U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12210842

Date: NOV. 27, 2020

Appeal of Nebraska Service Center Decision

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

The Petitioner, a manager of creative services/senior graphic designer, 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 Nebraska Service Center denied the petition, concluding that although the Petitioner satisfied three of the initial evidentiary criteria for this classification, as required, he did not show sustained national or international acclaim and demonstrate that he is among the small percentage at the very top of his field of endeavor. The matter is now before us on appeal.

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, the Petitioner has not met this burden. Accordingly, 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 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).

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 reflects that the Petitioner was employed as a manager of creative services for [redacted] as of the date of filing and that he previously served in a senior graphic designer role for this employer.

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 has consistently claimed that he meets the following four criteria:[1]

- (iv), Participation as a judge of the work of others;
- (vii), Display of his work at artistic exhibitions or showcases;
- (viii), Leading or critical roles for organizations or establishments that have a distinguished reputation; and
- (ix), High salary or other significantly high remuneration in relation to others in the field.

[1] The Petitioner initially claimed that he satisfied the original contributions criterion at 8 C.F.R. § 204.5(h)(3)(v), but on appeal, he does contest the Director's determination that he did not meet this criterion. In addition, the Director's request for evidence (RFE) and denial addressed the criteria relating to awards and commercial success in the performing arts, although the Petitioner did not claim that he meets these two criteria. The Petitioner does not address these criteria on appeal. Issues or claims that are not raised on appeal are deemed to be waived. See, e.g., Matter of M-A-S-, 24 I&N Dec. 762, 767 n.2 (BIA 2009). See also Sepulveda v. U.S. Att'y Gen., 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); Hristov v. Roark, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court determined the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

The Director found that the Petitioner meets the criteria relating to judging, display at artistic exhibitions, and leading or critical roles. The Petitioner's participation on a jury panel at [redacted]s 2018 and 2019 [redacted] Connections trade shows demonstrates that he has participated as a judge of the work of others in the same or allied field under 8 C.F.R. § 204.5(h)(3)(iv). The record also reflects that the Petitioner has displayed his artwork at three art exhibitions in [redacted] thus meeting the criterion at 8 C.F.R. § 204.5(h)(3)(vii). Finally, the Petitioner demonstrated that he serves in a critical role with [redacted] and established the distinguished reputation of that organization. Accordingly, the Petitioner has satisfied the criterion at 8 C.F.R. § 204.5(h)(3)(viii).

Because the Petitioner has established that he meets the requisite three evidentiary criteria, he has satisfied the initial evidence requirements. On appeal, the Petitioner claims that the Director's decision did not explain why the submitted evidence was insufficient to establish that he satisfied the high salary criterion at 8 C.F.R. § 204.5(h)(3)(x). He also asserts that the Director's failure to grant this fourth criterion prejudiced his case.

We will consider the evidence submitted in support of the high salary criterion, together with the balance of the record, to determine whether the Petitoner possesses the level of sustained acclaim and standing in his field to establish his eligibility as an individual of extraordinary ability.

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] For the reasons discussed below, we conclude that the Petitioner has not established his eligibility.

The Petitioner's supporting letter describes him as "one of the industry's most successful graphic designers and art directors." The record confirms his employment with [redacted] since 2016, where he currently serves as Manager, Creative Services assigned to the [redacted] brand. A letter from a former director of design for [redacted] confirms that he provided services to [redacted] as a contracted graphic designer in in "2014/15." Earlier in his career, beginning in 2006 or 2007,[3] the Petitioner worked as a contracted graphic designer for [redacted]

[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).

[3] A letter from [redacted] former [redacted] Manager for [redacted] in [redacted] indicates that the Petitioner worked for [redacted] from 2006 until 2012. A letter from [redacted] Company payroll department indicates that he was on the company payroll from July 2007 until November 2011, while the introductory letter submitted in support of the petition indicates that the Petitioner left [redacted] in 2010 "to pursue other creative endeavors."

in [redacted] and later as a senior graphic/product designer for the [redacted] in [redacted] The supporting letter mentions that he has also provided services as a designer for other companies including [redacted] and [redacted] Other evidence indicates that the Petitioner studied art in [redacted] and began his design career in the advertising industry in the late 1990s.

As mentioned above, the Petitioner established that he has judged the work of others within his field, displayed his work at artistic exhibitions, and performed in a critical role for [redacted] The record, however, does not demonstrate that his achievements reflect a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

Relating to the Petitioner's service as a judge of the work of others, it is appropriate to evaluate the significance of his experience to determine if such evidence indicates the required extraordinary ability for this highly restrictive classification. See Kazarian, 596 F. 3d at 1121-22.[4] The Petitioner submitted evidence that he served on the 68-member juries at the 2018 and 2019 [redacted] Connections trade show, an annual event organized by [redacted] and described as "the only custom made trade show for the creative community." The evidence establishes that the Connections trade shows include an award component in which the jury selects winners in the areas of creative content, video and print advertising and other creative specialties. The record reflects that [redacted] is a global network and resource that offers exposure to companies and individual members of the creative community.

The Petitioner asserts that the Director's final merits determination failed to consider the prestige of this [redacted] event or the stature of his fellow jurors. Specifically, he notes that his fellow jurors were creative professionals from companies such as Vans, Nike, Sony Pictures, Apple, Google and NBC Universal, demonstrating that the jury was comprised of "a veritable who's who of top creative talent."

We note that all of the supporting evidence regarding the [redacted] Connections shows was sourced from the event's own website. The evidence does not establish, for example, that the awards bestowed by juries at these shows are major awards in the creative industry or that the Connections show receives media coverage in professional or trade publications or major media. The record supports the Petitioner's claim that most of the jurors hold creative positions with well-known companies, but the evidence does not describe [redacted]'s jury selection process or otherwise corroborate the Petitioner's assertion that only those in the small percentage at the very top of the creative field are invited to participate as jurors. We acknowledge that each juror was recognized with an individual profile and short interview published on the event's website but it is unclear how this recognition by the organizers resulted in or is reflective of the Petitioner's sustained national or international acclaim as a graphic artist or art director. The record does not demonstrate that he garnered wide attention from the field based on his work as a juror at these annual events.

We also note that the Petitioner's only documented judging experience, in 2018 and 2019, is quite recent and therefore does not clearly support a determination that he has documented a "career of

[4] See also USCIS Policy Memorandum PM 602-0005.1, supra, at 13 (stating that an individual's participation should be evaluated to determine whether it was indicative of being one of that small percentage who have risen to the very top of the field of endeavor and enjoying sustained national or international acclaim).

acclaimed work in the field" as contemplated by Congress or indicative of the required sustained national or international acclaim. See H.R. Rep. No. at 59 and section 203(b)(1)(A) of the Act. The Petitioner indicates that he has "several years" of jury experience at this event but has not documented any participation as a juror at this or any other event prior to 2018. Without evidence that sets him apart from others in his field, the Petitioner has not shown that his judging experience places him among "that small percentage who [has] risen to the very top of the field of endeavor." See 8 C.F.R. § 204.5(h)(2).

As it relates to the display of his work at artistic exhibitions and showcases, the Petitioner provided evidence that he displayed his artwork at (1) the 2014 s of the Art Show," an exhibit at Stan Lee's Expo; (2) a 2016 exhibit titled " " held at the Exhibit A Gallery in ; and (3) a 2017 exhibit titled " " hosted by Creature Features in . In addition to these exhibitions, the Petitioner claimed eligibility under the display criterion based on his creative contributions to s promotional materials for and game displays at the video game expo, Comic-Con International, and events, described as "some of the biggest events in the videogame industry."

In addressing this criterion in the final merits determination, the Director observed that "participation in exhibits is expected of artists," and determined that the Petitioner had not demonstrated how his own participation demonstrates his sustained acclaim. On appeal, the Petitioner asserts the Director failed to consider the nature and importance of the exhibitions in which he participated and failed to explain why the evidence was deficient to support his extraordinary ability claim. The Petitioner solely emphasizes the work he performed for 's releases of and which was displayed at , Comic-Con, and gaming conventions. However, while he established that he worked on promotional materials, the evidence does not establish that these video game industry events qualify as "artistic exhibitions or showcases" intended to display the work of individual graphic or visual artists.

With respect to the "Mistress of the Art Show," the Petitioner submitted a letter from president of who describes this art show as a main feature of the exhibit, and as "one of the most popular" shows "within the world of comic books and horror." who states that her company holds licensing rights for horror film icon , indicates that she selects no more than 25 artists out of hundreds of submissions for this art show. She identifies "notable artists" who have participated in these exhibitions, and states that she selected the Petitioner because he has consistently provided exceptional artwork for her company. The Petitioner also submitted promotional materials for the exhibition and background information regarding the indicating that it is the largest pop culture convention held in

However, the submitted media coverage about the exhibition does not highlight the "Mistress of the Art Show" or the artists participating in the show. Nor is 's letter alone sufficient to establish that only acclaimed artists were selected to participate in this exhibition. In addition, although the record documents the Petitioner's participation in the above-referenced tribute and exhibits, it does not include supporting evidence demonstrating his involvement in either show resulted in or is indicative of his

significant recognition in the field. Overall, the Petitioner has not established that his participation in the three exhibitions mentioned, between 2014 and 2017, places him among the small percentage at the very top of his field or contributed to his sustained national acclaim in the field.

With respect to the Petitioner's employment, the appeal brief emphasizes that he has worked with prestigious companies such as and which "surely have their choice when hiring graphic designers," and notes that these companies have entrusted him with progressively more senior roles within their design departments. The Petitioner further states that the Director failed to explain how a graphic designer "working in a critical and leading role for a respected multinational company with an instantly recognizable name – an individual with overall responsibility for a brand that is an international blockbuster – has somehow not risen to the top of his field."

The record reflects that the Petitioner has worked for since December 2016. While the Director acknowledged that the Petitioner established his critical role with the company, the record does not support his claim that he has "overall responsibility" for the brand. The Petitioner initially submitted a letter from Director of Creative Services for , along with evidence indicating that is recognized as being part of the original design team for and has been featured and interviewed on fan websites. explained that the Petitioner was hired to "manage the workflow for the US team including all creative for licensing, marketing and packaging." He emphasized the Petitioner's "carefully honed expertise, and his broad knowledge of fashion, licensing and marketing" and noted that he was instrumental in the marketing campaigns for the major release of and both award-winning games. further described the Petitioner as "overtly influential in the continued success of

The record also contains a more recent letter from a Senior Vice President of and Chief Brand Officer of . describes the Petitioner's responsibilities as "senior graphic designer/manager of creative services of ," noting that he delegates responsibilities to internal designers, selects external creative agencies, works with them to develop the brand's trend style guides, and reviews and validates creative assets. He states that "the entire operation of the Head Office relies upon his experience, expertise, leadership and critical role." Finally, emphasizes the success of notes the game's many accolades and industry awards, and attributes this success, in part, to the Petitioner's "leadership and guidance."

While confirms that the Petitioner contributed to the successful promotional launch of two major video game titles, it is unclear how his contributions resulted in national or international acclaim to the Petitioner personally. The record contains ample evidence that the games were well-received and received awards, but this represents acclaim to and the already successful brand, not to the Beneficiary in his personal capacity as a graphic designer working on creative aspects of licensing, marketing and packaging. Submitted credits for the and games indicate the Petitioner's involvement as a member of 's creative services team, but these credits list many other branding, marketing, licensing and creative services employees working for various companies, many of them senior to the Petitioner. In fact, both and hold senior positions within the brand team, which raises questions regarding

statements that the Petitioner, as a senior graphic designer, is the person primarily responsible for all creative aspects of the brand.

The Petitioner suggests that the very fact that [redacted] hired him to work on its flagship brand indicates that he is at the top of his field, but we cannot reach this conclusion based solely on the statements provided by [redacted] representatives. We acknowledge that the company clearly value his creative talents and consider him a key contributor to creative services for the brand. However, absent evidence that sustained national or international acclaim is a condition of being considered for employment for a graphic design position with [redacted] or that his role has resulted in such acclaim, he cannot establish extraordinary ability based solely on his position with the company. The evidence demonstrates that the Beneficiary's contributions for [redacted] have been noticed within the company, but the record does not establish that his achievements have been recognized more broadly in the field of expertise at the level required to support an extraordinary ability claim. As noted, it appears that his participation as a juror for the [redacted] Connections shows in 2018 and 2019 likely stemmed from his key creative role with a prominent company like [redacted], but this evidence alone does not establish his sustained national acclaim as a graphic designer.

The Petitioner has also submitted letters regarding his role as a senior graphic and product designer for [redacted], [redacted] former European Design Manager of [redacted] Head Office in [redacted] indicates that the Petitioner was part of the creative team that designs [redacted] merchandise sold across Europe, including products such as apparel and home accessories. He notes that the [redacted] organization "is in a position to set extremely high hiring standards for Designers" and attracts the "best and brightest." With respect to the Petitioner's contributions, [redacted] notes that his projects included major [redacted] franchises such as [redacted] and [redacted] and explains that he won an international intracompany design competition that resulted in the release of a limited edition t-shirt featuring his design and signature. He also highlights the success of a Christmas tree ornament set designed by the Petitioner that quickly earned collectable status.

While the evidence establishes that Petitioner was a member of a critical design team that developed [redacted] products sold throughout Europe and had some notable successes, the record does not establish that the widespread distribution of the products or artwork he designed resulted in individual recognition for the Petitioner that would constitute national or international acclaim in his field. While we do not doubt that [redacted] has high standards when selecting graphic designers for their creative teams, the evidence does not support a conclusion that being hired by [redacted] alone is evidence that he is recognized as being among the small percentage at the very top of his field. We acknowledge the Petitioner's success in his industry, but the record has not shown that he has received national or international acclaim for his work on these projects.

Finally, the Petitioner asserts that the Director erred by determining that he did not provide evidence that he has commanded a high salary in relation to others. Offer and promotion letters from [redacted] indicate that he was hired at an annual base salary of $82,500, that his base salary in the 2019 fiscal year was $85,660, and that his 2020 fiscal year pay rate would be $90,800. He was notified of

a promotion to the position of Manager, Creative Services on May 1, 2019.[5] His initial offer letter indicates his eligibility to participate in an Employee Bonus Program. The Petitioner also submitted copies of his IRS Form W-2s indicating that he earned "wages, tips and other compensation" of $80,954 in 2017, $149,117.48 in 2018, and $114,428.92 in 2019. Based on the letters discussed above, his reported income in 2018 and 2019 reflected substantial bonuses.

The Petitioner submitted a 2019 graphic designer occupational profile from the Department of Labor's CareerOneStop website which shows salary data for the [redacted] area where he works. This evidence shows a median wage of $55,300, a 75th percentile wage of $73,240, and a 90th percentile wage of $94,310. The Petitioner also compares his total compensation figures to the U.S. Department of Labor data for both Graphic Designers in the [redacted] area at the Level 4, or fully competent, wage, stating that his compensation significantly exceeds those wages. We note that the Occupational Employment Statistics (OES) data obtained from the FLCDatacenter.com website, from which the Petitioner obtained this data, does not include bonuses or benefits.[6] Therefore, the Petitioner's base salary is the appropriate basis for comparison to the Department of Labor data he provided.

According to the Department of Labor database for the period beginning July 2019, the Level 4 Wage for a graphic designer is $71,178. The evidence indicates that the Petitioner's base salary is higher than the average wage for a graphic designer with his education and experience, and even above the 75th percentile wage. However, it does not establish how his salary places him among the small percentage of graphic designers at the very top of the field. Although the Petitioner's total remuneration was significantly higher than his base salary in 2018 and 2019, he has not provided evidence that would allow us to compare his total remuneration to that of others in his field.

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. U.S. Citizenship and Immigration Services 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 ongoing 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 that 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).

The Petitioner has performed design work for high-profile brands and has been entrusted with increasing responsibility, particularly in his latest role with [redacted] However, the record does not indicate that he has already achieved a degree of recognition consistent with the sustained acclaim that the statute demands. We find the record insufficient to demonstrate that he has sustained national or

[5] The Petitioner listed his occupation as "Art Director/Graphic Designer" on the Form I-140. The Petitioner explained that he anticipated at the time of filing that his job title following promotion would be "Art Director." However, the promotion letter identifying his new position as "Manager, Creative Services" pre-dated the filing of the petition by three months.
[6] See the OES FAQ page at https://www.bls.gov/oes/oes_ques.htm (last visited Nov. 25, 2020).

international acclaim and is among the small percentage at the top of his field. See section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2).

C. O-1 Nonimmigrant Status

We note that the record reflects that the Petitioner was granted O-1 status, a classification reserved for nonimmigrants of extraordinary ability. Although USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the Petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different standard – statute, regulations, and case law. Many Form I-140 immigrant petitions are 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 Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F. 2d 41 (2d. Cir. 1990).

Despite any number of previously approved petitions, USCIS does not have the authority to confer an immigration benefit when a petitioner fails to meet their burden of proof in a subsequent petition. See Section 291 of the Act. Moreover, an adjudicator's fact-finding authority is not constrained by any prior petition approval, but instead, is based on the merits of each case. In this case, for the reasons discussed, the evidence did not meet the Petitioner's burden of proof for this highly-restrictive immigrant classification.

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. See La. Philharmonic Orchestra v. INS, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

III. CONCLUSION

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.