



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

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

In Re: 15782327

Date: MAY 3, 2021

Motion On Administrative Appeals Office Decision

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

The Petitioner, an artist, 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 the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. The Director also concluded that the Petitioner had not shown that his entry would substantially benefit prospectively the United States. We dismissed the Petitioner's appeal from that decision, agreeing with the Director that the Petitioner had not satisfied at least three initial criteria. We reserved the issue of substantial prospective benefit. The matter is now before us on a motion to reopen.

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 review, we will grant the motion in part, but the appeal will remain dismissed.

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).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Under the above regulations, a motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. ANALYSIS

The Petitioner is a painter who trained in his native before relocating to the United States.

Because the Petitioner has not indicated or shown that he 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 Petitioner initially claimed to have satisfied six of these criteria, summarized below:

- (i), Lesser nationally or internationally recognized prizes or awards;
- (ii), Membership in associations that require outstanding achievements;
- (iii), Published material about the individual in professional or major media;
- (vii), Display at artistic exhibitions or showcases;
- (viii), Leading or critical role for distinguished organizations or establishments; and
- (ix), High remuneration for services.

The Director concluded, and we agreed, that the Petitioner meets criterion (vii), relating to display. On motion, the Petitioner asserts that he also meets the criteria numbered (i), (ii), and (ix). The Petitioner does not contest our conclusions regarding the criteria numbered (iii) and (viii), and therefore we consider those issues to be abandoned.¹

The Petitioner submits relevant new evidence on motion, and therefore we grant the motion in part. For the reasons explained below, however, we will not approve the petition. Also, in addition to submitting new evidence, the Petitioner states that he “will also rely on evidence previously submitted in support of his petition,” but the only purpose of a motion to reopen is to introduce new facts, along with supporting evidence. Therefore, while the motion includes frequent references to evidence submitted previously, revisiting such evidence does not fall within the compass of a motion to reopen. Allegations that the prior decision was incorrect based on the evidence in the record at that time would belong in a motion to reconsider, which the Petitioner has not filed.

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)

In our appellate decision, we concluded that the Petitioner had not shown that his “honorable mention award” from an Oil Painters of America (OPA) Online Showcase is a nationally or internationally recognized prize or award. We noted that OPA’s characterization of its own awards is not evidence of recognition beyond the awarding organization.

On motion, the Petitioner submits additional materials about the award, but these materials are all from OPA (such as a letter congratulating the Petitioner on the “wonderful achievement” of “winning an Honorable Mention Award”). Private correspondence from the awarding entity does not demonstrate national or international recognition of the Petitioner’s honorable mention award. The Petitioner contends that it “do[es] not make the slightest sense” for us to conclude that an “organization is prestigious but the awards it gives are not or suppose that OPA has awards of different qualities.” But the regulation requires recognition of the awards themselves, which is not the same thing as the reputation of the awarding organization. Also, different awards from the same organization might not enjoy the same level of recognition. Therefore, evidence about higher-level prizes from OPA does not establish recognition of honorable mention awards.

The Petitioner also won honorable mentions at two [redacted] Art Contests. In our appellate decision, we acknowledged the reputation of the [redacted] but concluded that the Petitioner did not establish that his honorable mentions are nationally or internationally recognized awards for excellence in his field. On motion, the Petitioner disputes our conclusions but submits no new evidence to address this point directly. Instead, the Petitioner asserts: “Many recognized art competitions in the world allow open entries,” and he submits the “Rules of the [redacted] Art Prize” to support this point. The Petitioner does not claim to have won a [redacted]

¹ See *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). See also *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff’s claims were abandoned as he failed to raise them on appeal to the AAO).

Art Prize, and he does not show that the rules for that competition are comparable or relevant to the contests in which he did participate. Any assertion of error in the prior decision would be within the scope of a motion to reconsider, rather than a motion to reopen.

The Petitioner also submits photographs from the award ceremony to show that the participants were adults, but we did not conclude otherwise. Rather, we noted that, according to an article that the Petitioner submitted, the contest was open to participants ages 15 and up. The Petitioner submits information about other individuals who won prizes at the [redacted] contests; the effect that political upheaval has had on the [redacted] art community; and other issues, but these materials do not show that an honorable mention at one of [redacted]'s contests is nationally or internationally recognized. The Petitioner acknowledges the lack of publicity accompanying his honorable mentions, but he states that press coverage is not "essential to prove that [he] obtained two honorable mentions." The point of such coverage is not to prove that the Petitioner won those mentions, but to show that they have attracted the attention that one would expect in relation to a widely recognized prize or award.

The Petitioner has not established, on motion, that he received nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.
8 C.F.R. § 204.5(h)(3)(ii)

The Petitioner previously claimed to satisfy this criterion with evidence regarding the [redacted] [redacted] and the [redacted]. We determined that the Petitioner did not establish his membership in the [redacted], and that the Petitioner did not show that the [redacted] has membership requirements that conform to the regulatory language.

On motion, the Petitioner submits a copy of an email message from the [redacted] welcoming the Petitioner "as an [redacted]." The announcement is dated August 16, 2019, more than six weeks after the Petitioner filed the petition on July 2, 2019, and about five weeks after the Director issued a request for evidence on July 11, 2019. Therefore, this document cannot establish eligibility at the time of filing, as required by 8 C.F.R. § 103.2(b)(1). The evidence is consistent with our prior conclusion that the Petitioner's participation in [redacted] competitions in 2016 and 2017 was not evidence of membership.

Furthermore, [redacted] is the lowest of three tiers of [redacted] membership (the others being [redacted] and [redacted]). A submitted printout from the [redacted]'s website indicates that a [redacted] must show "competence and understanding," whereas a [redacted] must have [redacted].

We concluded that letters from the [redacted]'s president were "not sufficiently detailed to establish that the [redacted] requires prospective members to demonstrate 'outstanding achievements' as a condition of admission." We noted that the Petitioner did not submit documentary evidence of the organization's membership requirements.

On motion, the Petitioner submits a printout from the [redacted]'s website, stating: "The first criteria [*sic*] is talent, regardless of the length of the CV, years of experience, awards and honors received. . . . All our academicians have been subject to a rigorous selection and selected for excellence in their work."²

The Petitioner also submits a new letter from the president of the [redacted], who repeats assertions from his prior letters and states that jurors consider "pictorial techniques," "compositional ability," "inherent meaning" and "uniqueness" of submitted works. These are factors that relate to subjective evaluations of an artist's skills, but the Petitioner has not shown that they rise to the level of outstanding achievements.

We previously observed that the Petitioner did not submit [redacted] documentation such as its bylaws or constitution. In the absence of documented, enforceable rules and definition of key terms, the submitted information is too vague to establish that [redacted] membership meets the regulatory requirements.

The Petitioner, on motion, has not established his membership in associations that meet the requirements specified in the regulations.

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 our appellate decision, we acknowledged that letters from galleries indicate that the Petitioner's paintings command high prices, but we stated: "The Petitioner has documented the sales price for only two of his paintings." We concluded that the Petitioner did not "establish that he has commanded *significantly* high remuneration in relation to others." Furthermore, the Petitioner's documented sales were through galleries, but his arguments relied upon market reports that only deal with auctions, rather than gallery sales.

On motion, the Petitioner submits printouts from the website of an online gallery, listing the prices for the Petitioner's work and other paintings of the same size, style, and media. These listings are for paintings that remain available for sale, and therefore they do not show the prices that buyers have actually paid for the Petitioner's work. Furthermore, the Petitioner has not established that this one gallery is representative of the field as a whole.

The Petitioner also submits an [redacted] exhibition catalog from 2018. His work is not listed, but the Petitioner states that most of the prices in that catalog are lower than the prices for his work. As above, the Petitioner has not shown the prices in this catalog to be representative of the price range to be found in the field overall.

The Petitioner submits invoices to show "the progressive increase in the value of his work since 2014." The invoices show that three of his paintings sold for \$5000-\$6000 each in 2014-2015, and five others sold for between \$9010 and \$11,200 in 2019-2020. Two of the invoices are dated after the petition's

² The use of the plural "criteria" instead of "criterion" is one of several grammatical and spelling errors in the web printout (such as "authot" instead of "author" and "justificative" instead of "justification").

filing date. One invoice reflects a 20% discount from the asking price, which demonstrates that purchasers do not always pay the full published price of an artwork. As a result, the full prices listed on websites do not necessarily match the amounts that the Petitioner will eventually receive.

The invoices are not sufficient to establish any definite trend in the prices of the Petitioner's work, partly because there are only a few of them, with a gap of several years between 2015 and 2019. Also, the recent invoices are mostly for much heavier (and, thus, presumably larger) works than the older invoices.

The Petitioner compares the prices his work commanded in 2014-2015 with [redacted]'s "monthly minimum wage in the same month and year." The comparison is not instructive, because the regulations require remuneration to be significantly high in relation to others *in the field*, rather than in relation to the local minimum wage or the population as a whole.

Together, the invoices document \$68,168 in sales over a span of five and a half years. The six invoices dated prior to the July 2019 filing date show an average price of \$7643. The Petitioner has not established that these figures are significantly high in relation to others in the field.

The Petitioner, on motion, has not established that he meets the requirements of this criterion.

The remainder of the new evidence submitted on motion concerns the Petitioner's ongoing activity, intended to establish that he continues to work as an artist. Our appellate decision included no substantive conclusions in this regard, and therefore we need not discuss this evidence here.

III. CONCLUSION

The Petitioner's new evidence does not establish eligibility or overcome the grounds for dismissal of the appeal. The motion to reopen is granted in part and denied in part for the above stated reasons.

ORDER: The motion to reopen is granted in part and dismissed in part.