U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10070333

Date: SEPT. 24, 2020

Appeal of Texas Service Center Decision

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

The Petitioner, a physiatrist specialist, 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 Petitioner satisfied at least three of the initial evidentiary criteria, 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 the field of endeavor. Subsequently, the Director dismissed the Petitioner's joint motion to reopen and motion to reconsider as untimely filed.

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 withdraw the decision and remand the matter to the Director.

I. LAW

Section 203(b)(1)(A) 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 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

Because the Petitioner did not establish that he received a major, internationally recognized award, he claimed to satisfy at least three of the ten alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). Ultimately, the Director determined that the Petitioner met four of those criteria: published material under 8 C.F.R. § 204.5(h)(3)(iii), judging under 8 C.F.R. § 204.5(h)(3)(iv), scholarly articles under 8 C.F.R. § 204.5(h)(3)(vi), and leading or critical role under 8 C.F.R. § 204.5(h)(3)(viii). As such, the Director conducted a final merits determination and concluded that the Petitioner did not show that he garnered sustained national or international acclaim and that his achievements have been recognized in the field of expertise, demonstrating that he is one of that small percentage who has risen to the very top of the field.[1] The Director subsequently decided that the Petitioner untimely filed his joint motion to reopen and motion to reconsider and dismissed the motions.

Motions must be filed within 30 days of the decision.[2] *See* 8 C.F.R. § 103.5(a)(1)(i). If the decision was mailed, 3 days will be added to the filing time requirement. *See* 8 C.F.R. § 103.8(b). When the last day of a period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. *See* 8 C.F.R. § 1.2. USCIS will consider a benefit request received and will record the receipt date as of the actual date of receipt at the location designated for filing such benefit request whether electronically or in paper format. 8 C.F.R. § 103.1(a)(7)(i).

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[1] *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* 13 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html (providing that objectively meeting the regulatory criteria in part one alone does not establish that an individual meets the requirements for classification as an individual of extraordinary ability under section 203(b)(1)(A) of the Act).

[2] The 30-day filing period for a motion to reopen "may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner." 8 C.F.R. § 103.5(a)(1)(i).

The record reflects that the Director denied the petition by mail on September 12, 2019.[3] As such, the regulations permitted the Petitioner to file a motion within 33 days, or by October 15, 2019 (Tuesday).[4] *See* 8 C.F.R. §§ 103.5(a)(1)(i) and 103.8(b). The Director determined that the Petitioner filed the motions on October 18, 2019, 36 days after the decision. However, although USCIS receipted the motions on October 18, 2019, the record establishes that USCIS actually received the motions on October 15, 2019, within the 33-day timeframe to file motions.[5] *See* 8 C.F.R. § 103.1(a)(7)(i). Therefore, the Director incorrectly dismissed the motions as untimely filed.

Accordingly, we will remand the matter to the Director to consider all of the arguments and documentation in the record, including on motion and on appeal, to determine whether the totality of the evidence overcomes the initial decision denying the petition, and whether the Petitioner established sustained national or international acclaim and that his achievements have been recognized in the field of expertise, demonstrating that he is one of that small percentage who has risen to the very top of the field. *See Kazarian*, 596 F.3d at 1115.

III. CONCLUSION

The Director erroneously dismissed the motions as untimely filed. As such, we will remand the matter for further consideration of the record, including claims and documentation submitted on motion and on appeal, and entry of a new decision.[6]

ORDER: The decision of the Director, Texas Service Center, is withdrawn. The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

[3] The Director indicated in his introductory discussion paragraph that "[o]n September 5, 2019, Form I-140 was denied by U.S. Citizenship and Immigrant Services (USCIS). . . ." However, in his conclusory paragraph, the Director stated that "[t]he notice of USCIS's decision to deny the Form I-140 was sent on September 12, 2019." The record shows the denial decision dated on September 12, 2019, as the official decision date.

[4] Columbus Day, a legal holiday, fell on Monday, October 14, 2019.

[5] The record contains a stamped date of "OCT 15 2019 A.M. 02" on the envelope. In addition, the U.S. Postal Service tracking number attached to the envelope confirms delivery on October 15, 2019 at 5:33 AM. *See* https://tools.usps.com/go/TrackConfirmAction? and accessed on September 21, 2020.

[6] We have the authority to withdraw a decision and remand the case for further action, with an order that it be certified back to us if the new decision is adverse to the affected party. USCIS Policy Memorandum PM-602-0087, *Certification of Decisions to the Administrative Appeals Office* (AAO) 4 (July 2, 2013), https://www.uscis.gov/laws/policy-memoranda, Adjudicator's Field Manual 3.5(c), 10.18(a)(3), https://www.uscis.gov/ilink. This order is not meant to compel approval of the remanded case, but is designed to preserve the affected party's ability to seek appellate review without payment of a second appeal fee. *Id.*