



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

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

In Re: 10094866

Date: MAY 24, 2021

Appeal of Nebraska Service Center Decision

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

The Petitioner, an orchestral musician, 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 was a recipient of a major, internationally recognized award or had met at least three of ten evidentiary criteria, as required.

On appeal, the Petitioner submits a brief and asserts her eligibility for the classification sought.

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 international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award).

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 is the assistant principal [redacted] player for the [redacted].¹

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that she has received a major, internationally recognized award, she 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 five of these criteria, summarized below:

- (i), Lesser nationally or internationally recognized prizes or awards;
- (ii), Membership in associations that require outstanding achievements;
- (iv), Participation as a judge of the work of others;
- (vii), Display at artistic exhibitions or showcases; and
- (viii), Leading or critical role for distinguished organizations or establishments.

The Director found that the Petitioner met the evidentiary criterion at 8 C.F.R. § 204.5(h)(3)(viii), relating to leading or critical role. We will not disturb this conclusion. The record contains an offer letter and [redacted] concert programs establishing that the Petitioner is the assistant principal [redacted] player for that entity, a letter of recommendation from [redacted] orchestra personnel manager for the [redacted] describing her duties in that role, and news articles showing the [redacted]'s distinguished reputation.

On appeal, the Petitioner asserts that she also meets the evidentiary criteria relating to lesser prizes or awards, membership, and judging. The Petitioner does not contest the Director’s conclusion regarding

¹ USCIS records reflect that the Petitioner received O-1 status, a classification reserved for nonimmigrants of extraordinary ability.

the artistic display criterion, and therefore, we consider that issue to be abandoned.² After reviewing all of the evidence in the record, we find that the Petitioner has not established she meets three of the regulatory criteria, as required.

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 initially asserted eligibility for this criterion based upon a claim that she received a [redacted] Award in 2008 and provided a certificate recognizing her participation as a musician on an album nominated for this award.³ In response to the Director's subsequently issued request for evidence (RFE),⁴ the Petitioner acknowledged that the album was nominated for, but did not win the [redacted]. She resubmitted the certificate of recognition, referred to it as an award certificate, and explained that it "is specific in naming [her] individually for her role on the album... which received a nomination for [redacted] Award." She also included a 2008 article from National Public Radio entitled [redacted] describing the 2008 [redacted] nominees and asserting that the album in question "deserves several awards" and "should be considered the Best Classical Album." This article does not indicate that the album received the [redacted].

In his decision, the Director acknowledged this certificate and article, but found that the Petitioner did not meet this criterion as she failed to establish either that the album won a [redacted] or that she received a [redacted] as a member of the orchestra performing on this album.

On appeal, the Petitioner reasserts eligibility based upon her receipt of the aforementioned certificate. Although the Petitioner received this certificate recognizing her participation on the [redacted] nominated album, the regulation at 8 C.F.R. § 204.5(h)(3)(i) provides that this award must be nationally or internationally recognized for excellence in her field of endeavor. Relevant considerations regarding whether the basis for granting the prizes or awards was excellence in the field include, but are not limited to: the criteria used to grant the awards or prizes; the national or international significance of the awards or prizes in the field; and the number of awardees or prize recipients as well as any limitations on competitors (an award limited to competitors from a single institution, for example, may have little national or international significance).⁵ The Petitioner does not provide the criteria used to grant this certificate, evidence of its national or international significance, documentation of the limitations on competitors, or other materials demonstrating that the award certificate is nationally or internationally recognized in the field of orchestral music as required. Accordingly, the Petitioner has not met the requirements of this regulatory criterion.

² 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).

³ The Petitioner also submitted evidence regarding the criteria for receiving the [redacted] award and describing the [redacted] Academy, which confers the [redacted].

⁴ In this RFE, the Director requested additional evidence to establish that the Petitioner, either individually, or as part of an orchestra, won a [redacted] award.

⁵ See 6 USCIS Policy Manual F.2(B)(2), Appendix: Extraordinary Ability Petitions – First Step of Reviewing Evidence, <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2>

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 Director concluded that the Petitioner was a member of the [redacted] that the symphony was an organization in her field of endeavor, and that her membership in the symphony was based upon an open audition judged by recognized experts in that field; however, the Director did not grant this criterion because the Petitioner did not submit evidence demonstrating that the [redacted] required outstanding achievements of its members.

On appeal, the Petitioner argues that she meets this criterion as “[e]vidence was submitted to show that outstanding achievement was required to even be invited to audition” and that “further achievement was required (performance during the audition) under the careful judging eye of expert musician members.” Upon review of all of the evidence in the record, we agree with the Director’s conclusions with respect to this criterion.

The Petitioner indicates, and letters in the record corroborate, that she won an open audition to become a member of the [redacted]. The Petitioner further asserts that both her selection to participate in this open audition and her selection as a member of the [redacted] required outstanding achievements in the field of music. It is the Petitioner’s burden to establish eligibility for the benefit sought. *See* Section 291 of the Act, 8 U.S.C. § 1361. For the following reasons, the Petitioner has not met this burden.

First, the Petitioner has not provided evidence sufficient to establish the requirements for participating in this open audition. Although in their letters both [redacted] and [redacted], senior vice president of artistic planning and production for the [redacted], attest that outstanding achievements are required to audition for and be selected as a member of the [redacted], their letters do not specify what these achievements are. For example, [redacted] explains in his letter that the [redacted] [redacted] puts out public notices inviting musicians to apply for its auditions and that “only those applicants with outstanding achievement in their educational background and performance history are invited” to audition. [redacted] similarly indicates that “[m]embership is predicated upon ... meeting of minimum qualifications that include past outstanding achievement in the field and excelling in a high-pressure performance setting as judged by a panel of experts.” Repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *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.). Beyond using the language of the statute, the letters of [redacted] and [redacted] do not provide detailed examples of these outstanding achievements, and the Petitioner does not offer other material, such as the open audition selection process, the criteria for selection as a member of the [redacted] or other relevant documentation, doing so. Absent this evidence, we are unable to determine if the [redacted] requires outstanding achievements of its members, and accordingly, that the Petitioner’s membership with this organization satisfies this criterion.

[redacted] also states in her letter that membership in the [redacted] is predicated upon “excelling in a high-pressure performance setting as judged by a panel of experts,” but does not explain how excelling in this environment equals having outstanding achievements in the field of music. The record lacks other evidence establishing this. Without documentation demonstrating that surpassing others in a high-pressure performance constitutes an outstanding achievement in the field of orchestral music, [redacted]’s letter is insufficient to establish that the [redacted] requires outstanding achievements of its members, as judged by nationally or internationally recognized experts in the field of orchestral music.

Regarding the document titled “Code of Ethical Audition Practices” (Code), it also is insufficient to demonstrate that the [redacted] requires outstanding achievements of its members. First, the section “Conduct of Auditions,” states that an audition committee should “at least include the initial screening of applicants.” The Code does not indicate how this should be done, rather stating that “the existence and composition of an audition committee and the nature and extent of its participation in auditioning and hiring is determined locally.” In addition, the Code does not include a provision requiring that audition applicants have outstanding achievements in the field of music in order to be invited for an audition. Moreover, the record does not contain evidence establishing that the [redacted] [redacted] has endorsed this code. This is relevant as the document indicates that only those endorsing this code “assert thereby that they will conduct their auditions in accordance with the principles articulated therein.” Without evidence demonstrating that the [redacted] has endorsed the Code, and establishing that the Code requires audition applicants to have outstanding achievements in the field of orchestral music, this document does not support the Petitioner’s assertion on appeal that the [redacted] requires outstanding achievements of those who it invites to audition, and therefore of its members.

For the aforementioned reasons, the Petitioner has not established that she meets this criterion.

In light of the above conclusions, the Petitioner does not meet the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3). Detailed discussion of the remaining criterion at 8 C.F.R. § 204.5(h)(3)(iv), relating to judging, cannot change the outcome of this appeal. Therefore, we reserve this issue.⁶

III. CONCLUSION

The Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria. As a result, 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

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); see also *Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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 her 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 she 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).

For the reasons discussed above, the Petitioner has not demonstrated her eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.