U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6959088

Date: APR. 23, 2020

Appeal of Texas Service Center Decision

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

The Petitioner, a chef, 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 Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner meets at least three of the ten initial evidentiary criteria for this classification.

On appeal, the Petitioner submits a brief and new evidence, claiming that he meets at least three evidentiary criteria and is otherwise qualified for the benefit sought.

The petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we agree with the Director that the Petitioner has not demonstrated his eligibility as an individual of extraordinary ability.

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 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).

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).

II. ANALYSIS

The Petitioner is currently employed as the executive chef at [redacted] a restaurant in [redacted] Texas. According to his résumé, he has worked in various chef positions at restaurants in the United States and Italy since 2000.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that he has received 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).

The Petitioner initially claimed that he meets six of the ten initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), and now claims on appeal that he meets four criteria.[1] The Director found that the Petitioner met one of the evidentiary criteria, relating to performance in a leading or critical role with an organizations or establishments that has a distinguished reputation. *See* 8 C.F.R. § 204.5(h)(3)(viii). The Petitioner provided evidence of his critical role as executive chef of [redacted] along with media coverage and other evidence demonstrating that this establishment enjoys a distinguished reputation.

On appeal, the Petitioner asserts that he also meets the evidentiary criteria relating to published material about him and relating to his work, display of his work at artistic exhibitions or showcases, and high salary or other significantly high remuneration. After reviewing all of the evidence in the record, we conclude that the Petitioner did not establish that he meets at least three criteria.

[1] The Petitioner has not pursued his initial claim that he meets the criteria related to memberships in associations in the field that require outstanding achievements of their members (8 C.F.R. § 204.5(h)(3)(ii)) or commercial success in the performing arts (8 C.F.R. § 204.5(h)(3)(x)). Therefore, we deem these issues to be waived and will not address these criteria in this decision. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

Published material about the individual in professional or major trade publications or other major media, relating to the individual'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)

On appeal, the Petitioner claims that he meets this criterion based on previously submitted evidence of articles that appeared in Italian publications including *Il Venerdi Di' Repubblica* and *Cucina Italiana*.

The article from *Il Venerdi Di' Repubblica* is about the Beneficiary and his work. We note that the article that appeared in the magazine *Cucina Italiana*, while titled [redacted] indicates that the chef interviewed for the 2008 article had been working for [redacted] since December 2007. The Beneficiary's resume does not state that he worked for that restaurant. Rather, it indicates that he worked in Italy at [redacted] from 2006 to 2008 and for [redacted] from 2008 to 2010. There is no evidence in the record of the Petitioner's employment as a chef at [redacted] in 2008. Therefore, we cannot determine that this article is about the Petitioner.

The Petitioner did not provide any supporting evidence, at the time of filing or in response to the Director's request for evidence (RFE), to establish that either publication qualifies as a professional or major trade publication or other major media.[2]

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). In this case, the Director advised the Petitioner in the RFE that additional documentary evidence would be needed to establish that any of the submitted articles satisfy the requirement that the material be published in professional or major trade publications or other major media. Specifically, the Director advised that such evidence could include the circulation (on-line and/or in print) for the publications in which the material appeared and the intended audience of the publication.

The Petitioner did not acknowledge this request or submit the requested evidence in response to the RFE, but now submits evidence pertaining to the circulation of the two above-referenced publications on appeal. We note that the Petitioner does not claim that the previously submitted evidence was sufficient to meet this criterion or claim that the Director's determination was otherwise erroneous based on the evidence before him at the time of the decision.

When, as here, the record shows that a petitioner was put on notice of an evidentiary deficiency and was given an opportunity to address that deficiency, we will not accept evidence regarding that deficiency when offered for the first time on appeal. *See, e.g., Soriano*, 19 I&N Dec. 764; *Obaigbena*, 19 I&N Dec. 533. Accordingly, the Petitioner has not established that he meets this criterion.

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[2] *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 7 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html. (providing that evidence of published material in professional or major trade publications or in other major media publications should establish that the circulation (on-line or in print) is high compared to other circulation statistics).

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)

In order to meet this criterion, the Petitioner must establish that the work displayed is his own work product and that the venues at which his work was displayed were artistic exhibitions or showcases.[3]

The Petitioner claims that he meets this criterion based on his participation in an "Ultimate Chef Showdown," a judged cooking competition that was held at the [redacted] 2015.[4] The [redacted] is described in the submitted materials as "the world's premier event for the [redacted] industry." According to the description of the 2015 event, the chef tournament was included as part of the Expo's focus on food and beverage operations as "one the most profitable categories within [redacted]."

While the evidence confirms the Petitioner's participation in the "Ultimate Chef Showdown," the evidence does not show that the event, a [redacted] conference, was intended as an "artistic exhibition or showcase" for display of the work of the chefs involved. Rather, the record reflects that chefs from certain [redacted] properties were invited to participate as part of the conference's programming in the food and beverage sector. Accordingly, the Petitioner did not provide evidence of the display of his work at artistic exhibitions or showcases.

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 Director acknowledged that the Petitioner submitted evidence of his prior earnings, including a copy of his latest IRS Forms W-2, Wage and Tax Statements. However, the Director determined that the Petitioner did not satisfy the criterion because he did not provide any "earning data from other sources showing that [his] salary is high in relation to others in the field."

The record reflects that the Director advised the Petitioner of this deficiency in the RFE, instructed the Petitioner to provide "independent evidence" to establish that his salary is high in relation to others, and provided a list of the types of evidence that may satisfy this evidentiary requirement. The Petitioner did not acknowledge this request or submit any of the requested evidence in response, but now submits comparative salary data from Department of Labor resources on appeal. The Petitioner does not claim that the Director reached an erroneous conclusion based on the evidence previously submitted.

As noted above, where, as here the record shows that a petitioner was put on notice of an evidentiary deficiency and was given an opportunity to address that deficiency, we will not accept evidence

[3] *See also* USCIS Policy Memorandum PM 602-0005.1, *supra* at 9-10 (stating that officers should use the common dictionary definitions of "exhibition" and "showcase" in evaluating this criterion, and indicating that a "showcase" is "a setting, occasion, or medium for exhibiting something or *someone*, especially in an attractive or favorable aspect" (emphasis added)).

[4] The Petitioner also submits new evidence related to his participation as a local celebrity chef in the 2019 [redacted] a fundraising event sponsored by the [redacted]s division. The Petitioner filed this petition in 2018. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Accordingly, we will not evaluate this new evidence in determining whether the Petitioner met the criterion at 8 C.F.R.§ 204.5(h)(3)(vii) at the time of filing.

regarding that deficiency when offered for the first time on appeal. *See, e.g., Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

B. O-1 Nonimmigrant Status

We note that the record reflects that the Petitioner previously 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 Beneficiary, the prior approvals do not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different standard - statute, regulations, and case law. Many Form 1-140 immigrant petitions are correctly 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 Brothers Co. Ltd.*, 724 F. Supp. at 1103. 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. *Louisiana 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 his 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 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).

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.