



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

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

In Re: 21694953

Date: SEP. 20, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, a musician, 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 met the initial evidence requirements for the classification by establishing his receipt of a major, internationally recognized award or by meeting at least three of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3).

In these proceedings, it is the petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will withdraw the Director's decision and remand the matter for a new decision consistent with the following analysis.

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 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 record reflects that the Petitioner is a musician who has worked as a singer, conductor, and composer. He indicates that he seeks to work as an independent choral or orchestral conductor in the United States.

A. Evidentiary Criteria

Because the Petitioner has not claimed or established that the Beneficiary has received a major, internationally recognized award, the Beneficiary 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 meet nine of these criteria, summarized below:

- (i), lesser nationally or international recognized awards or prizes;
- (ii), memberships in associations that require outstanding achievements;
- (iii), published materials in professional or trade publications or major media;
- (iv), participation as a judge of the work of others in the field;
- (v), original contributions of major significance;
- (vi), authorship of scholarly articles in professional publications or other media;
- (vii), display of work in artistic exhibitions or showcases;
- (viii), leading or critical role for an organization with a distinguished reputation; and
- (ix), high salary or other significantly high remuneration in relation to others.

The Director concluded that the Petitioner met only one criterion, related to published materials at 8 C.F.R. § 204.5(h)(3)(iii). On appeal, the Petitioner maintains that he meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3) and is otherwise qualified for the classification sought. After reviewing all the evidence in the record, we conclude that the Director applied incorrect standards when evaluating two of the claimed criteria and failed to consider relevant evidence submitted with respect to a third

criterion. Based on these deficiencies, we will withdraw the Director's decision and remand the matter for entry of a new decision.

The first step of the evidentiary review of an extraordinary ability petition should be limited to determining whether the evidence submitted with the petition satisfies the plain language of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). *See Kazarian*, 596 F.3d 1115 (9th Cir. 2010). This limited determination does not require an assessment of whether the evidence is also indicative of a petitioner's sustained national or international acclaim. Rather, the question of whether a petitioner is one of that small percentage who have risen to the very top of the field of endeavor and enjoys sustained national or international acclaim should only be addressed in the second step of the analysis (final merits determination).

Here, the Director's decision reflects that he erroneously imposed qualitative requirements to the first step of the evidentiary review process with respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vii). The criterion at 8 C.F.R. § 204.5(h)(3)(iv) requires evidence that the individual has participated as the judge of the work of others in the same field or an allied field of specialization for which classification is sought. While the Director acknowledged that the Petitioner had documented his participation as a judge of the work of others, he determined that the evidence did not satisfy the plain language of this criterion because he had judged "students, adult amateurs or early career professionals" and therefore had not judged "peers," a requirement that does not appear in the regulation at 8 C.F.R. § 204.5(h)(3)(iv). The Director also questioned whether the evidence could establish that "the petitioner's 'achievements have been recognized in the field of expertise,'" an analysis that must be made in a final merits determination, but one that is not appropriate in evaluating whether the evidence submitted objectively satisfies the regulatory criterion. As the matter will be remanded, the Director should re-evaluate the evidence submitted under this criterion.

Similarly, the Director inappropriately imposed requirements when evaluating the criterion at 8 C.F.R. § 204.5(h)(3)(vii), which requires "evidence of the display of the [individual's] work in the field at artistic exhibitions or showcases." The Director acknowledged that the Petitioner submitted evidence related to his public performances as a vocalist and conductor but stated:

Music festivals and theatres generally are not artistic exhibitions designed to showcase a single individual's work in the same sense that a painter or sculptor displays his work in a gallery or museum. Also, the fact that a musical artist has displayed his work does not necessarily establish extraordinary ability. The artist must also demonstrate the exhibition or showcase was at a venue of a sufficient level to evidence acclaim and that the exhibited works placement at such an exhibition or exhibition was itself of such significance. While a musical artist could possibly claim this criterion, it is more likely that an artist who is at the top of his field would be able to claim this success under 8 C.F.R. § 204.5(h)(3)(x).

We note that the plain language of this regulation does not exclude performing artists or limit its application solely to visual artists (such as painters or sculptors). Further, as discussed above, when determining whether a petitioner has submitted evidence that satisfies a given criterion, it is inappropriate to impose a requirement that the evidence also demonstrate the person's acclaim or establish his or her extraordinary ability. Finally, the fact that the Director believes that the Petitioner, as a performing artist, should be able to meet the criterion at 8 C.F.R. § 204.5(h)(3)(x) is irrelevant to

an analysis of the evidence submitted under 8 C.F.R. § 204.5(h)(3)(vii). The Director's evaluation of this criterion must be based on the evidence the Petitioner submitted, rather than on assumptions about the Petitioner's failure to address a different criterion. On remand, the Director is instructed to re-evaluate the submitted evidence to determine whether it satisfies the plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(vii).

Finally, we note that the Director's discussion of the criterion at 8 C.F.R. § 204.5(h)(3)(i) contains few references to the Petitioner's evidence. In support of his claim that he has received lesser nationally or internationally recognized awards or prizes, the Petitioner submitted evidence related to twelve awards, some of them individual awards, and some for which he was recognized as a conductor or co-conductor of a group. In determining that the Petitioner did not meet this criterion, the Director specifically addressed only one of these awards, and therefore did not provide sufficient support for his conclusion that none of the awards could satisfy the plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(i).

An officer must fully explain the reasons for denying a visa petition to allow a petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). Here, with respect to the three criteria discussed above, the Director's decision did not adequately explain the reasons for denial.

On remand, the Director is instructed to re-evaluate the evidence submitted in support of the petition to determine whether the Petitioner satisfied the plain language of at least three criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), and to issue a new decision.

B. Final Merits Determination

As the Director did not conclude that the Petitioner met the requisite three evidentiary criteria, he was not required to conduct a final merits determination of whether the Petitioner has established that he possesses sufficient acclaim and standing in his field to warrant classification as an individual of extraordinary ability. If after review the Director determines that the Petitioner satisfies at least three criteria, his decision should include an analysis of the totality of the record evaluating whether the Petitioner has demonstrated, by a preponderance of the evidence, his sustained national or international acclaim and whether the record demonstrates that he is one of the small percentage at the very top of the field of endeavor, and that his achievements have been recognized in the field through extensive documentation.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.