



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

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

In Re: 20480162

Date: MAY 12, 2022

Appeal of Texas Service Center 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had satisfied at least three of the 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; *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 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 sustained acclaim and the recognition of their 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 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).

II. ANALYSIS

The Petitioner is a visual artist who has displayed her work internationally. She also commercially markets her designs and illustrations on paper and stationery products. The Petitioner intends to continue working as a visual artist in the United States.

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 Director determined that the Petitioner met two of the claimed evidentiary criteria relating to published material at 8 C.F.R. § 204.5(h)(3)(iii) and artistic display at 8 C.F.R. § 204.5(h)(3)(vii), and we agree with that determination.

On appeal, the Petitioner asserts that she also meets the evidentiary criteria relating to leading or critical role under 8 C.F.R. § 204.5(h)(3)(viii) and high salary under 8 C.F.R. § 204.5(h)(3)(ix). The Petitioner has not pursued her initial claim that she meets the criterion relating to lesser nationally or internationally recognized awards under 8 C.F.R. § 204.5(h)(3)(i), nor does she contest the Director’s decision relating to this criterion on appeal. Therefore, we deem this issue to be waived and will not address this criterion in our decision. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

We will address the Petitioner’s claims with respect to the individual evidentiary criteria below.

A. Evidentiary Criteria

Evidence that the individual 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)

For the purposes of this criterion, a leading role should be apparent by its position in the overall organizational hierarchy and through the role’s matching duties. A critical role should be apparent from the Petitioner’s impact on the organization or the establishment’s activities. The Petitioner’s

performance in this role should establish whether the role was critical for the organization or establishment as a whole.

The Petitioner claims that she performed in a leading and critical role for [redacted]. The Petitioner submitted letters from [redacted] Director, who explained that [redacted] is a company registered in both Venezuela and the United States that produces [redacted] products, such as [redacted]. She further states that the Petitioner is co-director of the company, as well as the company's lead and sole artist, and that the Petitioner's original designs and illustrations are used on the company's [redacted]. The Petitioner also submitted a copy of the company's registration documents and bylaws, which indicate that the Petitioner is the majority partner/shareholder of the company. This evidence is sufficient to demonstrate that the Petitioner plays a leading or critical role for [redacted].

However, the Petitioner has not established that [redacted] has a distinguished reputation. [redacted] states in her letter that the company has acquired numerous contracts with companies such as [redacted], [redacted], and [redacted] who have purchased the Petitioner's artistic designs or commissioned unique works. She concludes that the acquisition of ongoing contracts with such prestigious clients "is a marker of a company with a highly esteemed and distinguished reputation in the industry." However, these statements are not supported by independent, documentary evidence. Although the record includes testimonial letters from these clients praising the Petitioner's artwork and artistic vision, and confirming their acquisition of her work, these letters do not speak to the company's reputation beyond the personal opinions of some of its clients. Further, although the record contains media articles complementing the Petitioner's achievements as a visual artist, and acknowledging that her work is commercially marketed [redacted] [redacted] these articles comment upon the Petitioner's reputation, but not on the company's reputation. The evidence is therefore insufficient to establish that [redacted] has a distinguished reputation.

On appeal, the Petitioner asserts that she is [redacted] and that the company is just a legal medium through which she operates. She states that "if it is established that [redacted] equals [the Petitioner], one and other are interchangeable, then I have submitted enough documentation of interviews, press releases, followers on social network, published books, that it does have the necessary recognition by itself." In order to fulfill this criterion, however, the Petitioner must demonstrate that she "performed in a leading or critical role *for organizations or establishments* that have a distinguished reputation." (emphasis added). The Petitioner, as an individual artist, is not an "organization or establishment" as contemplated by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Here, the Petitioner has not submitted independent evidence sufficient to establish that [redacted] has a distinguished reputation, as required. While the Petitioner documented her personal career achievements and her reputation in the industry, the record is insufficient to demonstrate that [redacted] is recognized as having a reputation marked by eminence, distinction or excellence as required by this criterion.

For the reasons discussed above, the Petitioner has not provided evidence establishing her eligibility for this criterion.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)

In order to satisfy this criterion, the Petitioner must demonstrate that she commanded a high salary or other significantly high remuneration for services in relation to others in her field. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

The Petitioner submitted numerous purchase orders and invoices from 2014, which demonstrate the purchase of [redacted] by [redacted]. The Petitioner also submitted a 2019 printout from www.payscale.com which documents the average annual salary for a visual artist. In denying the petition, the Director determined that the purchase orders and invoices were insufficient to establish the Petitioner's earnings and to show that her income was significantly high in relation to others in the field as required by this criterion. Specifically, the Director noted that the purchase orders and invoices did not reflect compensation to the Petitioner, and therefore were not sufficient evidence of the Petitioner's salary or remuneration for services.

Upon review, we agree with the Director's finding. The Petitioner's name is not depicted on the purchase orders or invoices to establish that she is the intended recipient. Rather, the invoices are billed by [redacted] without specifying that the Petitioner was the supplier of the services represented or the intended recipient of the amounts due. On appeal, the Petitioner claims that the invoices and purchase orders are sufficient evidence of her earnings as all of her operations are done through [redacted] and she receives the majority of the profits rather than a traditional salary.

While her assertions are noted, the Petitioner has not supplemented the record with evidence of the actual salary or other remuneration that she has commanded for her services. The record is not supported by verifiable business or personal tax documentation, and none of the evidence the Petitioner offered confirms the amount of compensation provided to her by [redacted] in any given year. Moreover, based on her assertion that she received the "majority" of the company's profits, the amounts listed on the purchase orders and invoices do not necessarily match the amounts that the Petitioner actually received, and therefore do not serve as a basis for comparison to the remuneration of other visual artists absent additional evidence pertaining to her actual amount of compensation.

The record is insufficient to allow us to determine the amount of the Petitioner's actual income or remuneration, and therefore it cannot establish her eligibility under this criterion. Without a proper basis for comparison and evidence showing her comprehensive earnings during a sustained period

¹ We acknowledge the Petitioner's initial claims that she also performed in a leading or critical role for [redacted] clients, including [redacted], [redacted], and [redacted] as well as for [redacted] an international art fair. On appeal, the Petitioner does not pursue these claims regarding her role with these organizations. Consequently, we deem these claims to be waived and will not address them in our decision. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. at 767 n.2.

predating the filing of the petition, we cannot conclude that the Petitioner has commanded a high salary or other significantly high remuneration for services in relation to others in her field. Accordingly, the Petitioner has not established that she meets this criterion.

B. O-1 Nonimmigrant Status

We note that the record reflects that the Petitioner received 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 standard - statute, regulations, and case law. Many Form I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Sunlift Int'l v. Mayorkas, et al.*, 2021 WL 3111627 (N.D. Cal. 2021); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d at 41. Furthermore, our authority over the USCIS service centers, the office adjudicating the nonimmigrant visa petition, is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of an individual, we are not bound to follow that finding in the adjudication of another immigration petition. *See La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

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. Here, the Petitioner has established that she is a skilled visual artist and that she has gained recognition for her unique designs and illustrations. But she has not shown that this recognition rises to the required level of 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 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.