U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26351439

Date: APR. 13, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a fashion designer and entrepreneur, seeks classification as an alien 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 while the record showed that the Petitioner met the initial evidence requirements for this classification, it did not establish that she has national or international acclaim and is one of the small percentage at the top of her field. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility as an individual of extraordinary ability, a petitioner (or anyone on the petitioner's behalf) must establish that they:

- Have extraordinary ability in the sciences, arts, education, business, or athletics;
- Seek to enter the United States to continue work in their area of extraordinary ability; and that
- Their entry into the United States will prospectively substantially benefit the United States.

Extraordinary ability must be demonstrated by evidence of sustained national or international acclaim as well as extensive documentation that their achievements have been recognized in the field. Section 203(b)(1) of the Act.

The implementing regulation further states that 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." It also

sets forth a multi-part analysis. A petitioner can demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If such evidence is unavailable, then they must alternatively provide evidence that meets at least three of the ten listed criteria, which call for evidence about other awards they may have received, published material about them in qualifying media, and their authorship of scholarly articles, among other types of evidence. 8 C.F.R. §§ 204.5(h)(2),(3).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination, assessing whether the record shows that the individual possesses the acclaim and recognition required for this highly exclusive immigrant visa classification. *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 fashion designer and the co-founder and CEO of [redacted] Colombia, with several clothing stores and franchises in Colombia operating under the [redacted] brand. She is also the owner and CEO of [redacted], a Florida company which does business as [redacted] and distributes the company's clothing in the United States. The Petitioner states that she intends to continue working in the United State to expand the brand into additional areas.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that she 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 found that the Petitioner met three of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to published material about her and her work, participation as a judge of the work of others, and display of her work at artistic exhibitions or showcases. However, the Director concluded in his final merits determination that the Petitioner did not have the requisite acclaim and standing in her field to qualify as an individual of extraordinary ability. On appeal, the Petitioner asserts that she also meets the criterion pertaining to commercial success in the performing arts, and that she otherwise qualifies for the requested classification.[1] She also submits additional information with her brief. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). As the Director notified the Petitioner in his request for evidence (RFE) of the deficiencies in the evidence she initially submitted

[1] The Petitioner does not challenge the Director's conclusions that she does not meet the criteria at 8 C.F.R. §§ 204.5(h)(3)(ii),(v) and (ix), relating to evidence of her membership in associations which require outstanding achievements, her original business contributions of major significance, and her salary, respectively. In general, we will not address issues that were not raised with specificity on appeal. We will therefore consider these issues to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n. 2 (BIA 2009).

and provided her an opportunity to respond, which she did, we will not consider the new evidence submitted on appeal.

After reviewing all of the evidence in the record, we disagree with the Director's conclusion that she meets the initial evidence requirements, and conclude that she is not eligible for the requested classification.

> *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)

The Director determined that the Petitioner meets this criterion, but did not provide an analysis of the evidence presented or explain his reasoning. We note that the plain language of this criterion requires that the evidence of published material include the title, date, and author of the material. In this case, the majority of the articles submitted, while they are about the Petitioner and her work as a fashion designer and entrepreneur, do not include the name of the author. One article, published on the website of *El Heraldo de Mexico*, includes the author's name as well as the other required information, and the evidence establishes that it qualifies as a major medium. We therefore conclude that the Petitioner meets this criterion.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought.* 8 C.F.R. § 204.5(h)(3)(iv)

The Petitioner submitted evidence that she was a member of the jury for the [redacted] beauty pageants in 2020, which can be considered an allied field to her specialization of fashion design. We agree with the Director that she meets this criterion.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii)

This criterion requires evidence that the individual's work has been displayed at an exhibition or showcase that is artistic in nature. The Petitioner submitted evidence that she exhibited clothing under the [redacted] brand on three occasions at the [redacted] Market, and at the [redacted] event in [redacted] But there is no indication in the record that these events are artistic in nature. For example, the materials describing the [redacted] Market indicate that it is a commercial exhibition "for the business of fashion," and is attended by buyers representing boutiques and department stores. As such, we disagree with the Director and withdraw his conclusion that the Petitioner meets this criterion.

> *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)

In his decision, the Director stated only that the Petitioner did not submit evidence to establish that she meets this requirement. On appeal, the Petitioner submits definitions of the words "commercial" and "success", concluding that the phrase means that "the performing arts have made a lot of money commercially." However, the Petitioner has not established that she is a performing artist, nor has she submitted evidence of the type specifically called for in the regulation. While the Petitioner submitted a letter from an accountant in response to the RFE which attested to her income and net worth, there is no suggestion that she earned this income as a performing artist. We therefore conclude that she does not meet this criterion.

B. Final Merits Determination

Because of our withdrawal of the Director's affirmative conclusion regarding the criterion related to artistic displays of the Petitioner's work, we conclude that she does not meet the initial evidence requirement of either a one-time achievement or documents that meet at least three of the ten 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 have reviewed the entire record and conclude that it does not establish that the Petitioner has the acclaim and recognition required for the classification sought.

In a final merits determination, we examine and weigh the totality of the evidence to determine whether the Petitioner has sustained national or international acclaim and is one of the small percentage at the very top of the field of endeavor, and that their achievements have been recognized in the field through extensive documentation. Here, the Petitioner has not offered sufficient evidence that she meets that standard.

While the Director acknowledged that the Petitioner's work as a fashion designer and entrepreneur has been well received in her home country of Colombia, he concluded that the evidence did not show that it had received sustained national or international acclaim or that she is one of the small percentage at the very top of those fields. On appeal, the Petitioner refers to new evidence of her participation in additional trade exhibitions, a client suggesting that she has sold her apparel to more than 150 boutiques, and evidence that a national retailer in the United States has ordered some of her apparel. As noted above, we will not consider this newly submitted evidence on appeal. In addition, eligibility for an immigration benefit must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), further provides that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

While the Petitioner asserts that she has achieved international recognition and has risen to the top of her field through the establishment of her business and the sale of her apparel in Colombia, Ecuador, and the United States, the record does not include sufficient evidence that she has achieved the sustained recognition necessary for this highly restrictive immigrant visa classification. For example, media coverage of the Petitioner and her brand was almost exclusively published within the year before the filing of her petition. Further, the record does not adequately document any financial success for [redacted] as a business or for the Petitioner personally.

III. CONCLUSION

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for those 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 Petitioner has not shown that the significance of her work 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 she 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).

ORDER: The appeal is dismissed.