U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 5565038

Date: JAN. 24, 2020

Appeal of Texas Service Center Decision

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

The Petitioner, a cellist, 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 although the record established that the Petitioner satisfied the initial evidentiary requirements, it did not establish, as required, that the Petitioner has sustained national or international acclaim and is one of that small percentage at the very top of the field. The Director also found that the Petitioner had not shown that he is coming to the United States to continue working in the field. The Petitioner appealed that decision.

On appeal, the Petitioner noted that the denial decision contained a number of inapplicable references to athletics, and that the Petitioner had documented upcoming work in the United States. The Director issued a revised decision which addressed these issues and raised additional points. Because the Petitioner's appeal predated these revisions, we allowed the Petitioner an additional 30 days to supplement the record and respond to the latest version of the decision. The record contains no response to this notice, and we consider the record to be complete as it now stands.

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 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 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).

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 cellist. The Petitioner has studied at China's [redacted] of Music, the University of [redacted] the National University of [redacted], and [redacted] University. When he filed the petition, the Petitioner was studying at [redacted] Conservatory.[1]

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 ten alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). The Petitioner claimed to have met seven of those criteria:

- (i), nationally or internationally recognized prizes or awards for excellence;

[1] The Petitioner appears to have left the United States; on the appeal form, he provides an address in China.

- (ii), membership in associations requiring outstanding achievements;
- (iii), published material in professional or major trade publications or other major media;
- (iv), participation as a judge of the work of others;
- (v), original contributions of major significance;
- (vii), display at artistic exhibitions or showcases; and
- (viii), performance in a leading or critical role for organizations or establishments that have a distinguished reputation.

The Director found that the Petitioner met five of the ten criteria: (ii), (iii), (iv), (vii), and (viii). On appeal, the Petitioner does not dispute the Director's findings regarding the other two criteria. After reviewing all of the evidence in the record, we find that the Petitioner has satisfied four of the five criteria that the Director granted. We disagree with the Director's remaining finding:

> *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)

In general, in order for published material to meet this criterion, it must be about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution.

In late 2017 and early 2018, profiles of the Petitioner appeared in three provincial newspapers published in [redacted]. Submitted information indicates that one of these publications, *Sichuan Daily*, "rank[s] highest [in] circulation among provincial newspapers in China." An unspecified number of copies circulate in other countries, but the Petitioner did not show significant national or international distribution of what the record describes as a "provincial newspaper."

In [redacted] 2017, the Petitioner was one of two musicians interviewed on *New York Lounge*, a television talk show broadcast by [redacted]. The Petitioner did not establish that [redacted] constitutes major media. Rather, it is a "Chinese-language TV station in the [redacted] area." The submitted information indicates that the program's viewership is predominantly local, and necessarily limited to viewers who speak Chinese.

Other local media carried preview pieces, announcing then-upcoming shows by the Petitioner. One such preview appeared on an online platform that claims "readers from 181 countries," but the article about the Petitioner's [redacted] 2016 performance at [redacted] had only 349 page views more than two years after that performance took place.

Two preview pieces for that same [redacted] 2016 performance appeared not in local media, but on blogs that aggregate content. One blog, *Don411*, includes news stories covering a variety of topics, while the other, *Classical Candor*, focuses on classical music. The Petitioner did not establish that either blog constitutes a professional or major trade publication or other major media. Furthermore, both pieces include identical language; in *Classical Candor*, the piece was specifically credited to an artist management and public relations agency. As such, the item is not a news article about the Petitioner, but rather a promotional press release.

The Petitioner established that *The Straits Times* is a major English-language newspaper in [redacted] but the submitted article from that paper is not about the Petitioner. The 2010 review of an ensemble performance mentions the Petitioner only once, in the context of "a six-minute work for oboe and cello."

To satisfy this criterion, an article must both (1) appear in professional or major trade publications or other major media, and (2) be about the Petitioner. None of the submitted articles meet both of these requirements, and therefore the Petitioner has not satisfied this regulatory criterion.

As the Petitioner has demonstrated that he satisfies at least 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 he has demonstrated, by a preponderance of the evidence, his sustained national or international acclaim and that he is one of the small percentage at the very top of the field of endeavor, and that his 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.[2] In this matter, we determine that the Petitioner has not shown his eligibility.

It is significant that the prizes the Petitioner has won are specifically for young or student musicians, for which the most highly acclaimed artists in the field were ineligible. The Director raised this point in the amended notice of decision, to which the record contains no response from the Petitioner.

The same pattern is evident in other aspects of the record. While [redacted] is a prestigious and well-known concert venue, the record shows that the Petitioner performed there in the venue's smallest concert space. The record includes a printout from [redacted]'s website, stating: "With 268 seats, the elegant, intimate [redacted] Recital Hall is home each season to hundreds of recitals, chamber music concerts, panel discussions, and master classes. At many of these events, you're likely to find young musicians making their [redacted] debuts."

Likewise, the Petitioner served as principal cello for four conservatory or youth orchestras, including the [redacted] Philharmonia. These placements attest to the Petitioner's skill in relation to his fellow students, but youth and student orchestras, by definition, exclude the most experienced musicians who have completed their training. As such, the Petitioner's principal cello positions do not attest to his standing in the field as a whole.

[2] *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), https://www.uscis.gov/policymanual/HTML/PolicyManual.html (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).

Musicians can achieve acclaim and reach the top of their field while they are still students, but the burden is on the Petitioner to show that he has reached the top of his entire field. As recently as November 2016, less than 19 months before the petition's filing date, the Petitioner performed at a gala produced by an organization "dedicated to discovering, presenting and supporting the most talented young musicians, helping them achieve their full potential to become tomorrow's great concert artists."

The Petitioner's field comprises all cellists, not only student cellists or young cellists. Any evidence that limits comparison to students or young musicians is greatly diminished in weight, because such evidence excludes many of the most accomplished musicians in the Petitioner's field. (In his introductory statement, the Petitioner mentions [redacted] a prominent cellist who was 62 years old at the time of filing.) The Petitioner seeks an employment-based immigrant classification, which demands comparison of the Petitioner to those who are employed in the field, rather than students who are preparing for entry into that field.

By way of analogy, U.S. Citizenship and Immigration Services (USCIS) has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of "extraordinary ability." *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994); 56 Fed. Reg. at 60899. The AAO notes that in *Matter of Racine*, 1995 WL 153319 at *1, *4 (N.D. Ill. Feb. 16, 1995), the Court stated, with reference to a hockey player:

> [T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

The Court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable. By this same reasoning, the Petitioner must show that he is a top cellist, rather than a top student or a top "young cellist."

The Petitioner has not shown that any established symphony orchestras, comprised of working musicians rather than conservatory students, have sought to employ him, either as a principal or otherwise. The upcoming work in the United States (which the Director acknowledged in the revised decision) consisted of the following:

- A recording session to produce 60 minutes of music for a documentary film;
- Providing accompaniment to a pianist for a six-date concert tour; and
- Providing accompaniment at a concert to mark the release of an album by another musician.

The Petitioner did not establish that any of these short-term projects reflected, resulted from, or contributed to acclaim in the field, or that the events themselves have a prominence indicative of the very top of the field.[3]

Individuals who have worked with the Petitioner in various capacities, including the president of [redacted] and a pianist who has employed the Petitioner as a touring accompanist, praise the Petitioner's skill as a musician, with particular attention to his bow technique. The record does not show, however, that these abilities have earned the Petitioner significant recognition beyond those who have worked with him.

The record establishes that the Petitioner was a highly accomplished student of the cello, developing a technique that impressed his teachers while also earning coveted opportunities both to study and to perform. Ultimately, however, the key test of eligibility is not promise, potential, or subjective evaluations of the Petitioner's talent. Rather, the Petitioner must show that, at the time of filing the petition, he has already earned sustained national or international acclaim and reached the very top of his field. As substantial as his student accomplishments may be, the Petitioner has not yet met this very high threshold.

III. CONCLUSION

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. By way of comparison, 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.

ORDER: The appeal is dismissed.

[3] By acknowledging that the Petitioner "provided partial evidence in the form of upcoming engagements," the Director effectively withdrew the earlier finding that the Petitioner "has not provided any evidence" that he is coming to the United States to continue work in his field of expertise.