



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 16169597

Date: JULY 15, 2021

Appeal of Nebraska Service Center Decision

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

The Petitioner, a writer, 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 record established that the Petitioner satisfied the initial evidentiary requirements, it did not establish, as required, that the Petitioner has sustained national or international acclaim and is an individual in the small percentage at the very top of the field. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. 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 entry of a new decision consistent with our discussion below.

### I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals 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 writes fiction and non-fiction under a variant of his legal name.<sup>1</sup> In addition to nonfiction essays, blog posts, and short stories, the Petitioner has written two novels, one of which, with the title [REDACTED] resulted in his prosecution in [REDACTED] under public decency laws. His conviction and imprisonment in 2015 drew significant international attention. The Petitioner also worked as an editor at the [REDACTED] magazine [REDACTED]. The Petitioner is a fellow at the [REDACTED] at the University of [REDACTED].

We agree with the Director that the Petitioner has satisfied three of the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3), pertaining to lesser nationally or internationally recognized prizes or awards; published material about the individual in professional or major media; and participation as a judge of the work of others. The Petitioner claims to satisfy a fourth criterion at 8 C.F.R. § 204.5(h)(3)(v), relating original contributions of major significance, but we need not reach a conclusion on this claim in order to proceed to the final merits determination.

In a final merits determination, the Petitioner must demonstrate, 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. *See Kazarian*, 596 F.3d at 1119-20.<sup>2</sup>

The Director determined that the Petitioner did not establish the necessary sustained acclaim. The Director cited two factors in support of this conclusion. Firstly, regarding the explicit nature of some

<sup>1</sup> Many record materials show the name [REDACTED] but there is no indication that the Petitioner uses this name on legal identification documents.

<sup>2</sup> *See also 6 USCIS Policy Manual F.2(B)(2)*, <https://www.uscis.gov/policymanual> (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).

of the Petitioner's writings, the Director stated that "such material is common in the United States and does not demonstrate that the petitioner is one of that small percentage who has risen to the top of the field." The Petitioner, however, had not claimed that his choice of subject matter or his use of explicit language placed him at the top of the field. The above observation, therefore, is not a valid basis for denying the petition.

Secondly, the Director concluded that letters written in support of the petition "describe the petitioner's work in terms of social and political activism, which is not a field of endeavor under this visa classification." This is, at best, an incomplete summary of the submitted letters, many of which discuss the literary and artistic merit of the Petitioner's fiction, as well as the quality and impact of his journalism.

For the reasons explained above, the Director's discussion of these issues does not suffice as a final merits determination. We will therefore withdraw the denial decision based on that analysis, and remand the matter for a new decision, taking the issues below into account.

The record shows that the Petitioner rose to international prominence when his imprisonment made him a potent symbol for advocates of freedom of speech and of the press. The key issue is whether the Petitioner has earned acclaim as an extraordinary writer, separate from the attention that attended his prosecution. Publicity for one's circumstances is not the same as acclaim for one's achievements.

The Director was correct in observing that the petition relies heavily on letters newly written specifically to support the petition. Some of the letters suggest that the Petitioner was well-known in [redacted] before his prosecution, which could rise to the level of national acclaim and thereby qualify him for the classification he seeks. But such a conclusion would require direct, contemporaneous evidence, rather than new letters claiming that the Petitioner has been well-known for years.

The value of such letters lies in giving perspective and context to the other evidence in the record; they cannot fully take the place of that evidence. The letters include several claims of fact for which objective, primary evidence ought to exist. These claims may be true, but they have minimal weight without corroborating evidence.

For instance, an associate professor at [redacted] University who translated [redacted] into English asserts that he has "been following [the Petitioner's] work for more than ten years," and has used that work in "numerous peer-reviewed articles, conference papers, book chapters, and interviews" during that time. But he does not identify or submit these works. If the Petitioner's work was the subject of scholarly commentary before 2015, then those materials ought to be available for submission and consideration.

Likewise [redacted] was not the Petitioner's first novel. The record indicates he published [redacted] in 2007. Contemporary evidence such as reviews and comparative sales figures could help to establish recognition as a novelist, outside of the context of the controversy surrounding [redacted]

Evidence of the Petitioner's pre-2015 career as a journalist could also shed valuable light on the Petitioner's reputation and recognition.

The Director did not issue a request for evidence to give the Petitioner an opportunity to fill this critical gap in the record. Instead, the Director issued a notice of intent to deny the petition, which serves a different function (to notify a petitioner of potentially disqualifying information).

Therefore, we will remand the matter so that the Director may (1) issue a request for information to allow the Petitioner an opportunity to produce documentary evidence that predates his prosecution, thereby demonstrating that he did not rise to public attention *only* because his work was deemed to run afoul of  laws; and (2) render a new final merits determination that more fully considers the totality of the record.

### III. CONCLUSION

The final merits determination in the original decision was deficient in that it focused on peripheral issues. Also, several letters in the record include claims which, if true, may warrant approval of the petition, but the Director did not provide the Petitioner with an adequate opportunity to supplement the record with evidence to corroborate those claims.

As the matter will be remanded, the Director should request any additional evidence deemed warranted and allow the Petitioner to submit such evidence within a reasonable period of time.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis, which, if adverse, shall be certified to us for review.