U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13725062

Date: MAR. 26, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, a photographer, 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 Petitioner satisfied at least three of the initial evidentiary criteria for this classification, as required, she did not show sustained national or international acclaim and demonstrate that she is among the small percentage at the very top of her field of endeavor. We dismissed the Petitioner's subsequent appeal of that decision after reaching the same conclusion. The matter is now before us on a combined motion to reopen and motion to reconsider.

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 review, we will dismiss both motions.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. See 8 C.F.R. § 103.5(a)(4).

II. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals with 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. 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 their 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 they 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) (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).

III. ANALYSIS

The issue in this matter is whether the Petitioner has submitted new facts supported by documentary evidence sufficient to warrant reopening her appeal and/or established that our decision to dismiss the appeal was based on an incorrect application of law or USCIS policy.

A. Prior AAO Decision

In our decision dismissing the Petitioner's appeal, we determined that she satisfied four of the initial evidentiary criteria, relating to awards at 8 C.F.R. § 204.5(h)(3)(i), published material at 8 C.F.R. § 204.5(h)(3)(ii), judging under 8 C.F.R. § 204.5(h)(3)(iv), and display of her work at 8 C.F.R. § 204.5(h)(3)(vii). Moreover, we conducted a final merits determination in which we reviewed the record as a whole, including the evidence the Petitioner submitted under other claimed criteria.[1] Based on this review, we concluded that the Petitioner did not establish her sustained national or international acclaim, that she is among the small percentage at the very top of the field of endeavor, and that her achievements have been recognized in the field through extensive documentation.

[1] During the course of the proceeding, the Petitioner had claimed to meet the criteria relating to original contributions of major significance in the field at 8 C.F.R. § 204.5(h)(3)(v) and leading or critical roles at 8 C.F.R. § 204.5(h)(3)(viii).

B. Motion to Reconsider

In the Petitioner's motion to reconsider, she argues that we applied a heightened evidentiary standard and did not properly weigh the evidence in its totality in the final merits determination. As noted, where a petitioner satisfies at least three categories of evidence, we 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 at 1115.[2] We concluded that, although the Petitioner had garnered awards, received press coverage, judged the work of others, and displayed her work, the record did not demonstrate that her achievements rise to a level of a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

The evidence established that the Petitioner satisfied the regulatory criterion related to lesser nationally or internationally recognized awards. We determined that, while the prizes and awards reflect recognition of her work by the field, she "did not demonstrate how her honors place her among that small percentage at the very top of the field" as required by 8 C.F.R. § 204.5(h)(2). We observed that she "for instance, did not establish how her receipts of such prizes and awards compare to those in the upper echelon of her field," and did not provide supporting documentation showing that the awards garnered her "significant attention demonstrating her sustained national or international acclaim."

The Petitioner maintains that "the awards themselves speak the fact that they are national awards and the award winner, the Petitioner has received national acclaim" and that the awards are of such significance that her receipt of them clearly shows that she "is among that small percentage of the very top in her field." She also emphasizes that she received awards in 2006, 2007, 2011, 2014, and 2015 and points to a non-precedent decision in which we determined that a petitioner who had received awards in 2006, 2009, 2010, and 2012 had established that their awards were indicative of their sustained national acclaim. Non-precedent decisions apply existing law and policy to the specific facts of the individual case and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. They do not bind USCIS officers in future adjudications. See 8 C.F.R. § 103.3(c).

The Petitioner appears to contend that any individual who submits evidence satisfying the lesser nationally or internationally recognized awards criterion at 8 C.F.R. § 204.5(h)(3)(i) should automatically meet the threshold for establishing national or international acclaim in a final merits determination. However, meeting the initial evidence requirement does not, in itself, establish that an individual is eligible for classification as an individual of extraordinary ability.[3] Rather, the quality of the evidence must be considered as part of the final merits determination to determine whether it is indicative of a petitioner being one of that small percentage who have risen to the top of the field. While we acknowledge that the Petitioner has consistently received awards for her work, she has not

[2] See also 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 4 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html (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 high level of expertise of the immigrant classification).

[3] Id. at 13.

established that all of her awards garnered her recognition that extended beyond the exhibition or contest in which that work was submitted or exhibited.

The Petitioner's claim that her awards place her among the small percentage of photographers at the top of the field is based on a calculation of the number of entries and number of prizes given in the individual contests or exhibitions in which she received an award or prize. For example, in a letter in support of the petition, she stated that her "commendation" award in the 2007 [redacted] Photography Contest [redacted]) "put her in the top 0.1% of the field of endeavor," because there were 41,980 works submitted, and 40 prizes in total (including a total of ten first, second and third prizes and "commendation" or honorable mention prizes in each of four categories). While the evidence demonstrates that her commended work was judged to be in the top 10 among an unspecified number of photographs submitted in her category, the results of a single contest do not speak to her overall placement in her field.

The Petitioner also argues that "the AAO is wrong and unreasonable requiring the Petitioner to compare her awards with upper echelon of her field," citing to Muni v. INS 891 F. Supp. 440, 445 (1995), a case involving a professional athlete in which the court rejected "an assumption . . . that a player must be one of the League's superstars to be considered to have extraordinary ability." She further asserts that we erred by observing that she "did not show she received significant attention demonstrating her sustained national or international acclaim" as a result of the awards she received.

While the Petitioner correctly argues that she need not establish that she is one of the foremost "superstars" in her field, or that there is no one more accomplished than she is, she nevertheless must provide sufficient context for us to evaluate whether her awards and other achievements support a finding that she is qualified for classification as an individual of extraordinary ability. As we stated in our decision, such context could be provided, for instance, through comparisons of her achievements to those recognized as being at the top of the field, but our decision does not reflect that we imposed a requirement that she submit this type of evidence.

With respect to our determination that the Petitioner did not sufficiently demonstrate the recognition she received as a result of her awards, we noted that, for certain awards, the evidence in the record was limited to her award certificate and a published list of winners in each category. The record reflects that there are many national photography contests in [redacted] that are open to both professional and amateur photographers alike. We cannot conclude that winning an award, or even several awards, at these national competitions would automatically earn a professional photographer sustained national acclaim and a place among the small percentage at the top of the field.

The Petitioner places particular emphasis of her receipt of an "Excellent Photographer" award at the 14th [redacted] International Photography Festival, noting that this festival bestows "one of the top national awards in photography in [redacted] with great international reputation." The evidence supports her claim that this is a well-known and prestigious festival and her most notable award, but she does not make the same claim or submit similar evidence regarding other awards she has received such as the [redacted]' 1st [redacted] Photographers Association [redacted] Photography Art Exhibition, the [redacted]' National Photography Competition, and the 3rd [redacted] National Photography Art Exhibition. For all of these reasons, the Petitioner has not established that our

evaluation of evidence related to her awards involved an incorrect application of the law or USCIS policy.

The Petitioner also asserts that we erred in our evaluation of the submitted media coverage about her and relating to her work. Specifically, she contends that we incorrectly applied Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010), by focusing on the quantity of evidence submitted without discussing the quality of such evidence. In our final merits determination, we concluded that the Petitioner did not establish that "the limited media reporting on her and her activities reflects a career of acclaimed work." The Petitioner maintains that she submitted "a good amount" of media coverage, including a total of eight articles published between 2009 and 2019. She emphasizes that each article is "high quality" and "indicative of her recognition and sustained national acclaim." She also highlights certain evidence, noting, for example, that she was interviewed by [redacted] Channel as part of its "Master of Photography" online video series in 2011. The Petitioner also emphasizes media reports relating to a 2013 exhibition titled '[redacted]' which aimed to collect "the most representative photography works and collections of famous photographers in [redacted]"[4] She notes that this exhibition also included works by [redacted] who submitted a recommendation letter in support of her petition, and is regarded as "a very top photographer in [redacted]." The Petitioner states that this media coverage therefore establishes that she "is in line with top tier photographers" and "at the top small percentage."

While the Petitioner claims that we did not follow the standard for evidentiary review set forth in Chawathe, we note that both the quantity and the quality of the submitted evidence are relevant in showing whether she has sustained national or international acclaim and is one of that small percentage who has risen to the very top of the field of endeavor. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provides that the "intent of Congress that a very high standard be set for [individuals] of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991).[5] Accordingly, the Petitioner did not establish that we incorrectly applied law or USCIS policy by focusing, in part, on the number of articles the Petitioner submitted that specifically relate to her and her work as one indicator of whether she has enjoyed "a career of acclaimed work" in the field. Our decision reflects that we did not rely solely on this factor without consideration of the actual articles and their contents.

As it relates to our evaluation of her experience as a judge of the work of others in her field in our final merits determination, the Petitioner maintains that we made an error of fact in concluding that she has only judged local or regional competitions. We emphasized in our decision that an evaluation of the significance of the Petitioner's judging experience is appropriate to determine if such evidence indicates the required extraordinary ability for this highly restrictive classification. See Kazarian, 596 F. 3d at 1121-22. We acknowledged that the Petitioner provided evidence that she participated as a review committee member for three photography exhibitions and noted that the names of the competitions indicate national exhibitions. However, we observed that other evidence in the record suggested that they were locally organized regional contests rather than nationally or internationally

[4] The Petitioner was not mentioned in the submitted media articles about this exhibition; she provided an excerpt from the exhibition book as evidence that her work was included.

[5] See also USCIS Policy Memorandum PM 602-0005.1, supra, at 2.

renowned contests. On motion, the Petitioner explains that in [redacted] national exhibitions are often coordinated by local organizers with the support of local district government. She also points to previously submitted evidence indicating that the competitions she judged accepted entries from photographers nationwide. Upon review, the record supports the Petitioner's assertion that the contests she judged were national exhibitions.

The Petitioner also maintains on motion that her service as a judge in three photography contests is "consistent with her reputation and a career of acclaim in photography." She maintains that we applied an inappropriate standard in noting the absence of additional evidence that sets her apart from others in the field. We acknowledge that the Petitioner's invitations to judge photography competitions demonstrate that the contest organizers deem her to be an expert in the field. However, the Petitioner has not shown that this acknowledgement rises to the level of acclaim, or that her work in this role for three contests between 2016 and 2019 demonstrates recognition that places her near the top of her field and indicates sustained national acclaim.

In our appellate decision, we also observed that the Petitioner's display of her artwork at exhibitions does not automatically place her at the top of her field. We acknowledged the exhibition of her work at the 14th and 18th [redacted] International Photography Festival, the 2017 [redacted] Photo Festival Exhibition, the 6th [redacted] International Photography Exhibition, 2015 [redacted] and the 1st [redacted] International Exhibition of Photography. On motion, the Petitioner asserts that we erred in our observation that she "did not establish that her work garnered a level of attention or was regularly seen at highly reputable venues consistent with being among that small percentage who has risen to the very top of the field of endeavor." She asserts that [redacted], [redacted] and [redacted] are three major venues of photography exhibitions in [redacted]' and [redacted] and [redacted] are also well-known venues for photography exhibitions." The Petitioner maintains that her display of her work at these venues in 2013-2015 and 2017-2019 indicates that her work was "regularly exhibited" at highly reputable venues and she specifically highlights seven exhibitions that occurred during these years.

While the record establishes that the Petitioner has displayed her work at the listed festivals, it lacks sufficient evidence to establish that the inclusion of her work in seven notable exhibitions over a period of seven years is indicative of her being among the small percentage of photographers at the very top of the field. The Petitioner emphasizes in her brief that her work was exhibited alongside that of [redacted] in the 2013 exhibition titled '[redacted]' and describes him as "a very top photographer in [redacted]." [redacted] states in his letter that he has participated in exhibitions in France, Germany, the United States, and Japan, and that his works have been collected in museums in France, Switzerland, and the National Museum of China. [redacted] photographer [redacted], also provided a letter in support of the petition and indicates that his works were exhibited at the 2015 [redacted] International Photography Festival along with the Petitioner's. He states that his work has been exhibited in more than 15 countries and has been collected by more than 40 museums worldwide, including the Museum of Modern Art. We emphasize that the Petitioner does not need to establish that she has received the same level of national and international recognition as those individuals who provided letters in support of her petition. However, their achievements provide some context in evaluating the Petitioner's achievements and the recognition she has achieved for them, particularly in light of her claim that she is "in line with top tier photographers."

The inclusion of the Petitioner's work in these festivals is a significant achievement and reflects her success in her field. However, the evidence does not establish, for example, that the thousands of photographs exhibited at each festival are the work of nationally or internationally acclaimed artists at the top of their field, or that all artists whose work is included garner such acclaim. She has received some recognition in the media and in the field based on the exhibition of her work at some of these festivals, but the record does not contain sufficient evidence distinguishing her from others in the field and does not demonstrate that her achievements are at a level that places her among the small percentage at the top of the field. The Petitioner has not established on motion that we misapplied the law or USCIS policy in reaching this conclusion based on the evidence she submitted.

Finally, the Petitioner asserts that we erred in our conclusion that the submitted letters from experts "did not establish that she has made impactful or influential contributions in the greater field reflecting a career of acclaimed work in the field, garnering the required sustained or international acclaim." The Petitioner emphasizes that she does not need to demonstrate that she met the criterion relating to original contributions of major significance in order to qualify for the requested classification. She also emphasizes that the letters provided are from "very reputable and top artists in the field" who testify that she has obtained national acclaim and is at the top of the field. The Petitioner maintains that "their testimonies confirmed the Petitioner's career of acclaim have been recognized and should be taken into account."

Our appellate decision did not impose a requirement that she meet an additional criterion in the final merits determination. We addressed the evidence submitted in support of the original contributions criterion because the Petitioner initially claimed that she could satisfy that criterion. However, we did not dismiss the appeal, in whole or in part, based on a finding that she did not satisfy the criterion at 8 C.F.R. § 204.5(h)(3)(v). Rather, we acknowledged her claim that she had made contributions to the field and evaluated those contributions in terms of whether the evidence reflects that they contributed to her national or international acclaim. Further, our decision reflects that we reviewed and considered each of the submitted expert opinion letters; the Petitioner does not sufficiently explain her assertion that we failed to take them into account.

For the reasons discussed above, the Petitioner has not demonstrated that our appellate decision was incorrect based on the evidence before us at the time of our decision or that it was based on a misapplication of law or USCIS policy. Accordingly, we will dismiss the motion to reconsider.

C. Motion to Reopen

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

In support of her motion to reopen the Petitioner submits new evidence intended to demonstrate that she has earned a high salary or other significantly high remuneration for services in relation to others in the field. See 8 C.F.R. § 204.5(h)(3)(ix). She has not previously claimed to meet this criterion, but maintains that the new evidence demonstrates that her "annual compensation as a photographer is also in the top small percentage of the photographer profession in [redacted] and, when considered together

with other documentation in the record, supports a conclusion that she is eligible for classification as an individual of extraordinary ability.

The Petitioner explains that her primary compensation as a photographer is derived from a gallery that she runs, the sale of her photography artwork to private collectors, and other photographic projects. She states that her 2018 compensation "was at least about RMB2.9 Million Yuan (equivalent to US Dollar $437,405)." In support of her claim, she submits excerpts from her 2018 Bank account transaction history, two Artwork Purchase Contracts and one Agreement for Personal Entrusted Project, all executed in 2018. This evidence indicates that she sold two series of photographs (55 photographs) to a private collector in January 2018 for ¥2.59 million, a series of five photographs to the same collector in November 2018 for ¥280,000 and received ¥25,000 for the referenced project.

She also provides a 2018 Salary Survey Report for the occupation of "Photographer in ' published by , found at . The survey reports on a sample size of 135 salaried photographers and provides base pay and other compensation information (annual allowances, performance pay, project income, personal works sales revenue, etc.). The survey indicates an average "annual total of cash pay" of ¥437,152 and a 90th percentile of ¥552,075. The Petitioner also submits salary data from Salary Explorer, which indicates average monthly earnings of ¥16,500 and high earnings of ¥25,800 for persons working as photographers in inclusive of salary, allowances and benefits. However, the Petitioner indicates that she is self-employed and does not receive a monthly base salary and allowances. Therefore, we cannot conclude that the submitted surveys provide a meaningful compensation comparison for evaluating the relative income of a self-employed photographer.

The submitted contracts indicate that the Petitioner sold many pieces from some of her most notable photographic series[6] to a private collector in 2018 for a unit price of ¥38,960 to ¥56,000, or in the range of $5900 to $8450 per photograph. The record does not provide any context for these sales prices that would allow us to determine whether this represents significantly high remuneration in comparison to other photographers who sell to private collectors. Further, while this new evidence of sales to a private collector demonstrates some degree of recognition of her achievements in the field, the Petitioner has not submitted evidence showing her earnings are at a level reflecting that she is one of the small percentage who has risen to the top of the field. Nor does she demonstrate that the newly documented sales of her artwork from a single year reflect her sustained national or international acclaim.

The Petitioner also submits new evidence on motion in response to our observation that she did not demonstrate that her service as vice chairperson to the and the Women Photographers Association resulted in her national or international acclaim as a photographer. The new evidence consists of two articles, both titled " posted at the websites of the Photographers Association) and

[6] For example, the January 2018 contract indicates that a private collector purchased "30 photographs of series," the series for which the Petitioner received an "Excellent Photographer" award at the 14th International Photography Festival in 2014.

[redacted]. The articles list the members of the exhibition's 15-member organizing committee by providing their names and the association with which they are connected. The articles identify the Petitioner as [redacted]." The Petitioner maintains that her service to these associations "caused her being selected as a member of the Organizing Committee" for this competition, and, by virtue of the published articles, "caused her national acclaim in the field." This new evidence, which is comparable to other evidence that we previously considered, is not sufficient to overcome our previous determination that the Petitioner has not shown how her association memberships and officer-level roles with [redacted] photography associations have contributed significantly to her national or international acclaim as an artist.

For the reasons discussed, the Petitioner's additional evidence on motion does not show her sustained national or international acclaim, that she is one of the small percentage at the very top of the field of endeavor, and that her achievements have been recognized in the field through extensive documentation. Accordingly, we will deny her motion to reopen.

IV. CONCLUSION

The Petitioner has not shown that our previous decision was incorrect based on the record before us, nor does her new evidence on motion demonstrate her eligibility for the benefit sought.

ORDER: The motion to reconsider is denied.

FURTHER ORDER: The motion to reopen is denied.