U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6109901

Date: FEB. 25, 2020

Appeal of Texas Service Center Decision

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

The Petitioner, an songwriter and singer of traditional Irish music, 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, while the Petitioner had satisfied three of the ten initial evidentiary criteria, she had not demonstrated sustained national or international acclaim and that her achievements have been recognized through extensive documentation.

On appeal, the Petitioner submits a brief and asserts that the Director erred in applying a final merits analysis when concluding that she had not established her eligibility for the classification sought, and that, this error notwithstanding, .

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* 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) 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) (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

The Petitioner is a singer and songwriter of traditional Irish music.

In his decision, the Director determined that while the Petitioner met three of the ten evidentiary requirements. After considering the totality of the evidence in a final merits determination, the Director found that the record did not show sustained national or international acclaim or demonstrate that the Petitioner was at the very top of her field of endeavor.

On appeal, the Petitioner asserts that the Director erred in conducting a two-stage analysis following a determination that she meets three of the ten evidentiary criteria as, "[t]he regulations do not call for the two step analysis used by [him]." She further argues that he "failed to provide specific and substantiated reasons why it believes [she] has not risen to the top of her field of traditional Irish music." She cites to *Buletini v. INS*, 860 F. Supp. 1222, 1234 (E.D. Mich. 1994) in which the court stated:

> Proof that an alien meets three of the criteria of the regulation is intended to constitute evidence that the alien has extraordinary ability...It is an abuse of discretion for the agency to deviate from the criteria of its own regulation. Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R. § 204.5(h)(3), the alien must be deemed to have extraordinary ability unless the INS sets forth specific

and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.

In contrast to the broad precedential authority of the case law of a United States circuit court (such as with *Kazarian*), we are not bound to follow the published decision of a United states district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before us; however the analysis does not have to be followed as a matter of law. *Id.* At 719.

Regardless, the above quote from *Buletini* indicates that the court considered the possibility that a petitioner can submit evidence satisfying three criteria and still not meet the extraordinary ability standard if USCIS provides specific and substantiated reasoning for its conclusion. *See Buletini*, 860 F. Supp. at 1234. The court in *Buletini* did not reject at any time the concept of examining the quality of the evidence presented. Specifically, the court in *Buletini* acknowledged, "the examiner must evaluate the quality, including the credibility, of the evidence presented to determine if it, in fact, satisfies the criteria." *Id.* We therefore determine that the Director did not err in his analysis with respect to conducting a two-stage analysis. However, upon *de novo* review of the record,[1] we conclude that the Petitioner has not established that she meets three of the ten evidentiary criteria, and will withdraw the Director's determination in that manner as discussed below.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that she has received a major, internationally recognized award, she must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director found that the Petitioner met three of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to published material, judging, and leading or critical role. After reviewing all of the evidence in the record, we find the Petitioner does not demonstrate that she meets three of the ten criteria, as required.

> *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)

In order to establish eligibility for this criterion, the Petitioner submits several media articles as well as printouts of the Facebook page for [redacted] Facebook page. Several articles are not about the Petitioner, as required. Specifically, '[redacted]' printed in the *New Ross Standard*, is primarily about the launch of the musical [redacted] at a

[1] We exercise *de novo* review of all issues of fact, law, policy, and discretion. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). This means that we look at the record anew and are not required to defer to findings made in the initial decision. Furthermore, our decision may address new issues that were not raised or resolved in the prior decision. The former Immigration and Naturalization Service (INS) recognized the AAO's *de novo* review authority as far back as 1984. *See Powers and Duties of Service Officers*, 49 Fed. Reg. 7355 (Feb. 29, 1984). Courts have also long recognized the AAO's de novo review authority. *See, e.g., Soltane v. USDOJ*, 381 F.3d 143, 145-46 (3rd Cir. 2004); *Sadeghzadeh v. USCIS*, 322 F.Supp.3d 12, 19 (DDC 2018). In addition, the AAO's *de novo* review authority is acknowledged in our precedent decisions. *See, e.g., Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 542 n.1 (AAO 2015).

local theater. While this article includes a photograph of the Petitioner with other performers at the launch of this musical, she is not identified within the text of the article. '[redacted]' published online at www.wmfe.org, focuses on [redacted] the fiddler for [redacted], and his upcoming participation in a 'traditional musician of the year' competition. The Petitioner is briefly mentioned as a member of [redacted], however this article cannot be considered to be about her.

The record also includes screenshots from [redacted]'s Facebook page, such as photos of the Petitioner performing with, and Facebook reviews of the band. Here, the Petitioner does not demonstrate how these photos and reviews constitute published material to satisfy this criterion. However, even were we to accept these screenshots as published material, the Petitioner has not established that reviews and photos about [redacted] are about her. In order to establish eligibility for this criterion, the published material should be about the Petitioner relating to her work in the field. Articles that are not about a petitioner do not meet this regulatory criterion. *See, 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). Furthermore, the record lacks evidence establishing that the *New Ross Standard*, www.wmfe.org, or Facebook, are professional or major trade publications or other major media, as required.[2]

The remainder of the articles in the record are about the Petitioner and relate to her work.[3] For example, [redacted] and '[redacted]," and '[redacted]" are about the Petitioner and her father singing [redacted]' in a church.[4] The record reflects that these articles were published online at Independent.ie, However, the record does not demonstrate that Independent.ie is a professional or major trade publication or other major medium, as required.[5] The Petitioner provides a printout from SimilarWeb listing this website's global rank, number of total visits, average visit duration, number of pages per visit, graphs of total visits over the past six months, and the percentage of traffic, by country. However, she does submit evidence, such as on-line circulation statistics or other relevant data, to show that independent.ie's circulation is high relative to others, and thus is a major medium.[6] She therefore does not demonstrate that such statistics reflect status as a major medium.

The remainder of the articles about the Petitioner and related to her work were published in *Wexford Echo*, *Wexford People*, and online at mchalespub.com. However, she does not present evidence establishing that these newspapers or website are professional or major trade publications or are major media. For the foregoing reasons, the Petitioner has not demonstrated that she meets this criterion and we withdraw the Director's finding in this matter.

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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 (noting that evidence of published material about the alien in major media should establish that its circulation (on-line or in print) is high compared to other circulation statistics.

[3] While we discuss a sampling of the articles here, we have reviewed the record in its entirety.

[4] We note that several of the articles submitted do not include an author, as required by the regulation, and therefore cannot be considered. This includes the articles published on www.sunnyskyz.com, mummypages.ie, crosswalk.com, godvine.com, and godtube.com.

[5] *See* USCIS Policy Memorandum PM 602-0005.1, *supra*, at 7.

[6] *Id.*

As discussed above, we find that the Petitioner does not meet the criterion related to published material. Although the Petitioner also claims that she meets the criteria related to judging and to leading or critical role, we need not reach these issues. We reserve them as the Petitioner cannot meet the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3). *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).

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 her 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 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).

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, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.