U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12331969

Date: DEC. 28, 2020

Appeal of Texas Service Center Decision

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

The Petitioner, a percussionist, 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

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). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if he or she is 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).

II. ANALYSIS

The record indicates that the Petitioner has accompanied Venezuelan artists such as [redacted], [redacted] and [redacted] in the recording studio and in live performances, some of them televised.

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 claims to have met five criteria, and to have submitted comparable evidence relating to a sixth, 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; and
- (x), Commercial success in the performing arts.

The Director concluded that the Petitioner met the first evidentiary criterion, relating to prizes or awards. On appeal, the Petitioner asserts that he also meets the other claimed criteria.

We have reviewed all of the evidence in the record, and conclude, for the reasons discussed below, that it does not show that the Petitioner satisfies the requirements of at least three criteria.

Documentation of the alien'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 record contains evidence regarding various awards and nominations. The Director granted this criterion without specifying which award or awards were found to meet the requirements. Upon review of the record, we disagree with the Director's conclusion that the Petitioner has satisfied this criterion.

The Petitioner performed on three albums (one by [redacted] two by [redacted]) that were nominated for Latin Grammy Awards in various "best album" categories. (The Petitioner does not claim that the nominated albums won the awards.) Translated certificates from the Latin Academy of Recording Arts and Sciences (LARAS) show the Petitioner's name "in recognition of his participation" on the recordings, but do not indicate that the Petitioner himself was actually nominated for the awards. Album credits and letters in the record indicate that the Petitioner was a guest musician who played on one song on each of the nominated albums. Acknowledgment of participation as a guest on a nominated album is not a prize or award.

The Petitioner is the named winner of an award from the Mara de Oro de Venezuela Foundation. The president of that organization states that award winners are chosen "according to the results of surveys conducted" among "the people of [redacted] in Venezuela. A printout from the foundation's website indicates that the award was created "in order to highlight the best of the best of the city [redacted] These statements indicate a local-level award.

The Petitioner submits information about the "Mara International Prize," which does not appear to be the same as the Mara de Oro prize. Information about the Mara International Prize identifies its founder as Maria Laya. The founder of the Mara de Oro de Venezuela Foundation was Guillermo Sanchez Garcia. Furthermore, the record provides different years for the founding of the two organizations. The submitted evidence, therefore, appears to relate to two different organizations and two different prizes.

The Petitioner has not established that the award from the Mara de Oro Foundation is nationally or internationally recognized.

The Petitioner submits information about the [redacted] Orchid Festival, and a photograph of the Petitioner holding a photograph of a trophy. An anonymous, handwritten annotation on the photograph indicates that the Petitioner "won the highest prize of the event," but the accompanying documentation does not corroborate this claim. The submitted photograph is not sufficient evidence that the Petitioner won the award.

The musical duo [redacted] presented the Petitioner with an "award of recognition . . . for 5 years of outstanding work as a part of this great musical family." The record indicates that [redacted] are a successful musical act, but it does not follow that awards which they present to their supporting musicians are nationally or internationally recognized.

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)

The Petitioner has signed endorsement deals with manufacturers of musical instruments and related supplies. The Petitioner contends that these arrangements amount to "endorsement associations where top musicians are selected for membership." The Petitioner, however, has not shown that the participants constitute "associations in the field," or that recognized national or international experts are responsible for selecting endorsers. The endorsement is, instead, a business transaction in which a musician agrees to use and promote a company's products in exchange for consideration from that company. An official of one of the manufacturers refers to the arrangement not as an association, but as a "sponsorship program." The record also refers to the endorsement deals as "commercial contracts."

We agree with the Director that an endorsement contract is not membership in an association.

Regarding his voting membership in LARAS, the Petitioner states that applicants must "meet stringent requirements," but the LARAS bylaws, in the record, state only that "Each Voting Member . . . must be an active participant in the Latin recording industry." Active participation in the industry is not intrinsically an outstanding achievement, and the bylaws do not indicate that recognized national or international experts judge the achievements of applicants for membership.

The Petitioner has not established that voting membership in LARAS requires outstanding achievements as judged by recognized national or international experts.

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

Citing the "comparable evidence" provision at 8 C.F.R. § 204.5(h)(4), the Petitioner documents several concert and television performances by [redacted] and asserts that his "headlining of world tours in front of millions of audience members is comparable to a traditional artist's display of their work at a gallery or museum." It can be debated whether the chief purpose of these performances was for entertainment rather than artistic, but that discussion is unnecessary because of a more fundamental issue. Notwithstanding his use of the term "headlining," the Petitioner was not the featured performer; he was one of several musicians providing instrumental support for [redacted] Audiences would have seen and heard his performances, along with the other musicians, but they would have also seen the work of the costume designers, lighting designers, carpenters, and the manufacturers of the instruments, microphones, and loudspeakers. But all of these contributions, both musical and non-musical, were in service and support of the performances by the artists named on the tickets and promotional materials.

The Petitioner's presence onstage as a supporting musician during performances by [redacted] and other headlining artists does not amount to display of the Petitioner's work, or comparable evidence thereof.

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)

The Petitioner is credited as a session musician on recordings by several Venezuelan recording artists. The Petitioner submits chart data showing that these recordings sold well, but the recordings were not sold under his name. The submitted credits show that many other musicians likewise participated in the recording sessions, sometimes ten or more on a given track. We note that chart data for [redacted] includes a recording credited to [redacted] The Petitioner's name is not highlighted or featured in this way.

The Petitioner has performed, as a guest musician, on commercially successful recordings, but he has not established that *he* has achieved commercial success as a result. The Petitioner contends that his performances contributed to the success of the recordings and concerts, stating, for instance, that his "performance on [redacted] ultimately led the song to sell over 120,000 records" and reach the top of a Venezuelan record chart. The burden is on the Petitioner to show that he has achieved commercial success as a performing artist, which is not the same as performing on other artists' commercially successful recordings. In letters in the record, the recording artists themselves contend that the Petitioner's performances are responsible for the records' success, but the record does not support these statements. The record does not show, for instance, that the artists' recordings with the Petitioner consistently outsold their other recordings.

The Petitioner claims to have met six of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). Because he did not meet the above four, detailed discussion of the two remaining criteria cannot change the outcome of this appeal. Therefore, we reserve the remaining issues relating to published material under 8 C.F.R. § 204.5(h)(3)(iii) and participation as a judge under 8 C.F.R. § 204.5(h)(3)(iv).[1]

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 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 for individuals progressing toward the top or who have worked with individuals at the top. Here, while the Petitioner has worked with acclaimed artists, he has not shown that he himself has earned the required sustained national or international acclaim or 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

[1] *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, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

demonstrate that the Petitioner 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.

ORDER: The appeal is dismissed.