U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8044293

Date: MAY 28, 2020

Appeal of Nebraska Service Center Decision

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

The Petitioner, a motion picture production designer and art director, 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 Nebraska 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).

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 worked on several student films as an art director or production designer in conjunction with her studies at the [redacted] Since that time, she has worked on major motion pictures as an art department assistant and assistant art director, culminating in an art director credit for [redacted] At the time of filing, the Petitioner was an art director for [redacted] and [redacted] which have not yet been completed.

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 Petitioner claims to have met seven criteria, summarized below:

- (i), Lesser nationally or internationally recognized prizes or awards;
- (iii), Published material about the alien in professional or major media;
- (v), Original contributions of major significance;
- (vii), Display at artistic exhibitions or showcases;
- (viii), Leading or critical role for distinguished organizations or establishments;
- (ix), High remuneration for services;
- (x), Commercial success in the performing arts

The Director found that the Petitioner did not meet any of the claimed evidentiary criteria. After reviewing all the evidence in the record, we find that the Petitioner meets two of the criteria, relating, respectively, to published material about the alien and display of her work at artistic exhibitions or showcases.

We discuss the various criteria below.

> *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 Petitioner worked on several films that won various awards, but she does not establish that she received those awards. The Petitioner asserts that awards given to groups or teams can satisfy this criterion; the Petitioner cites the example of Olympic team medals, and concludes that she need not be

"the direct recipient of a prize or award." However, each competing member of a medaling Olympic team receives their own medal. The Petitioner has not shown that she meets the wording of the regulation, which calls for evidence of "the alien's receipt" of prizes or awards, rather than participation in award-winning projects.

Furthermore, the documentation in the record does not simply identify award-winning projects. It identifies other individuals, usually directors or producers, as the award winners. For instance, regarding the film [redacted] the Petitioner states that she "served as a core member of the creative team, and [was] therefore rightfully honored as a winner of the [redacted] Student Academy Bronze Award." The press release from the Academy of Motion Picture Arts and Sciences specifically identifies the film's director as the winner of the award.

The Petitioner submits several newspaper and magazine articles saying that she won a Student Academy Award for [redacted] but the regulation calls for "documentation of the alien's receipt" of the award. Third-party media coverage is not documentation that she received the award, and the Petitioner does not submit any documentation from the Academy itself to confirm that the Academy presented the Petitioner with the award.

The Petitioner cites an unpublished appellate decision from 2003, indicating that a petitioner's involvement in an award-winning project is sufficient to satisfy the criterion. That decision never had the force of precedent, and any informal guidance that the decision might have provided was superseded in 2010 by the issuance of a policy memorandum that emphasizes that "the focus should be on the alien's receipt of the awards or prizes, as opposed to his or her employer's receipt of the awards or prizes."[1]

Some award materials do mention the Petitioner by name, and we will consider those here. Cine Gear Expo named the film [redacted] among its [redacted] Film Series Winners." The festival's website identified eight people involved with making the film, including the Petitioner. The Petitioner, however, did not establish that this award is nationally or internationally recognized.

Cine Gear Expo also named the Petitioner among the makers of [redacted] in a list of "Finalists," but the record does not show that [redacted] won the award in question. The regulation requires "receipt of . . . prizes or awards," rather than nomination for prizes or awards that others received instead. (Even further removed from an actual award, the director and producer of [redacted] were shortlisted as finalists for an Academy Award nomination, but did not receive that nomination. For several reasons, this is not documentation of the Petitioner's receipt of a prize or award.)

[redacted] was also among the nominees for "Best Production Design / Art Direction" at "the [redacted] FilmQuest Festival" in [redacted] The Petitioner was the film's production designer, and therefore a "Best Production Design" award would directly acknowledge her work. But, again, the record does not show that the film actually won the prize for which it was nominated. Nominations for recognized awards may

[1] 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*, 6 (Dec. 22, 2010), https://www.uscis.gov/legal-resources/policy-memoranda.

be considered in the context of a final merits determination, but the Petitioner did not establish that FilmQuest awards were nationally or internationally recognized from the time [redacted].

The After Hours Film Society presented the director of [redacted] with an Award of Excellence at the [redacted] Say It In Eight Student Film Festival. Festival materials credit the Petitioner among three "Secondary Filmmakers," but the award itself only names the director. The Petitioner did not establish that the award is nationally or internationally recognized.

The Petitioner was also one of several individuals credited in the "Art Department" of higher-profile feature films such as [redacted] and [redacted] but in lower-ranking roles. The Petitioner did not show that she received any awards related to her work on these films.

The Petitioner has not established her receipt of nationally or internationally recognized prizes or awards.

> *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 submits copies of several articles about her. Not all of these articles meet the requirements of the criterion, but some do. For example, the Petitioner was the subject of an article in *The Hindu*, which she shows to be among India's highest-circulation daily newspapers. Therefore, we disagree with the Director's finding that the Petitioner does not satisfy this criterion.

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v)

In order to satisfy this criterion, petitioners must establish that not only have they made original contributions, but also that those contributions have been of major significance in the field. For example, a petitioner may show that the contributions have been widely implemented throughout the field, have remarkably impacted or influenced the field, or have otherwise risen to a level of major significance. The phrase "major significance" is not superfluous and, thus, it has some meaning. *See Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

The Petitioner claims to be "widely recognized as one of the preeminent production designers and art directors in the entertainment industry," whose "record of major critically acclaimed successes is unparalleled." The Petitioner submits letters from several producers and production designers, most of whom have employed or supervised the Petitioner in some capacity. These individuals attest to the Petitioner's talent, list her credits, and claim that she is well known and in demand throughout the industry, but they do not explain the major significance of specific contributions that the Petitioner has made.

For example, a production designer who has worked with the Petitioner on three feature films states that the Petitioner "exceeded the ordinary parameters of the art department" as an art department assistant on [redacted] and was "integral in assembling" "one of the most iconic sets" as an assistant art director on

[redacted] The letter does not explain how the Petitioner's contribution to this film set is of major significance in the field.

The Petitioner has not established that she has made original contributions of major significance in the field.

> *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)

The Director found that the Petitioner did not satisfy this criterion. We disagree.

Much of the record concerns showings of films at festivals, which differ from commercial screenings in that the focus is on the artistic merit of the films and, in some instances, specific elements of those films. The Director acknowledged that the Petitioner worked "on films that were shown at festivals," but stated that these showings did "not demonstrate that [the Petitioner's] actual work was recognized."

As noted above, however, [redacted] was nominated for "Best Production Design / Art Direction" at the [redacted] FilmQuest Festival, and the Petitioner was the production designer for that film. The film did not win the award, but the very existence of the category shows that the festival's jurors were paying special attention to production design and art direction. The Petitioner's "actual work was recognized" by [redacted] nomination in a category directly related to the Petitioner's role on the project.

We conclude that the Petitioner has satisfied this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii)

If the standards at 8 C.F.R. § 204.5(h)(3)(i)–(x) do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(h)(4). The Petitioner states:

> [P]roduction designers and art directors in the film industry typically work on productions . . . and are not in-house staff working for organizations. As such, this criterion would not normally apply to creative artists such as art directors, production designers, actors, or directors. Respectfully, consideration of [the Petitioner's] lead and critical roles for productions with distinguished reputations would seem to be the appropriate comparable criterion for the Service to consider.

We need not consider the merits of this argument unless the Petitioner establishes that she has in fact performed in a leading or critical role for productions with a distinguished reputation. The record does not show that she has done so.

At the time of filing, the Petitioner was "an Art Director for [redacted] and [redacted]." Whatever the reputation of the first [redacted] the sequels are still in production. The reputations of individual participants may contribute to expectations about the film, but expectations are not the same as a reputation. We

cannot find that a film has a distinguished reputation while it is still in production. The Petitioner's hiring for a high-profile project is a factor that could have been considered in a final merits determination, if the proceeding had reached that stage.

With regard to films that had already been completed and released by the petition's filing date in November 2018, the Petitioner's positions of greatest responsibility were on short student films. In terms of major motion pictures, she was credited in lower-ranking roles such as "art department assistant" and "property master," with one "art director" credit for [redacted] The submitted credits for that film, however, list the Petitioner as one of ten art directors; the Petitioner answered to one of four supervising art directors. The presence of nine other art directors, including several who outranked her, would appear to significantly limit the scope of the Petitioner's responsibility on the project. Also, the Petitioner did not submit objective (non-promotional) evidence that [redacted] enjoys a distinguished reputation. (A big-budget feature from a major studio is not intrinsically distinguished. The record does not establish the overall critical reception of the film;[2] show that the film earned enough to cover production and marketing expenses; or otherwise demonstrate that the film has a distinguished reputation.)

Several of the submitted letters indicate that the Petitioner deserves substantial credit for the success of films on which she has worked. U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding a foreign national's eligibility. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*

USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Id.* In this case, key assertions on the letters appear to be exaggerated or unwarranted. For example, a production designer in the industry asserted: "Due to [the Petitioner's] international renown in the industry, she has served as production designer and art director on . . . [redacted], [redacted], [redacted] [redacted] and [redacted]." All of the named titles are student films, made by the Petitioner's fellow students at the [redacted]. This information tends to cast doubt on the assertion that her involvement in the projects was the result of "international renown in the industry." Without documentary support, such assertions carry little weight.

The Petitioner has not satisfied the requirements of this criterion.

> *Evidence that the alien 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)

Pay receipts for her work on the [redacted] franchise show that the Petitioner earns $3867.10 per week on that project. The Petitioner states that she "commands a salary of $3,867.10 per week, or $96.67 per hour (annualized to $201,073.60)," and that "the median hourly wage for Art Directors is $44.97 (annualized

[2] Reviews in the record, chosen by the Petitioner, do not necessarily constitute a representative sampling. Websites such as *IMDb* and *Rotten Tomatoes* compile critical scores, but the Petitioner has not submitted that information.

to $92,497.60) as reported by the U.S. Department of Labor's Bureau of Labor Statistics." The same source states that the 90th percentile hourly wage is $81.84.

The data provided, however, do not provide a suitable comparison. The cited figures are for art directors in a variety of industries. The hourly mean wage for workers in the "Motion Picture and Video Industries" is $58.74, which is 18% higher than the $49.76 general mean across all industries. The submitted statistics do not break down median or percentile figures by industry, which limits their utility.

Furthermore, the Petitioner's stated calculation of $96.67 per hour assumes a 40-hour work week, but the record does not warrant that assumption. The [redacted] pay receipts show only a weekly figure, not an hourly wage. The only submitted document that shows the number of hours worked in a week is an earlier receipt for the Petitioner's work as an assistant art director for [redacted] Productions. That receipt indicates that she worked 60 hours during a five-day work week. If these hours are typical, then the Petitioner's hourly wage on the [redacted] sequels would be $64.45, not $96.67.

Also, the Petitioner repeatedly claims six-figure annual earnings, but she does not document her total earnings for any given year. Instead, she derives the sum by extrapolating her weekly pay. A small number of weekly pay receipts, in a field that employs the Petitioner on a project-by-project basis, does not demonstrate or imply that she consistently earned similar amounts every week leading up to the time of filing. (The Petitioner later submitted bank documents showing weekly deposits beginning in October 2018, shortly before the filing date, but the Petitioner has not documented her total earnings for any given year.)

The fragmentary evidence in the record is not sufficient to show that the Petitioner earns significantly high remuneration compared to other art directors in the motion picture industry.

> *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 did not initially claim to have satisfied this criterion. In response to a request for evidence, the Petitioner asserted that she satisfies this criterion because she "played a critical role on projects that have been both commercially and critically successful," although this statement deviates significantly from the actual regulatory criterion. Likewise, fulfilling the criterion is not simply a matter of credited involvement in a commercially successful film.

A production designer who worked supervised the Petitioner's work on several feature films stated: "I am confident that the success of these productions was contingent on the extraordinary artistry exhibited by" the Petitioner. The Petitioner was not the lead production designer or art director on any of the projects named in the letter, and the record contains no objective evidence to support the claim that the Petitioner was significantly responsible for the commercial performance of those films.

We agree with the Director's finding that the Petitioner did not show that her work was largely responsible for the commercial success of her projects.

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). By the same reasoning, involvement in major motion pictures is not presumptive evidence of eligibility. The Petitioner followed her involvement in well-regarded student films with lower-ranking crew positions on feature films. The Petitioner has since begun taking on positions of increasing responsibility, but the record does not support the contention that she has already achieved national or international acclaim at the top of the field of cinematic art direction. In the related but separate realm of production design, the Petitioner has no documented credits as a production designer subsequent to her student work. We find the record insufficient to demonstrate that the Petitioner has sustained national or international acclaim and is among the small percentage at the top of her field. *See* section 203(b)(1)(A)(i) of the Act; 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.

ORDER: The appeal is dismissed.