U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12964814

Date: FEB. 17, 2021

Appeal of Nebraska Service Center Decision

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

The Petitioner, a visual effects artist and animator, 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 met the initial evidentiary requirement of this classification through either receipt of a major, internationally recognized award or by meeting three of the evidentiary criteria listed under 8 C.F.R. § 204.5(h)(3).

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 Director's decision and remand the matter for the entry of a new decision consistent with the following analysis.

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 Petitioner earned a Master of Fine Art degree in animation from [redacted] College of Art and Design in 2013, and has been employed with [redacted] since 2015. He indicates that he intends to continue employment with this company in the United States.

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 Director found that the Petitioner did not meet any of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). On appeal, the Petitioner maintains that he meets six of these evidentiary criteria. After reviewing the Director's decision and the evidence in the record, we conclude that the Director did not apply the plain language of two of the criteria per established agency policy,[1] and failed to consider evidence submitted in support of another criteria.

> 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 submitted evidence relating to two awards which he asserts that he received:

- Finalist, [redacted] Annual Shorty Awards [redacted] category
- Silver, 2018 Marketing Awards [redacted], [redacted] category

[1] See USCIS Policy Memorandum PM 602-0005.1, Evaluation of Evidence Submitted With Certain I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14. [page number] (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

The evidence accompanying each of these awards consists of pages from the websites of each of the organizations, which include brief descriptions of the advertisements and a list of those whose names were submitted with the entries. The Petitioner appears on both lists as a "CG artist."

In his decision, the Director noted that the Petitioner was not the "sole recipient" of either award, and that they were "not the top awards bestowed to winners." However, neither of these are elements of this criterion, and the Director evaluated the evidence under this criterion as well as the standard applicable to a final merits determination. The plain language of this criterion requires that the Petitioner be a recipient of an award, that the award was granted for excellence in the Petitioner's field of endeavor, and that the award is recognized at the national or international level.[2] Therefore, on remand, the Director should reevaluate this evidence to determine whether the Petitioner was a recipient of an award, as well as whether any awards he received were for excellence in the field of computer graphics, visual effects and animation. If so, the Director should then determine whether any such awards are nationally or internationally recognized in the Petitioner's 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)

As noted in the Director's decision, the record includes evidence of the Petitioner's work on advertising campaigns for well-known brands which appeared on television and other video media. In making his finding regarding this criterion, the Director cited to a federal district court decision, Negro-Plumpe v. Okin, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008), for the proposition that this criterion is limited to the visual arts. The Director then goes on to conclude that since the Petitioner "is not a visual artist and has not created tangible pieces of art that were on display at exhibitions or showcases," he does not meet the plain language of this criterion. We first note that despite the Director's statement, the nature of the Petitioner's work in computer graphics and animation is visual. More importantly, we disagree with the Director's interpretation that the plain language of the regulation renders this criterion applicable only to visual artists and those that produce tangible or physical art. The regulation requires only that the work displayed be a given petitioner's own work product and that the exhibition or showcase at which his or her work was displayed be artistic in nature. On remand, the Director should consider only these elements which appear in the plain language of the regulation in reviewing the evidence.[3]

> 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 support of his claim to this criterion, the Petitioner submitted copies of his IRS Forms W-2 for the years of 2017 and 2018, earnings statements for several months in 2018 and 2019, a letter from president of [redacted] and commercial and governmental salary surveys for occupations related to his.[4] The letter, which the Petitioner asserts is from his certified public accountant, states that the author "anticipates" that the Petitioner's gross income in 2019 will be

[2] See Kazarian, 596 F.3d at 1121

[3] See Kazarian, 596 F.3d at 1121.

[4] The Petitioner also submitted his 2019 Form W-2 on appeal.

"between $145,000 and $155,000," an estimate which is "based on his current day rate of $700 per day."

In his decision, the Director stated that he was "unable to decipher what [the Petitioner's] current annual salary [is] because we are unable to resolve the discrepancy in his annual and hourly wage figures as cited in [the letter from the president of [redacted]." He bases this conclusion on a comparison of his own extrapolated annual salary based on the Petitioner's "day rate" cited in the letter to the estimated annual salary provided in this letter, and questions the validity of these estimates based upon the difference between them. The Director then states that this "discrepancy" between the two figures "may lead to a reevaluation of the reliability and sufficiency of the remaining evidence," and that such discrepancies must be resolved by independent objective evidence. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). He adds that it "appeared" that the Petitioner received bonuses and other compensation in addition to his salary and "there are too many variables involved."

We first note that, despite the Petitioner's claim, the letter from [redacted] does not identify the writer as an accountant or indicate the source of his knowledge of the Petitioner's or his company's financial position. Further, the figures stated in this letter are merely projections which are insufficient to establish the Petitioner's actual salary. Therefore, given the minimal probative value of this evidence, the Director should not have relied upon it to the exclusion of other, more probative evidence in the record.

In addition, as noted by the Petitioner on appeal, the Director's calculation of the Petitioner's annual salary based upon the day rate stated in the letter is based upon the flawed assumption that he, as a contract worker, will receive this amount for every workday in a year. This assumption led to the finding of a discrepancy with the projected annual figures stated in the letter, and ultimately to the Director discounting more reliable evidence of the Petitioner's salary in the record. On remand, the Director should consider whether this more reliable evidence, including the earnings statements and IRS forms, establish that his salary is (or was) high in relation to others in his field.

B. Final Merits Determination

The Director found that the Petitioner did not meet the initial evidence requirements for this classification, and thus did not conduct a final merits determination. If after review of the evidence consistent with the analysis provided above, the Director determines that the Petitioner meets the requisite three evidentiary criteria, he should then 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.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.