes the Director's conclusion that radio and television appearances "are not published material." We agree with the Petitioner that the Director erred by arbitrarily excluding radio and television coverage. The regulation refers to "publications or other major media." This wording is broad enough to include broadcast media as well as print media, all of which are "published" through their availability to the public, whether via print or electronic means.

The Petitioner has established the required media coverage.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.* 8 C.F.R. § 204.5(h)(3)(iv)

The Petitioner is a voting member of the Latin Academy of Recording Arts & Sciences (LARAS), in which capacity she votes among the nominees for Latin Grammy Awards. By having some influence over the selection of award winners, the Petitioner participates as a judge as described in the regulation. The significance of this voting activity is a matter for the final merits determination, further below.

As the Petitioner has demonstrated that she satisfies three criteria, we will evaluate the totality of the evidence in the context of the final merits determination below.

B. Final Merits Determination

As the Petitioner submitted the requisite initial evidence, we will evaluate whether she has demonstrated, by a preponderance of the evidence, her sustained national or international acclaim and that she is one of the small percentage at the very top of the field of endeavor, and that her achievements have been recognized in the field through extensive documentation. In a final merits determination, we analyze a petitioner's accomplishments and weigh the totality of the evidence to determine if their successes are sufficient to demonstrate that they have extraordinary ability in the field of endeavor. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2), (3); *see also Kazarian*, 596 F.3d at 1119-20.[1] In this matter, we determine that the Petitioner has not shown her eligibility.

The Petitioner has established an active career in live performance and as a recording artist. The record shows a pattern of increasing exposure, but does not show that her career has progressed to the point where she is in the small percentage at the very top of her field.

The Petitioner was nominated for the "[redacted]" award at the [redacted] Latin Grammys. Although she did not win the award, she contends that the nomination itself should carry considerable weight, to the point of being comparable evidence of a one-time achievement (a major, international recognized award) contemplated by 8 C.F.R. § 204.5(h)(3). The regulation at 8 C.F.R. § 204.5(h)(4), however, does not permit evidence comparable to a one-time achievement; it applies only to the ten lesser criteria enumerated at 8 C.F.R. § 204.5(h)(3)(i)–(x). Furthermore, the comparable evidence clause applies only if the ten criteria "do not readily apply to the beneficiary's occupation." Awards clearly exist in the Petitioner's field of endeavor; nomination for such an award, without actually winning the award, does not trigger the comparable evidence clause.

The Petitioner states that her "nomination for a Latin Grammy Award alone evidences she has risen to the top of her field and is an acclaimed international musician. Nomination for this award sets her apart from all others in her field." Such a claim requires substantial supporting evidence, which the Petitioner has not provided.

A Latin Grammy nomination is a significant achievement, but a nomination for "[redacted]" by its very nature, is not indicative of sustained acclaim. The [redacted]' category inherently excludes widely-recognized and long-established artists from consideration.

It also bears noting that the Petitioner began releasing recordings in 2009, and was nominated for the [redacted]" award about eight years later. The Petitioner's eligibility for that category does not suggest that LARAS had taken significant notice of the Petitioner's earlier recorded work (and thus that the Petitioner's work had earned her *sustained* acclaim). When *Billboard* announced the [redacted]

[1] *See also* 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* 4 (Dec. 22, 2010), http://www.uscis.gov/legal-resources/policy-memoranda (stating that USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established, by a preponderance of the evidence, the required high level of expertise for the immigrant classification).

Latin Grammy nominations, it indicated that none of the Petitioner's recordings had appeared in the *Billboard* charts.

In light of this information, it is also significant that the Petitioner initially claimed to have satisfied 8 C.F.R. § 204.5(h)(3)(x), pertaining to commercial success in the performing arts, but she abandoned that claim on appeal after the Director found that the Petitioner had not submitted adequate supporting documentary evidence.[2]

Similarly, media coverage in the record does not portray the Petitioner as a top artist with sustained national or international acclaim. A 2018 interview with the Petitioner referred to her as "an emerging artist" at "the start of [her] career." The Petitioner has appeared on television and radio programs to promote recent releases, but has not established a level of consistent coverage that top musical acts can attract. A number of the television performances appear to have been on local morning programs rather than national prime-time broadcasts.

The president of the record company for which the Petitioner had recorded an album stated: "I have worked with worldwide superstars like Jennifer Lopez, Nelly Furtado, Marc Anthony and Ricky Martin." In contrast, he referred to the Petitioner as "a full time professional entertainer with an increasingly bright future and a long career ahead of her, which I am certain will take her to international fame." This statement is a subjective assessment of the Petitioner's potential for future acclaim, rather than an indication that she has already reached the top of her field. An "increasingly bright future" is not tantamount to sustained national or international acclaim.

The Petitioner has performed at various special events, but did not show that these performances were indicative of an artist already at the top of the field. She performed at an event related to the Latin Grammy Awards, but does not claim to have performed at the award ceremony itself. Her highest-profile touring activity appears to have been as a supporting act for another artist.

The Petitioner has established her membership in LARAS, but it appears that the major qualification for that membership is the commercial release of recorded work. Releasing recordings is not intrinsically indicative of acclaim, particularly at a time when changes in technology and the music industry have made it possible for artists (including the Petitioner) to independently self-release their recordings digitally via download or streaming services, without record company involvement.

Also with respect to the Petitioner's LARAS membership, we have concluded that it meets the letter of the regulatory requirement regarding judging the work of others, but we must also consider the context in which that judging takes place. All voting members of LARAS can vote in the balloting for the Latin Grammy Awards, and the principal requirement for voting membership in LARAS is to have an active recording career. Therefore, notwithstanding the prestige of the Latin Grammy Awards, the Petitioner's ability to vote for its recipients is not indicative of being at the top of the field or sustained acclaim.

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[2] *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *see also*, *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

The Petitioner submitted statistics regarding streaming of her music on Spotify, but she did not provide any context to compare those figures to those of others in her field. The raw numbers do not show where she stands in relation to other artists. The information also shows that listeners in 61 countries streamed her music, but, again, the available evidence is not sufficient to show that only a small percentage of recording artists at the very top of the field have such a wide distribution of listeners. Likewise, evidence of the Petitioner's social media presence carries limited weight without a basis for comparison.

The Petitioner showed that one of her singles placed on local charts in Bogota, but she did not establish comparable chart placement at the national level. The Petitioner showed that a manufacturer had invoiced a total of about 17,000 compact discs between 2009 and 2014. This is an aggregate total of several different titles, and even then, the documentation shows only how many copies exist, rather than their sales.

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. U.S. Citizenship and Immigration Services 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 record establishes that the Petitioner has earned some degree of success and attention in an intensely competitive field of endeavor. The Latin Grammy nomination, in particular, is a coveted form of recognition. The Petitioner, however, has not established 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 that 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).

III. CONCLUSION

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.

ORDER: The appeal is dismissed.