U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20434723

Date: JULY 20, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, a composer [redacted], 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 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 dismiss the appeal.

I. 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; who seek to enter the United States to continue work in the area of extraordinary ability; and whose 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. The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable evidence if they are able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)–(x) do not readily apply to the individual's occupation.

Where a petitioner meets the initial evidence requirements through either a one-time achievement or meeting three lesser criteria, 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 studied at [redacted] College of Music and [redacted] College [redacted]. Since 2014, he has worked for [redacted], a company owned by composer [redacted]. Many of the Petitioner's documented projects in the record have been as an assistant to [redacted]. Some of their projects are the [redacted], and [redacted].[1] His most recent work includes composing the score for the feature film [redacted] and the television series [redacted].

A. Evidentiary Criteria

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 claims to have satisfied four of these criteria, summarized below:

- (iii), Published material about the individual in professional or major media;
- (iv), Participation as a judge of the work of others;
- (viii), Comparable evidence of a leading or critical role for distinguished organizations or establishments; and
- (ix), High remuneration for services.

The Director concluded that the Petitioner met two of the criteria, relating to published material and participation as a judge. On appeal, the Petitioner asserts that he also meets the other claimed criteria.

Upon review of the record, we agree with the Director that the Petitioner has satisfied the criterion at 8 C.F.R. § 204.5(h)(iv) by serving as a judge at film festivals in Turkey. For the reasons explained below, we do not conclude that he has satisfied the other three claimed criteria.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii).

[1] The Petitioner is currently in the United States in O-1 nonimmigrant status, which relates to extraordinary ability. Nevertheless, the record of proceeding for the approved nonimmigrant petitions are not before us. Also, the nonimmigrant and immigrant categories have different definitions and standards for persons of the arts. "Extraordinary ability in the field of arts" in the nonimmigrant O-1 category means distinction. 8 C.F.R. § 214.2(o)(3)(ii). But in the immigrant context, "extraordinary ability" reflects that the individual is among the small percentage at the very top of the field.

Review of the record does not support the Director's conclusion that the Petitioner had satisfied the requirements of this criterion.

A number of the submitted articles are not about the Petitioner. Rather, they are about projects on which he worked. "The person and the person's work need not be the only subject of the material; published material that covers a broader topic but includes a substantial discussion of the person's work in the field" may also satisfy the criterion. *See* 6 *USCIS Policy Manual* F.2 appendix, https://www.uscis.gov/policymanual. In this instance, the submitted articles mention the Petitioner only briefly, and do not include substantial discussion of his work.

Other submitted articles are about the Petitioner, but the Petitioner has not established that the articles appeared in professional or major trade publications or in other major media publications. The submitted evidence should establish that the circulation (online or in print) or viewership is high compared to other statistics and show who the intended audience is. 6 *USCIS Policy Manual*, *supra*, at F.2 appendix.

The Petitioner asserts that each article includes "the applicable circulations [*sic*] figures for print publications and number of unique visitor[s] for all online publications," but the Petitioner did not provide this information for every submitted article. Where the Petitioner did provide the information, it is incorporated into transcripts or translations, without attribution of the source of the data. Also, these raw numbers do not establish that the circulation or readership is high compared to other publications in the field, as required.

The Petitioner also quotes what appear to be various publishers' own promotional material, such as a reference to *Film.Music.Media* as "your premiere destination when it comes to the world of film music." A publisher's "self-serving assertion" about its own publication is not sufficient to establish that the publication meets the requirements of 8 C.F.R. § 204.5(h)(3)(iii). *See Braga v. Poulos*, No. CV 06-5105 SJO FMOX, 2007 WL 9229758, at *7 (C.D. Cal. July 6, 2007), *aff'd*, 317 F. App'x 680 (9th Cir. 2009) ("The AAO need not, and indeed should not, rely on the [publisher's] self-serving assertion . . . to find that [the] magazine is a professional or major trade publication").

The Petitioner has been the subject of published material, but he has not established that the submitted materials meet the regulatory requirements.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

The Petitioner claims that this criterion is not readily applicable to his occupation, because musical "performances are always considered a critical role for productions or events rather than organizations and establishments." The Petitioner therefore asserts that evidence about individual "productions or events" is comparable evidence under 8 C.F.R. § 204.5(h)(4). The Petitioner submits letters from [redacted] and others, asserting that the Petitioner performed in a leading or critical role by contributing to the soundtrack scores for various [redacted]. The Petitioner appears to seek to extend the comparable evidence principle by then asserting that the studios that produced or distributed these [redacted] are establishments that have a distinguished reputation.

In the denial notice, the Director concluded that the Petitioner had not shown that the criterion does not readily apply to the Petitioner's occupation. The Director acknowledged that the Petitioner had made valued contributions to various projects, but had not shown his work to be leading or critical for any organization or establishment with a distinguished reputation. On appeal, the Petitioner repeats prior assertions and states that the Director erred by not considering the Petitioner's claim of comparable evidence.

Upon consideration of the record, we need not directly resolve the issue of comparable evidence, because the Petitioner has not shown his roles to be leading or critical in the alternative context of individual soundtrack projects.

Letters from [redacted] and others establish that the Petitioner has worked primarily as an assistant to [redacted] providing additional music to projects for which [redacted] is the credited composer. The record shows that most of the Petitioner's film work has been in lesser capacities, below that of composer, such as the following examples listed on a printout from *IMDb Pro*:

- Soundtrack Producer (uncredited)
- Score Production Assistant
- Additional Orchestrator (uncredited)
- Composer (additional music)
- Composer (trailer music)
- Score Production Coordinator
- Conductor
- Orchestrator
- Arranger

On the *IMDb Pro* printout, all nine of the projects that credit the Petitioner as the primary composer are short films. The printout does not provide box office figures for any of these short films, and the Petitioner has not otherwise established that these projects have distinguished reputations.

[redacted] notes that the soundtracks for [redacted] were nominated for Grammy Awards. The Petitioner does not submit any evidence from the Recording Academy to show that the Academy nominated the Petitioner, not just [redacted] for these awards.

The Petitioner has also claimed a leading role as a producer of motion picture soundtrack albums. The field of record production is related to, but distinct from, musical composition. The Petitioner has not established that production work of this kind demonstrates extraordinary ability as a composer.

The Petitioner has not established that his subordinate, supporting, and sometimes uncredited work rises to the level of being comparable to a leading or critical role for an organization or establishment with a distinguished reputation.

The Petitioner claims a lead composer credit for projects in the [redacted], but does not establish that these projects had even been released at the time he filed the petition. Whatever the prior success or reception of earlier [redacted], an individual film or television program's reputation and whether it is

distinguished, cannot be determined before its release. A petitioner must meet all eligibility requirements at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1).

> *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).

The Petitioner has earned a salary and bonuses from [redacted] and composing royalties from [redacted] In 2021, his base salary at [redacted] was $220,000 per year. In a February 2021 letter, [redacted] agreed to pay the Beneficiary a $400,000 advance on royalties anticipated through March 2026.

Documentation in the record indicates that the Petitioner received payment in the following amounts:

	[redacted]		[redacted]
2014	$15,006	(October-December)	
2015	47,504		
2016	67,860		
2017	96,156		
2018	133,324		$25,088
2019	104,191		38,468
2020	82,269		67,842
2021	125,294	(January-July)	

The Petitioner did not establish the amount of royalties already paid to him under the terms of the 2021 agreement with [redacted] and the Petitioner did not provide any basis for comparison to show that his remuneration in the form of royalty payments are significantly high in relation to others in his field.

The letter from [redacted] describes the Petitioner as a "composer, orchestrator and arranger," but the record indicates that the Petitioner has also acted as a producer at recording sessions. The record does not distinguish between the Petitioner's earnings as a composer and as a producer. Although there is some overlap, the two occupations are distinct. Remuneration paid to the Petitioner for his work as a producer, such as session fees, would not represent remuneration for work in the field of composition.

To indicate that his salary from [redacted] has been high in relation to others in the field, the Petitioner has submitted statistics from various online sources, including examples described further below.

In denying the petition, the Director concluded that the submitted salary information was too broad to provide reliable information specific to the Beneficiary's intended employment. The Director stated: "Average salary information for those performing work in a related but distinct occupation with different responsibilities is not a proper basis for comparison."

On appeal, the Petitioner asserts that the Director selectively interpreted the submitted evidence, and "only considered the average salaries and not the comparable salaries at low, medium as well as high levels for comparison purposes." But it is not apparent that the Petitioner submitted an adequate basis for comparison with respect to composers in the motion picture industry. The figures submitted by the Petitioner are not consistent from one source to the next:

- *O*NET Online* indicates that "Music Directors and Composers" in California earn an average of $57,050 per year, and 10% of them earn $139,620 or more;
- *Payscale* indicates that the median base salary for composers in the United States is $51,000 per year, and 10% earn $122,000 or more;
- *ZipRecruiter* indicates that film composers in [redacted] California, earn an average of $58,536 per year, and 10% of film composers throughout the United States earn $104,000 or more; and
- *Recruiter* shows an average income of $71,190 for "Music Composers and Arrangers" in California.

Most of the sources do not distinguish between film score composers and other types of composers and songwriters, and it is not evident that the private recruitment and job search websites drew on a large, representative data pool. The *Payscale* figures are "[b]ased on 50 salary profiles." *Recruiter* indicates that Nevada is the highest-paying state for composers, at $99,210 per year. Only *ZipRecruiter* provides figures specific to *film* composers, and that website indicates that three of the ten highest-paying cities for film composers are in Massachusetts, a state not among the 14 states listed by *Recruiter* as the highest-paying. The inconsistent information provided does not appear to be sufficient to show that the Beneficiary earns a high salary, or other significantly high remuneration, in relation to composers in the motion picture industry.

In this respect, we note that the Petitioner has done most of his work for a company owned by fellow film compose[redacted] has provided statements in support of the petition, but the record does not show [redacted] compensation, which might have provided a useful benchmark.

The Petitioner asserts that the Director "erroneously claimed that no corroborating evidence was submitted by unilaterally claiming it to be a temporal element to the criteria for high salary which is in direct conflict to the plain language of the statute." While the Petitioner does not elaborate, the Petitioner appears to refer to this passage from the Director's decision:

> The evidence appears to show that the beneficiary's earnings may be higher than average compared with data from the US Bureau of Labor Statistics and O-Net online. However, corroborative evidence showing that the wage rate is high relative to others working in the field was not provided. In addition, [an accountant] indicated that the beneficiary has been employed with [redacted] since on [*sic*] October 4, 2014. However, evidence of earnings from [redacted] prior to 2021 was not provided.

This passage is not a ground for denial of the petition. Rather, it is a quotation from the RFE, which the Director repeated as part of the chronological narrative of the record. The accountant's initial letter attested to the Petitioner's employment from 2014 to 2021, but did not specify how much he earned during that time. The Director went on to acknowledge the Petitioner's later submission of a new letter from the same accountant, specifying what [redacted] paid the Beneficiary each year.

The Petitioner has not established that he has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. Because royalties are not a salary, we would not compare royalty figures to salary figures. As noted above, the Petitioner did not provide any basis

for comparison to show that his remuneration in the form of royalty payments are significantly high in relation to others in his field.

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 lesser 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 conclusion 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. U.S. Citizenship and Immigration Services has long held 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 recognition of his work is indicative of the required sustained national or international acclaim or demonstrates 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 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).

The Petitioner has worked on some high-profile projects for major film studios, in positions of increasing responsibility, under the tutelage of [redacted] In this way he may be said to be progressing *toward* the top of his field. But employment with major studios is not inherently sufficient evidence that one has reached the top of that field; a comparison of the Petitioner's credits and achievements with those of [redacted], an Academy Award nominee, shows that while the Petitioner is rising in his field, he has not yet established the sustained national or international acclaim required to show that he has reached the top of that field.

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

ORDER: The appeal is dismissed.