U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21983129

Date: SEPT. 14, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, a visual effects artist and animator, 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 Petitioner appealed that decision, and we withdrew that decision and remanded the matter to the Director in February 2021, stating that the Director had not sufficiently considered some elements of the Petitioner's claims. The Director denied the petition for the second time in December 2021, stating that the Petitioner had satisfied only two of the threshold criteria, instead of the required three. 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 entered the United States as an F-1 nonimmigrant student to study for a master of fine arts degree in animation at [redacted] College of Art and Design. After completing that degree, he changed to H-1B nonimmigrant status in 2015 to work as creative manager for his design company. In 2022, he changed his nonimmigrant status to H-4, dependent of an H-1 nonimmigrant.

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 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;
- (vii), Display at artistic exhibitions or showcases;
- (viii), Leading or critical role for distinguished organizations or establishments;
- (ix), High remuneration for services; and
- (x), Commercial success in the performing arts.

The Petitioner also claimed to have submitted comparable evidence under 8 C.F.R. § 204.5(h)(4).

In the second denial notice, the Director concluded that the Petitioner met two of the criteria, pertaining to display and high remuneration. On appeal, the Petitioner asserts that he also meets the criteria relating to prizes and leading or critical roles. He does not dispute the Director's determinations regarding memberships, commercial success, and comparable evidence. Therefore, the Petitioner has waived appeal regarding those issues.[1]

Upon review of the record, we agree with the Director that the Petitioner has satisfied the two criteria relating to display and remuneration. We will discuss the other claimed criteria below.

[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).

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).

We note that the Petitioner did not initially claim to have satisfied this criterion. His response to a request for evidence (RFE) mentioned his involvement in an award-winning project. At that point, the Director issued a second RFE which was largely limited to the question of whether the Petitioner himself had received the award.

The Petitioner claims two awards under this criterion:

- Finalist, [redacted] Awards, [redacted] category
- 2018 Silver [redacted] Award for Craft – Cinematography from [redacted]

In our February 2021 remand order, we took no position as to whether either claimed award meets the requirements of the regulatory criterion. Instead, we determined that the Director had applied incorrect standards, and instructed the Director to "reevaluate this evidence to determine whether the Petitioner was a recipient of an award, as well as whether any awards he received were for excellence in the field of computer graphics, visual effects and animation." The Director concluded that the Petitioner had not met these requirements. We agree, for the reasons explained below.

The Petitioner acknowledges that he worked on a project that was a finalist for a [redacted] Award, but which did not win that award. The Petitioner asserts that "being a finalist for [a] prestigious award ought to be considered under 8 CFR § 204.5(h)(3)(i)." The language of the regulation, however, requires "*receipt* of . . . prizes or awards." The Petitioner cites no support for the contention that finalists who did not actually receive an award should, nevertheless, be considered to have this requirement. A nomination that did not result in receipt of a prize or award does not satisfy the regulatory requirements for the criterion.[2]

Furthermore, the Petitioner had previously acknowledged that the advertising campaign in question did not become a finalist for a [redacted] until after the petition's filing date. A petitioner must meet all eligibility requirements at the time of filing. 8 C.F.R. § 103.2(b)(1). The award nomination had not yet occurred at the time of filing, and therefore it cannot contribute to a finding that the Petitioner was eligible when he filed the petition.[3]

Regarding the [redacted] Award from [redacted] printouts from the awarding entity's website show that the named recipient was the marketing and advertising agency that produced a short promotional film on behalf of the Canadian Olympic Committee. As the regulation is worded, the focus should be on the person's receipt of the awards or prizes, as opposed to his or her employer's receipt of the awards or prizes. 6 *USCIS Policy Manual* F.2 (appendix), https://www.uscis.gov/policymanual.

The web page about that specific award lists dozens of credits for individuals and agencies that participated in making the film. The Petitioner correctly asserts that an individual might win an award as

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[2] If the proceeding had reached a final merits determination, then we would have taken nominations into consideration, because nominations are a form of recognition even if they do not rise to the level of prizes or awards. But because we have not rendered a final merits determination in this case, we need not explore this issue in depth.

[3] If the Petitioner had established eligibility as of the time of filing, then we would have considered later evidence in the context of whether he remained eligible while the petition was pending, which 8 C.F.R. § 103.2(b)(1) also requires.

part of a team, and need not be the only named recipient. Nevertheless, the page does not indicate that all the credited individuals and agencies individually received awards; the list of credits on the website is not, itself, an award. Participation in an award-winning endeavor is not the same thing as receipt of an award. Therefore, the Petitioner has not established his receipt of the award.

Furthermore, the prize or award must be for excellence in the Petitioner's field of endeavor. The web printout credits the Petitioner as the project's "CG [computer graphics] Artist." The submitted information does not indicate that the award was for excellence in computer graphics.

The Petitioner contends that the long list of credits shows that "the awards were collective efforts and all the contributors were recognized." But the award does not recognize the collective efforts of all the participants. Rather, the website printouts show that there are several different categories of award, such as "Craft" and "Design," each with several subcategories. The award given to the Petitioner's employer is in the "Craft" category, and the "Cinematography" subcategory. The website indicates that the "Cinematography" subcategory "[r]ecogniz[es] the art and science of beautiful film composition – framing, lighting, angles and movement." Thus, the award does not recognize the overall product of all the participants' cooperation; it specifically recognizes the cinematography. The Petitioner has not shown that his computer-generated artwork played a role in the selection of the winner. This information further weighs against the argument that the Petitioner himself actually received the award.

There is no indication that all the individuals credited on the website were involved in the film's cinematography. Apart from the Petitioner as the "CG Artist," other credited participants include "Copywriters," "Music," "Sound Design/Final Mix," and "Account Supervisor." Such roles have no demonstrated relevance to cinematography, and many of these roles fall within other award categories and subcategories, such as "Animation," "Editing," and "Sound Design" within the "Craft" category, and "Graphics" in the "Design" category.

Given the above information, the Petitioner has not met his burden of proof to show that the Silver [redacted] Award for "Craft – Cinematography" is an award that he personally received for excellence in his field of endeavor, as required by the language of 8 C.F.R. § 204.5(h)(3)(i).

> *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).

For a leading role, we look at whether the evidence establishes that the person is (or was) a leader within the organization or establishment or a division or department thereof. For a critical role, we look at whether the evidence establishes that the person has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities or those of a division or department of the organization or establishment. 6 *USCIS Policy Manual*, *supra*, at F.2 appendix.

The Petitioner asserted that "[a]s Creative Director [for his design company], he has played critical and leading roles in a number of productions for client companies . . . on high level media projects for major corporations such as [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] and [redacted] The named brands did not directly engage the Petitioner's services. Rather, those companies had contracted with various advertising agencies to produce advertising and marketing content, and the agencies, in turn, subcontracted some design work to the Petitioner.

Individuals from these agencies provided letters, providing details about the Petitioner's digital modeling work on various projects. For example, "he was solely responsible for modeling texturing, animating and lighting [a] 30 second video" for [redacted] he provided digital modeling for a television and social media campaign for [redacted] and he "model[ed] the environments and characters" for a [redacted] [redacted] promotion "while the other team was focused on animation." These letters indicate some degree of demand for the Petitioner's digital modeling services, but they do not establish that his contracted roles on these projects were leading or critical for any organization or establishment with a distinguished reputation.

The Director issued an RFE, stating that the submitted letters did not show how the Petitioner's roles were leading or critical for any "organization or establishment as a whole."

In response, the Petitioner noted that the *USCIS Policy Manual* does not require an individual's role to be critical to entire organizations or establishments. Rather, it requires that an individual "has performed in a leading or critical role for an organization, establishment, or a division or department of an organization or establishment." The Petitioner asserted that he satisfied this requirement because he "has been responsible for critical campaigns and projects for distinguished media studios serving big name clientele for organizations in his field of endeavor." Individual campaigns and projects, however, are not divisions or departments of an organization or establishment.

New letters submitted in response to the RFE provide more details about the Petitioner's modeling work on various projects, but these letters do not establish that how the Petitioner's work was critical to any organization or department or division thereof.[4] Assertions that his roles were critical to particular projects do not satisfy the criterion, because a project is not a department or division of an organization or establishment. The letters show that, on any given project, the Petitioner was part of a creative team that involved varying numbers of other artists and technicians performing assigned roles. The Petitioner has not established that his roles, in particular, were critical to the organizations or to departments or divisions thereof. Participation in a successful project is not automatically or presumptively a critical role for the organization, or a department or division of the organization, that undertook the project.

We need not discuss, at length, the related but separate question of whether the advertising agencies have a distinguished reputation.[5] We note, nevertheless, that the Petitioner submits no evidence to address this point, relying instead on the prominence of some of the agencies' clients. The Petitioner asserts that he "has used his extraordinary abilities to make a difference to animation projects of major US corporations." Those corporations hired advertising and marketing agencies for specific promotions, and those agencies, in turn, hired the Petitioner as a subcontractor to work on one aspect of their campaigns. The Petitioner has not shown that his indirect connection to the "major US corporations" as a subcontractor to advertising agencies amounts to a critical role for those corporations or divisions or departments thereof.

The Petitioner has not met his burden of proof with regard to the requirements of this criterion.

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[4] We also note that many of the projects discussed in the RFE response took place after the petition's filing date, and therefore cannot establish eligibility as of the filing date as required by 8 C.F.R. § 103.2(b)(1).

[5] *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).

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).

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 had some success providing image modeling for promotional use by prominent clients, but he has not shown that the recognition of his work rises to the required level of 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 not met his burden of proof to establish eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.