U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19083064

Date: MAR. 15, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, an executive producer, 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 has either a qualifying one-time achievement (a major, internationally recognized award), or that he has satisfied at least three of ten initial evidentiary criteria for this classification, 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 by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to aliens 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 the 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 is an executive producer in the entertainment industry whose body of work includes production and director of photography credits on commercial, television and film projects. At the time of filing, he was scheduled to work on upcoming television projects for [redacted] and [redacted]

The Director determined that record did not support the Petitioner's claim that he has a qualifying one-time achievement and therefore he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director denied the petition, concluding that the Petitioner satisfied only one of those ten criteria. On appeal, the Petitioner maintains that he presented evidence that he received a major, internationally recognized award, and, in the alternative, that he meets at least three of the ten criteria, discussed below.

A. One-time Achievement

The regulation at 8 C.F.R. § 204.5(h)(3) states that a petitioner may submit evidence of a one-time achievement that is a major, internationally recognized award. The Petitioner claims that he has received up to four qualifying awards, including a Grand Clio Entertainment Award, a Gold Clio Entertainment Award, a Gold Pencil Award from The One Show, and a Webby Award.[1] We agree with the Director that the evidence does not establish the Petitioner's receipt of a major, internationally recognized award.

[1] The record reflects that the Petitioner initially claimed these as "lesser national or internationally recognized awards or prizes" while indicating that his "Wood Pencil" award from the D&AD Awards was a qualifying one-time achievement. The Petitioner has not pursued his initial claim that the Wood Pencil award is a major, internationally recognized award and we will therefore not discuss it here.

Given Congress' intent to restrict this category to "that small percentage of individuals who have risen to the very top of their field of endeavor," the regulation permitting eligibility based on a one-time achievement must be interpreted very narrowly, with only a small handful of awards qualifying as major, internationally recognized awards. *See* H.R. Rep. 101-723, 59 (Sept. 19, 1990), reprinted in 1990 U.S.C.C.A.N. 6710, 1990 WL 200418 at *6739. The House Report specifically cited to the Nobel Prize as an example of a one-time achievement; other examples which enjoy major, international recognition may include the Pulitzer Prize, the Academy Award, and an Olympic Medal. The regulation is consistent with this legislative history, stating that a one-time achievement must be a major, internationally recognized award. 8 C.F.R. § 204.5(h)(3). The selection of Nobel Laureates, the example provided by Congress, is reported in the top media internationally regardless of the nationality of the awardees, reflects a familiar name to the public at large, and includes a large cash prize. While an internationally recognized award could conceivably constitute a one-time achievement without meeting all of those elements, it is clear from the example provided by Congress that the award must be global in scope and internationally recognized in the field as one of the top awards.

With respect to his Clio Entertainment Awards, the Petitioner provided a letter from [redacted] of the Clio Awards, indicating that he was recognized with a 2019 Gold Clio Entertainment Award in the [redacted] in 2019 for his work on [redacted] states that the Clio Awards are "the premier international awards competition for the creative business." The Petitioner submitted a photograph of his award statue confirming his receipt of the award, as well as evidence that he received a Grand Clio Entertainment Award in the same category for [redacted] related to the same creative project. The Petitioner also submitted information from the Clio Awards website (www.clios.com), which describes it as "the esteemed international awards competition," and mentions the "Grand Clio," which is awarded in each category, as "the highest honor" bestowed. According to a submitted printout from the main Clio Awards website, fewer than 20% of submissions within each media type survive the first two rounds of judging to be considered for a gold, silver, or bronze statue or a shortlist mention. The Clio Entertainment Awards are described as a separate awards program intended to recognize excellence "in marketing and communications across film, television, live entertainment and gaming," but the record does not include additional information regarding this separate Clio Awards program.

The Petitioner also provided a photograph of his 2020 One Club Gold Pencil Award ([redacted] category) for the [redacted] project. A letter from [redacted] the [redacted] of The One Club for Creativity, indicates that this project received more than a dozen awards across different categories at the 2020 awards, and that the Petitioner was credited on the work. [redacted] indicates that The One Club's professional awards show receives thousands of entries annually from advertising agencies worldwide, and that "to be selected for a Pencil is a great honor." A submitted screenshot from The One Club's website states that The One Show awards are "among the most coveted accolades in the history of the industry."

Finally, the Petitioner submitted a photograph of his 2020 Webby Award in the [redacted] category for the [redacted] campaign. A letter from [redacted] of the International Academy of Digital Arts and Sciences, which established The Webby Awards in 1996, describes the awards as "the internet's most respected symbol of success and achievement in technology and creativity," noting that "to be awarded at The Webby Awards is

to be recognized as being at the very top of the industry." The Petitioner also provided information regarding the awards program from the Webby Awards website, and articles about the awards from *Inc.*, *The New York Times*, and *Los Angeles Times*, which refer to the awards as "the Oscars of the Internet."

While the Petitioner's Clio Entertainment Awards, One Show Awards and Webby Award are all notable professional achievements, the regulation at 8 C.F.R. § 204.5(h)(3) requires the one-time achievement to be "a major, international[ly] recognized award." The Petitioner did not present evidence, for example, establishing that winners of Clio Entertainment Awards, One Show Awards or Webby Awards are widely reported by international media, recognized by the general public, or garner attention comparable to other major, globally recognized awards such as Academy Award winners. Nor is there supporting evidence showing that the recipients of these awards were announced in a manner consistent with a major, internationally recognized award. Accordingly, the Petitioner has not demonstrated that his receipt of the awards discussed above can qualify as a one-time achievement.

B. Evidentiary Criteria

Because the Petitioner has not established that he has 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 Director acknowledged that the Petitioner claimed to meet the following criteria:

- (i), Lesser nationally or internationally recognized awards or prizes;
- (iii), Published material in professional, major trade publications or other major media;
- (viii), Leading or critical role for organizations with a distinguished reputation;
- (ix), High salary or other significantly high remuneration for services; and
- (x), Commercial successes in the performing arts.

In denying the petition, the Director found that the Petitioner fulfilled one of the initial evidentiary criteria by providing evidence that he had performed in a leading or critical role for an organization that enjoys a distinguished reputation, under 8 C.F.R. § 204.5(h)(3)(viii). We will not disturb this determination and therefore, the Petitioner must demonstrate that he meets at least two additional criteria. On appeal, the Petitioner maintains that he meets at least three of the claimed criteria. Specifically, the Petitioner's brief focuses on evidence of his awards, compensation, "critical acclaim" received by his work, and his leading and critical positions, a criterion already granted by the Director. After reviewing all the evidence in the record, we conclude that the Petitioner has not established that he satisfies at least three of the ten initial evidentiary criteria.

> *Documentation of the individual'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)

To satisfy this criterion, the Petitioner must demonstrate that he has received nationally or internationally recognized prizes or awards for excellence in his field of endeavor. Relevant considerations regarding whether the basis for granting the prizes or awards was for 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.[2]

As discussed above, the Petitioner has documented his receipt of a Webby Award, Grand Clio and Gold Clio Entertainment Awards, and a One Show Gold Pencil award, among other awards from the One Show. The record also reflects that the Petitioner received a 2020 Clio [redacted] Bronze Award, a D&AD Wood Pencil Award, and that he was credited for a project that was shortlisted for a Cannes Lions Titanium Award.

We cannot determine based on the evidence submitted that all these awards qualify as nationally or internationally recognized awards or prizes for excellence in the Petitioner's field. However, although not at the level of recognition associated with a one-time achievement such as an Academy Award, the record reflects that the annual Webby Awards receive a level of national recognition that extends to major industry publications, entertainment media, and mainstream media. After considering this and other submitted evidence regarding the Webby Awards, we conclude that the Petitioner has satisfied the criterion at 8 C.F.R. § 204.5(h)(3)(i) based on his receipt of this award.

> *Published material about the individual in professional or major trade publications or other major media, relating to the individual'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).

In concluding that the Petitioner did not meet this criterion, the Director acknowledged the submitted evidence and explained his reasons for determining that none of the submitted published materials met all requirements set forth in the regulations. The Director observed that some of the submitted articles discussed projects on which the Petitioner had worked, but they were not "about" the Petitioner. We observe that most of these articles, some of which were published in major media, were about the [redacted] campaign on which the Petitioner worked, but they did not mention him or his role in the project. The Director also acknowledged that, while a few of the submitted articles were about the Petitioner and relating to his work, the supporting evidence, which included information from *SimilarWeb*, did not establish that the websites that published the articles were professional or major trade publications or other major media. We observe that one of the submitted articles about the Petitioner did not identify the title, date and author of the material and it is unclear where it was published.

On appeal, the Petitioner generally states that "the media" has recognized his work, but he neither claims nor explains how the previously submitted evidence satisfied the published materials criterion, nor does he include any direct reference to this criterion in his appellate brief. Further, the Petitioner does not point to a specific error on the part of the Director or otherwise address the Director's reasons for determining that he did not satisfy the requirements stated at 8 C.F.R. § 204.5(h)(3)(iii). Therefore, we cannot conclude that the Petitioner has challenged the Director's determination with respect to this criterion on appeal. Issues or claims that are not raised on appeal are deemed to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at

[2] *See* 6 *USCIS Policy Manual* F(2) appendix, http://www.uscis.gov/policy-manual.

*1, *9 (E.D.N.Y. Sept. 30, 2011) (the court determined the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

The record supports the Director's determination that the Petitioner did not meet his burden to establish that he satisfies the criterion at 8 C.F.R. § 204.5(h)(3)(iii).

> *Evidence that the individual 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)

To satisfy the requirements of this criterion, the Petitioner must establish that his salary, or total remuneration, is high or significantly high, respectively, based on a comparison with others in his field in similar positions and geographic locations.[3]

The Petitioner provided the following evidence in support of this criterion: (1) a November 2020 letter from a producer for [redacted] detailing his expected compensation for 2021; (2) a 2019 corporate tax return for [redacted] which is co-owned by the Petitioner; and (3) wage data for Producers or Producers and Directors from various online sources, including the U.S. Bureau of Labor Statistics, Glassdoor, and Salary.com.

The letter from [redacted] outlined the Petitioner's television project slate for 2020-2021 and identified four projects under "active negotiation," ranging from $15,000 in expected compensation for a broadcast commercial to $600,000 in expected compensation for a [redacted] series. However, the record did included minimal evidence of the Petitioner's compensation based on previous work. The regulation, by requiring evidence that the Petitioner "*has commanded* a high salary or other significantly high remuneration" cannot be satisfied with evidence of expected future earnings. The submitted 2019 federal tax return for [redacted] indicates that this entity paid the Petitioner $40,000 in salary and shows that he earned ordinary business income of $697 as a 50 percent owner of the company. While the company reported gross earnings of over $613,000, this figure does not represent the Petitioner's salary or total remuneration. The supporting wage data from the Bureau of Labor Statistics and other sources did not establish that the Petitioner's documented 2019 earnings of $40,697 were high in comparison with others in his field.

In a request for evidence, the Director observed that the record lacked supporting financial documentation to establish the Petitioner's past earnings (such as payroll records or income tax forms) during any given period of time and provided the Petitioner an opportunity to supplement the record.

In response, the Petitioner stated that he "earned a salary of $300,000" for his work on a 12-part miniseries for [redacted] and reiterated that he would be earning $600,000 ($75,000 per episode) for an upcoming [redacted] series titled [redacted] He emphasized that the highest salary reported for a producer, according to the submitted wage data sources referenced above, is approximately $183,000.

However, we agree with the Director's determination that the Petitioner did not adequately document his previous earnings as required by 8 C.F.R. § 204.5(h)(3)(ix). The Petitioner's response to the Director's

[3] *See* 6 *USCIS Policy Manual*, *supra*, at F(2) appendix (stating that it is the petitioner's burden to provide geographical and position-appropriate evidence to establish that a salary is relatively high).

request for evidence included a bid package and cost summary submitted to [redacted] a production company co-owned by him. The bid total amounted to $236,450.50 and therefore does not support the Petitioner's claim that he personally earned a salary of $300,000 for this project. Further, the bid total includes many costs and expenses beyond the Petitioner's expected individual earnings for the project. His actual remuneration from this project, assuming the bid was accepted, and the project was completed by [redacted] cannot be determined based on the documentation provided. The Petitioner also submitted cost summary documents submitted to [redacted] (in connection with its [redacted] campaign) and to [redacted] (in connection with the [redacted] campaign for end-client [redacted]. While these documents pre-date the filing of the petition, they do not provide information regarding the Petitioner's actual salary earnings or other total remuneration. The Petitioner did not submit any past earnings statements, IRS Forms 1099 or W-2, his own individual tax returns, any additional tax returns for his co-owned production companies, or other documentation that would allow us to determine his compensation based on past work.

On appeal, although the Petitioner claims the Director erred in concluding that he does not meet this criterion, he does not address the Director's determination that the record lacks evidence of his actual past earnings. We agree with the Director that the evidence in the record is not sufficient to show that the Petitioner has commanded a high salary or significantly high remuneration compared to other executive producers in his industry.

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.* 8 C.F.R. § 204.5(h)(3)(x)

This criterion focuses on volume of sales and box office receipts as a measure of the person's commercial success in the performing arts. Therefore, the mere fact that a person has recorded and released musical compilations or performed or participated in theatrical, motion picture, or television productions would be insufficient, in and of itself, to meet this criterion. The evidence must show that the volume of sales and box office receipts reflect the person's commercial success relative to others involved in similar pursuits in the performing arts.[4]

The Petitioner did not initially claim to have satisfied this criterion. In response to a request for evidence, the Petitioner asserted that he satisfies this criterion because he "directly impacted the success" of the [redacted] as its executive producer. The record establishes that the Petitioner served as executive producer for 30 episodes of this series; however, as noted above fulfilling this criterion is not simply a matter of credited involvement in a film or television series.

Here, the Petitioner did not submit sufficient evidence of the commercial success of the series as specified in the regulation at 8 C.F.R. § 204.5(h)(3)(x). The Petitioner submitted an article titled [redacted]' published by *The Wrap* in [redacted] 2015. The article mentions that [redacted] was set to start production on its third season and would premiere in the fourth quarter of 2015, but it does not provide evidence of the show's "commercial success." The Petitioner highlighted a portion of the article in which the author mentioned that the [redacted] "increased its audience by 31 percent in the advertise-sought 18-49 demographic and 21 percent

[4] *See* 6 *USCIS Policy Manual*, *supra*, at F(2) appendix.

in total viewers" between "Q2 2014 and Q2 2013" but did not establish that this overall ratings improvement for the network was attributed to the commercial success of [redacted] Another article, from [redacted] states that "the series is popular with the viewers and currently has an 8/10 rating on IMDb." However, the Petitioner did not provide evidence that would allow a comparison of the commercial success of [redacted] relative to that of other similar programming in the television industry.

In determining that the Petitioner did not meet this criterion, the Director acknowledged his claims regarding the commercial success of [redacted] But the Director emphasized that the regulatory criterion calls for evidence of commercial success in the form of "sales" or "receipts," evidence which the Petitioner had not provided.

On appeal, the Petitioner does not directly address the criterion at 8 C.F.R. § 204.5(h)(3)(x) or the Director's reasons for concluding that he did not establish that he meets this criterion. He generally references his work on "highly rated" projects without explaining how the previously submitted evidence demonstrates how his work has received high sales, receipts, or comparable evidence of commercial success relative to others in the industry. Accordingly, we affirm the Director's conclusion that the Petitioner did not demonstrate his commercial successes in the performing arts.

C. Prior approval of O-1 nonimmigrant petition

We note that the record reflects that the Petitioner has been granted O-1 status, a classification reserved for nonimmigrants of extraordinary ability. Although USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the Petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different statute, regulations, and case law.

In addition, it must be emphasized that each petition filing is a separate proceeding with a separate record. In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceedings. 8 C.F.R. § 103.2(b)(16)(ii). We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *3 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001).

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 evidentiary 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

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 record reflects that the Petitioner has been engaged in steady work as a producer and director of commercial and television projects, co-owns and leads a successful production company, and had recently participated in a [redacted] campaign for the [redacted] that garnered media attention for the network and series and industry awards for the Petitioner and other creative professionals involved in the campaign. However, the Petitioner has not shown that the significance of his work to date 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 that he is one of the small percentage who have 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 his eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.