U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14274052

Date: APR. 5, 2021

Appeal of Nebraska Service Center Decision

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

The Petitioner, an operatic vocalist, 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 Petitioner had only satisfied two of the ten initial evidentiary criteria, of which she must meet at least three.

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)(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

The Petitioner has performed at various concert and recital venues in the United States and France. Because the Petitioner has not indicated or established that she has received a major, internationally recognized award at 8 C.F.R. § 204.5(h)(3), she must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In denying the petition, the Director determined that the Petitioner satisfied only two of the initial evidentiary criteria, judging at 8 C.F.R. § 204.5(h)(3)(iv) and display at 8 C.F.R. § 204.5(h)(3)(vii). The Petitioner filed Form I-290B, Notice of Appeal or Motion, indicating that "I am filing an **appeal** to the AAO," and that she would be providing a brief and/or additional evidence within 30 days. (emphasis in original). *See* 8 C.F.R. § 103.3(a). In her subsequent brief, she contested the Director's decision as a motion to reopen and a motion to reconsider. *See* 8 C.F.R. § 103.5(a). As the Petitioner filed an appeal to us, we will adjudicate her Form I-290B as an appeal. Furthermore, the regulation does not permit us to adjudicate her appeal as a motion because motion jurisdiction lies with the official who made the latest decision in the proceeding, which, in this case, is the Director. *See* 8 C.F.R. § 103.5(a)(1)(ii).

On appeal, the Petitioner maintains eligibility for one additional criterion. After reviewing all of the presented evidence, the record does not reflect that the Petitioner meets the requirements of at least three criteria.

> *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 fulfill this criterion, the Petitioner must demonstrate published material about her in professional or major trade publications or other major media, as well as the title, date, and author of

the material.[1] At initial filing, the Petitioner provided articles posted online and printed in publications. The Director issued a request for evidence (RFE), stating that "some articles [] mention the [Petitioner's] name but are about the performance or production rather than the [Petitioner]." *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). In addition, the Director indicated that "some articles [are] about the [Petitioner] relating to her work," but she did not show "that the publications qualify as major trade publications or some other form of major media." Further, the Director offered various types of documentation, such as the title, date, and author of the published material; the circulation (online and/or in print); comparative circulation data of major publications in the field; and the intended audience of the publication.

In response, the Petitioner submitted translations of two articles published in *Midi Libre* and circulation data for the publication.[2] In denying the petition, the Director determined that "the [P]etitioner submitted sufficient evidence about *Midi Libre* to establish that it is a form of major media," but the Petitioner did not include the authors of the two articles. *See* 8 C.F.R. § 204.5(h)(3)(iii).[3]

In her brief, the Petitioner argues that "the Service did not address there being an issue with the absence of the author's name." Besides the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requiring "the title, date, and author of the material," the Director, as indicated above, informed the Petitioner in the RFE of the inclusion of the title, date, and author. In fact, the Petitioner's cover letter in response to the RFE repeated the Director's RFE language, specifically citing "the title, date, and author of the published material."

In addition, the Petitioner submits two letters. However, as she did not present this evidence in her initial filing or in response to the Director's RFE, we will not consider this new evidence in our adjudication of this appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose" and that "we will adjudicate the appeal based on the record of proceedings" before the Chief); *see also Matter of Obaigbena*, 19 I&N Dec 533 (BIA 1988). Here, the Petitioner did not establish that the Director erred in determining the absence of the authors in the published material.

Furthermore, we do not agree with the Director that the Petitioner demonstrated that *Midi Libre* qualifies as a major medium. In the RFE response, the Petitioner provided circulation figures from 2018 and 2019 for the publication. However, the Petitioner did not demonstrate the relevance or significance of the data to show *Midi Libre's* status as a major medium. The Petitioner did not offer, for example, comparative statistics for major newspapers in France in order to demonstrate *Midi Libre's* standing as a major medium. Moreover, although she claimed that *Midi Libre* "is one of the

[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* 7 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

[2] The Petitioner did not make any arguments or provide evidence relating to the other initially submitted articles and publications.

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

top newspapers in the entire country of France," the Petitioner did not submit documentation to support her assertions.

For the reasons discussed above, the Petitioner did not establish that satisfies this criterion.

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 conclusion 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). Although the record reflects her experience, the Petitioner did not establish that she is among the upper echelon in her field.

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.