U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14278047

Date: APR. 27, 2021

Appeal of California Service Center Decision

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

The Petitioner, a [redacted], 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 California Service Center initially denied the petition and subsequently affirmed the decision on motion, concluding that the Petitioner satisfied only two of the ten initial evidentiary criteria, of which he 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) 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 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 he or she 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 is a [redacted] who has performed individually and with multiple ensembles. The Petitioner studied at [redacted] Conservatory and the [redacted] Academy, and currently resides in [redacted] where he is pursuing career opportunities as a performer, composer, and recording artist.

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). In denying the petition, the Director found that the Petitioner met only two of the evidentiary criteria: judging under 8 C.F.R. § 204.5(h)(3)(iv) and display under 8 C.F.R. § 204.5(h)(3)(vii). We agree with this determination, as the record demonstrates that the Petitioner served as a voting member for the Grammy Awards on behalf of the Recording Academy, as well as a juror for the [redacted] Orchestra and SoundtRec.com, and further demonstrates that he displayed his work by performing at various artistic and musical venues. On appeal, the Petitioner maintains that he meets three additional criteria, discussed below.[1] We have reviewed all of the evidence in the record and conclude that it does not support a finding that the Petitioner satisfies 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.*

[1] The Petitioner initially claimed that he met the lesser awards criterion at 8 C.F.R. § 204.5(h)(3)(i) and the commercial success criterion at 8 C.F.R. § 204.5(h)(3)(x). Although the Director addressed the evidentiary deficiencies regarding these criteria in the previous decisions, the Petitioner has not pursued these claims on appeal. Accordingly, we will not further address these criteria. *See 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 found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). While we would consider this evidence in a final merits determination per *Kazarian*, 596 F.3d 1115, we have determined that the Petitioner has not met the initial evidentiary requirements and will therefore not reach a final merits determination.

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)

To meet the requirements of this criterion, the Petitioner must show that material has been published, that the material is about him and his work in the field for which classification is sought, and that it was published in a professional or major trade publication or other major media. In this case, the Petitioner provided numerous articles from various online publications including www.kibrispostasi.com, southcoastoday.com, yeniasir.com.tr, yenisafak.com, hurriyet.com.tr, hurriyetdailynews.com, dha.com.tr, sabah.com.tr, and radikal.com.tr, along with print articles from publications including *Cypress Today* and *Hurriyet Newspaper/Kelebek* (*Cumartesi*). The Petitioner also submitted screenshots and a transcript from youtube.com of a television program it claims aired on Turkish Radio and Television (TRT) in 2019.

The plain language of this regulatory criterion requires that the published material be "about the individual." With regard to the article published by *South Coast Today,* this article is about [redacted] and only briefly mentions the Petitioner. Articles that are not about an alien do not fulfill this regulatory criterion. *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).

We agree with the Petitioner that the remaining articles published by the above-referenced online publications contain sufficient references to and quotes from the Petitioner to qualify as published material about him and his work. However, the Petitioner did not establish that these publications qualify as major media. The Petitioner provided information about these publications from SimilarWeb pertaining to their rankings and viewing statistics. Although he provided evidence relating to general Internet traffic estimators, the Petitioner did not show the significance of those publications' viewing statistics or explain how such information reflects status as major media.[2] For example, the Petitioner did not show that the total visits or viewing statistics are high compared to other websites in the field. Although the size of each publication's online audience is noted, the Petitioner did not provide comparative circulation statistics or rankings to indicate that any of these publications has a widespread viewership or traffic rate on a national or international level.

With respect to the articles from *Cyprus Today* and *Hurriyet Newspaper/Kelebek* (*Cumartesi*), which were published in their print editions, the Petitioner did not submit sufficient evidence to establish that they qualify as major trade publications, professional publications or other major media.[3] Regarding the *Cyprus Today* article, the Petitioner relies on an excerpt from the website www.pressreference.com, which provides general information and basic data about the Republic of Cyprus. According to the document, the Republic of Cyprus has eight daily newspapers; however, *Cyprus Today* is not listed as one of these press or news agencies. Although the Petitioner highlights a statistic that states total circulation is 46,000, it appears that this statistic reflects the collective circulation of the Republic's eight daily newspapers, and not that of *Cyprus Today*. In fact, this

[2] *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 (indicating that evidence of published material in professional or major trade publications or in other major media publications should establish that the circulation (on-line or in print) is high compared to other circulation statistics).

[3] *See id.*

document makes no specific reference to *Cyprus Today* or its circulation, such that we can determine the publication's status as major media.

With regard to the article featured in *Hurriyet Newspaper/Kelebek* (*Cumartesi*), the Petitioner submits a document entitled "Medya Radar," which appears to be a weekly circulation report for a period defined as "March 16 to March 22" for 14 newspapers, including *Hurriyet*. No year is provided, and the source of this document is not identified. Although the document indicates *Hurriyet* ranks 3rd on the list, it did not show the significance of these rankings and circulation statistics or explain how such information reflects status as major media. On appeal, the Petitioner provided a copy of a document entitled "[redacted]" a Reuters Institute Fellowship Paper published in [redacted] 2016. Although the Petitioner asserts that this document provides relevant information regarding *Hurriyet's* status as major media, this paper focuses mainly on advertising trends. While we acknowledge that the report includes a reproduced chart attributed to the Nielsen Company which demonstrates Turkish newspaper circulation numbers and "total space distribution" for the period from 2011-2015, this chart alone does not show the significance of these numbers or explain how such information reflects status as major media. Moreover, the *Hurriyet* article discussed here was written in 2011, thereby rendering statistical data for future circulation period irrelevant.

The Petitioner also submits screenshots and a transcript of a television interview he claims aired on TRT in 2019. The screenshots submitted, however, demonstrate that the video was streamed on youtube.com, via what appears to be TRT's YouTube channel. The Petitioner, however, did not show that either TRT, or TRT's YouTube channel, constitutes major media. As evidence, the Petitioner provided an excerpt from TRT World's website, which states that it is the "national public broadcaster of Turkey." However, the Petitioner did not submit independent, probative evidence to support the broadcaster's claims. Absent additional evidence, this information from the broadcaster's own website is insufficient to demonstrate that it is a professional or major trade publication or other major media. *See Braga v. Poulos,* No. CV 06 5105 SJO (C. D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). Furthermore, it is unclear whether the interview was broadcast on TRT as a television show, or solely on TRT's YouTube channel. Regardless, the record is insufficient to establish that either TRT, or TRT's YouTube channel, constitute major media.

On appeal, the Petitioner asserts that our treatment of the evidence submitted in support of this criterion is inconsistent, as his receipt of O-1 status, a classification reserved for nonimmigrants of extraordinary ability, was based on the same set of documentary evidence currently before us. The Petitioner contends that as a result of these prior approvals, this criterion has previously been established. Extraordinary ability in the nonimmigrant context, however, means distinction, which is not the same as sustained national or international acclaim. Section 101(a)(46) of the Act explicitly modifies the criteria for the O-1 extraordinary ability classification in such a way that makes the nonimmigrant O-1 criteria less restrictive for an individual in the arts, and thus less restrictive than the criteria for immigrant classification pursuant to section 203(b)(1)(A) of the Act. Therefore, while USCIS has previously approved O-1 nonimmigrant petitions for the Petitioner, the prior approvals do not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different

standard - statute, regulations, and case law.[4]

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

> *Evidence that the individual 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).

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a *leading or critical role* for organizations or establishments that have a distinguished reputation [emphasis added]." In general, a leading role is evidenced from the role itself, and a critical role is one in which the petitioner was responsible for the success or standing of the organization or establishment.

A review of the record of proceedings reflects that the Petitioner claimed eligibility for this criterion based on his various performances with organizations such as the [redacted] Philharmonic Orchestra, the [redacted] Opera, the [redacted] Philharmonic, and the [redacted] Orchestra. While the Petitioner submitted testimonial letters from directors and producers of these organizations confirming his participation in various performances, they do not reflect that he performed in a leading or critical role. For example, the letters submitted claim that he performed as [redacted] However, the Petitioner provided no information regarding the number of [redacted] or the total number of musicians, that participated in each performance, such that we can ascertain his rank and position within each symphony or orchestra. In denying the petition, the Director determined that the Petitioner did not establish his role was leading or critical to the [redacted] section, let alone to the orchestras or symphonies as a whole, noting that "in an orchestra the leading musical role is generally held by the Concertmaster or first violin."

On appeal, the Petitioner challenges the Director's determination, and notes that despite having multiple musicians on stage, "a solo performance within the entire concert may bring about the entire success solely attributed to a particular musician." The Petitioner asserts that his solo performances have attributed to the high degree of success of various concerts in which he performed. Again, however, the Petitioner has not provided evidence to corroborate these claims, as the record contains no evidence that differentiates his role from the other [redacted] or other routine performers in subordinate roles within the given symphonies, orchestras, and ensemble performances. Absent documentation showing otherwise, we are not persuaded that the Petitioner, or every performer in a concert setting for that matter, performs in a leading or critical role.

The Petitioner also maintains that he satisfies this criterion based on his creation of an original score to accompany a three-minute promotional video for the University [redacted] [redacted] Institute. According to a letter from [redacted] the Petitioner "has been overwhelmingly critical to the continued success of the [redacted] Institute and has played

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[4] The Petitioner also claims that the same evidence was deemed acceptable to satisfy the criterion at 8 C.F.R. § 204.5(h)(3)(iii) in a prior immigrant petition for classification as an alien of extraordinary ability, which was ultimately withdrawn prior to adjudication. While the Petitioner's assertion is noted, it must be noted that in making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. 8 C.F.R. § 103.2(b)(16)(ii).

a leading a critical role in upholding the reputation of an elite institution like [redacted] The Petitioner submitted a screenshot of the promotional video, crediting the Petitioner with providing the music for this video. Although the Petitioner claims his work on this video demonstrates he performed in a leading and critical role, there is insufficient evidence to corroborate this claim. For example, the letter from [redacted] indicates that the Petitioner "worked well" with the Institute's IT team in helping to create the video. Absent evidence pertaining to the organizational hierarchy of this team and the Petitioner's position therein, we cannot determine that his role was leading or critical as contemplated by this regulatory criterion. Furthermore, the submitted letter does not describe in sufficient detail the extent of the Petitioner's role in creating this video, or how his role has been critical to the Institute's reputation.

Finally, we note that the Petitioner relies heavily on the testimonial letters submitted on his behalf, noting that they constitute "expert statements" from "world-renowned musicians." While the statements in these letters are noted, they are not accompanied by corroborating documentary that distinguishes the Petitioner's role from his fellow [redacted] or musical performers. We are not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the Petitioner's roles were leading or critical. Merely repeating the language of the statute or regulations does not satisfy the Petitioner's burden of proof. *See 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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The lack of supporting evidence gives us no basis to gauge the significance of the roles performed by the Petitioner.

As the Petitioner is a [redacted] it is expected that he will perform the routine duties of a [redacted] to perform on stage or in front of an audience. However, merely performing, even if the performance is considered noteworthy, does not equate to a leading or critical role. Although the testimonial letters generally praise his skilled performances and attribute large crowd attendance and sold out shows to his work, there is no evidence demonstrating how the Petitioner's roles differentiated him from the other [redacted] or other musicians in general. Without evidence establishing that the Petitioner performed in a leading or critical role, it is insufficient to simply submit documentary evidence reflecting that he performed as a flutist in a concert setting.

We further note that even if the Petitioner were to submit supporting documentary evidence showing that his roles with the [redacted] Orchestra, the [redacted] Opera, the [redacted] Philharmonic, and the [redacted] Orchestra meet the elements of this criterion, which he has not, the record does not demonstrate that these organizations have distinguished reputations. The Petitioner submitted excerpts from the organizations' websites, such as the "About Us" page for the [redacted] Orchestra, and claims that these documents establish the organizations' distinguished reputations. As noted previously in this decision, we need not rely on self-promotional material. *Cf. Braga v. Poulos*, No. CV 06 5105 SJO, *aff'd* 317 Fed. Appx. 680 (C.A.9) (concluding that the AAO did not have to rely on self-serving assertions on the cover of a magazine as to the magazine's status as major media). The unsupported assertions of the Petitioner and the self-promotional material from the organizations' websites is not sufficient to demonstrate that the organizations have a distinguished reputation.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a

distinguished reputation." The burden is on the Petitioner to establish that he meets every element of this criterion. The Petitioner did not establish that he has performed in a leading or critical role for organizations or establishments that have a distinguished reputation consistent with the plain language of this regulatory 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).

In order to satisfy this criterion, the Petitioner must demonstrate that he commanded a high salary or other significantly high remuneration for services in relation to others in his field. Here , the Petitioner did not establish the total amount of salary or remuneration he has earned. The Petitioner submitted various contracts for his services, primarily for one-time performances where he would earn varying amounts of flat-rate compensation ranging from $350 to $3,000. On appeal, the Petitioner submits copies of three 1099 forms from 2018, demonstrating that he earned a total of $7,400 for his services that year. He also provided evidence in the form of PayPal and Zelle transaction receipts, demonstrating total earnings in the amount of $870 pursuant to contractual agreements for one-time performances in 2019.

The Petitioner did not submit sufficient comparative evidence demonstrating that the contracted amounts per engagement is significantly higher than the remuneration of other [redacted]. Rather, he provides evidence from the U.S. Department of Labor's Office of Foreign Labor Certification, demonstrating that the mean salary for a musician in the Petitioner's geographical area from July 2019 to June 2020 was $39.01 per hour, or $81,141 annually. Although the Petitioner relies on this document as evidence that his hourly rate exceeds the mean hourly rate for musicians, he offers no basis for comparison showing that his compensation was significantly high "in relation to others in the field," which in this case is [redacted][5] While the Petitioner has provided documentation of hourly and annual compensation for the field, the record lacks evidence of his own hours worked or his total annual compensation. Without a proper basis for comparison and evidence showing his comprehensive earnings during a sustained period predating the filing of the petition (such as an income tax return), we cannot conclude that the Petitioner has commanded a high salary or other significantly high remuneration for services in relation to others in his field. Accordingly, the Petitioner has not established that he meets this criterion.

B. O-1 Nonimmigrant Status

As noted briefly above, we note that USCIS has approved several O-1 nonimmigrant visa petitions filed on behalf of the Petitioner. However, the prior approvals do 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). 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

[5] The musicians occupational category on the submitted wage report includes both musicians and singers.

approved a nonimmigrant petition on behalf of an individual, we are not bound to follow that finding in the adjudication of another immigration petition. *Louisiana Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

III. CONCLUSION

We find that although the Petitioner satisfies the judging criterion at 8 C.F.R. § 204.5(h)(3)(iv) and the display criterion at 8 C.F.R. § 204.5(h)(3)(vii), he does not meet any additional criteria on appeal. As the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3), we reserve this issue.[6] Accordingly, 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). 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). Although the Petitioner's work as a [redacted] has brought praise for his experience and technical skill, the record does not contain sufficient evidence establishing that he is among the upper echelon in his field.

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, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

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[6] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).