



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 23072127

Date: FEB. 08, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a photographer, 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 met the initial evidentiary requirements through evidence of a one-time achievement or meeting at least three of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3). 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

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 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).

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). This two-step analysis is consistent with our holding that the “truth is to be determined not by the quantity of evidence alone but by its quality,” as well as the principle that we examine “each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.” *Matter of Chawathe*, 25 I&N Dec. at 376.

II. ANALYSIS

The Petitioner indicates he owns and operates two businesses based in Brazil, a photography business, [REDACTED] Photography, and a digital marketing agency, [REDACTED]. He states that he intends to continue working as a Director of Photography for his companies in the United States.

The Petitioner did not indicate, and the record does not establish, that he has received a major, internationally recognized award pursuant to 8 C.F.R. § 204.5(h)(3). The Petitioner must therefore demonstrate his eligibility under 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 satisfied the regulatory requirements for one criterion, published material about the individual in professional or major media under 8 C.F.R. § 204.5(h)(3)(iii). The record reflects major media has published material about the Petitioner. Accordingly, we agree with the Director that the Petitioner met the published material criterion.

In denying the petition, the Director found the Petitioner’s evidence for five regulatory criteria was insufficient. On appeal, the Petitioner argues that he meets three of those evidentiary criteria, display of work at artistic showcases or exhibitions, leading or critical role, and high salary in relation to others in the field. After reviewing the evidence in the record, we find that the Petitioner has not established that he satisfies at least three of the ten initial evidentiary criteria and is not otherwise eligible for the requested benefit.

Documentation of the individual's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields. 8 C.F.R. § 204.5(h)(3)(ii).

To satisfy this criterion, a petitioner must document their membership in an association and demonstrate that membership in the association is based on being judged by recognized national or international experts as having outstanding achievements in the field for which classification is sought.¹

The Director found that while the evidence indicated that the Petitioner is a member of Professional Photographers of America, it did not establish that this association requires outstanding achievements of its members. Upon review, we agree with the Director's finding regarding this criterion. On appeal, the Petitioner did not directly address this criterion, therefore we will consider his claim to this criterion abandoned.²

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 a petitioner's work was displayed, and that display occurred within an exhibition or showcase that was artistic in nature.³ The Director found that the evidence was insufficient to show the Petitioner's work has been displayed in an artistic exhibition or showcase.

The Petitioner submitted a marketing flyer and photographs from an event entitled [redacted] [redacted] in [redacted] from January 18 to 23, 2008. The Director found that such marketing material was not sufficient evidence that the Petitioner's work was displayed at an artistic exhibition. We agree with the Petitioner's argument that the photographs submitted show "[the Petitioner] and his photography displays within an artistic photography exhibition venue." Also, the marketing flyer clearly states that the event is a photographic exhibition of the Petitioner's work. The submitted photographs showing the Petitioner with his photographs being displayed at the event, together with the marketing flyer stating this was a photographic exhibition of the Petitioner's work, are sufficient evidence demonstrating the Petitioner's photographic work was displayed at an artistic exhibition.

The Petitioner also submitted marketing flyers from other events displaying the Petitioner's photographs, as well as screenshots of online videos of Brazilian singers and articles related to the videos where the Petitioner and the company, [redacted] are credited with the direction, production,

¹ See generally 6 USCIS Policy Manual F.2(B)(2) appendix, <https://www.uscis.gov/policymanual> (providing an example of admission to membership in the National Academy of Sciences as a Foreign Associate that requires individuals to be nominated by an academy member, and membership is ultimately granted based upon recognition of the individual's distinguished achievements in original research).

² 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); Hristov v. Roark, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (finding plaintiff's claims were abandoned as he failed to raise them on appeal).

³ See generally 6 USCIS Policy Manual, supra, at F.2 appendix (stating that officers should use the common dictionary definitions of "exhibition" and "showcase" in evaluating this criterion).

screenplay and editing of videos. If the Petitioner meets three of the required criteria, we will then consider this evidence with the totality of the material provided in a final merits determination.

For the reasons discussed above, the Petitioner has demonstrated he meets this criterion, and we withdraw the Director's decision for this criterion.

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).

To meet the plain language requirements of this criterion, a petitioner must establish that they have performed in either a leading or critical role, and that the role has been for an organization or establishment (or a division or department of an organization or establishment) having a distinguished reputation. A leading role should be apparent by its position in the overall organizational hierarchy and through the role's matching duties. A title, with appropriate matching duties, can help to establish if a role is or was, in fact, leading.⁴ If a critical role, the evidence must establish that a petitioner has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities. It is not the title of the petitioner's role, but rather the petitioner's performance in the role that determines whether the role is or was critical. In addition, this criterion requires that the organization or establishment be recognized as having a distinguished reputation, which is marked by eminence, distinction, or excellence.⁵

The Director found that the evidence submitted did not satisfy the plain language of this criterion. The Director stated that while the evidence showed the Petitioner photographed Brazilian singers during their careers, it was not sufficient to show that the Petitioner performed in a leading or critical role for an establishment or organization having a distinguished reputation. The Director listed the Petitioner's evidence but did not analyze why the evidence did not meet the elements of the criterion. Upon de novo review, we find that the Petitioner has not established eligibility for this criterion by a preponderance of the evidence, as explained below.

The Petitioner indicates he is the founder, owner, and primary Director of Photography for two Brazilian businesses, [redacted] (doing business as [redacted] Photography) and [redacted]. The record establishes the Petitioner has a leading role for these businesses.

The Petitioner argues these entities have a distinguishable reputation based on the work he has done through these entities "for distinguished clients, including shooting and editing the album cover of Grammy winning musical artist [redacted] as well as prolific media coverage [the Petitioner's] companies have garnered." The Petitioner submitted the businesses' website information pages and articles briefly describing he founded [redacted] the services offered by the businesses, the history of the businesses, and clients they have worked with. The Petitioner also submitted photographs of music album covers indicating him as the photographer or director,

⁴ See generally 6 USCIS Policy Manual, supra, at F.2(B)(2) appendix.

⁵ Id. (noting that Merriam-Webster's online dictionary defines "distinguished" as "marked by eminence, distinction, or excellence or befitting an eminent person").

letters from the Petitioner's singer clients attesting to the Petitioner's work, articles about the successes of the singers, and articles about the Petitioner and his photography work for successful singers.

Although the record includes testimonial letters from the Petitioner's clients praising the Petitioner's photography and artistic talents, as well as, confirming their business relationship with the Petitioner as a contributor to their successes, these letters do not speak to the businesses' reputations. Two letters mention in a sentence that the Petitioner provides his services through the business, [REDACTED] [REDACTED] however, the letters do not attest to the reputation of the business. For instance, while the letter from [REDACTED] states, "[t]hrough his company, [REDACTED] has been my photographer for all facets of my career," [REDACTED] goes on to explain at length the work performed by the Petitioner and the critical role he played in shaping [REDACTED] career, including the Petitioner receiving "a critically acclaimed spotlight for his work regarding our [REDACTED] Award in 2012." The letter from [REDACTED] also explains at length the photography and video work performed by the Petitioner for him, and the impact the Petitioner has had on [REDACTED] career, with a brief reference that artists want to hire the firm, [REDACTED]. The letter from [REDACTED] mostly explains that the Petitioner's work has helped towards his successful career and states the Petitioner has an extraordinary ability with his photography and marketing consultancy work. Mr. [REDACTED] also identifies the services of [REDACTED] and credits it for his success, however, he does not speak to the business's distinguished reputation. While the letters show the Petitioner's clients value the Petitioner's services and talents, they do not demonstrate his businesses are organizations or entities with a distinguished reputation.

The record contains a media article from Metropoles complimenting the Petitioner's achievements as a photographer and marketing consultant for well-known singers. The article mainly focuses on the Petitioner's life and his history becoming a photographer. The article does not mention [REDACTED] [REDACTED] and briefly mentions in a sentence that [REDACTED] was formed in 2015 with the names of its artist clients. The Petitioner submitted another article from Cartao de Visita to establish his businesses' distinguished reputations. However, the article does not include the author of the article and seems to be a marketing, public relations article since the wording is primarily the same, word for word, as the wording on the website for [REDACTED] Photography, except the article also indicates the Petitioner now lives and works in Florida. The Cartao de Visita article has the same sentence about [REDACTED] used in the Metropoles article. While these articles mention [REDACTED] and some of its clients, they do not provide sufficient evidence the businesses have a reputation marked by eminence, distinction or excellence as required by this criterion.

Other articles submitted relate to his clients' videos and their achievements. While the Petitioner and the business, [REDACTED] are credited in the articles for direction, production, and photography, the articles primarily focus on the artists, instead of the reputation of the Petitioner's businesses. The evidence is therefore insufficient to establish that the Petitioner's businesses have a distinguished reputation.

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 meet this criterion, a petitioner must demonstrate that their salary or remuneration is high relative to the compensation paid to others working in the field in similar positions and geographic locations.⁶ The burden is on the petitioner to provide appropriate comparative evidence. Examples may include, but are not limited to, geographical or position-appropriate compensation surveys. Persons working in different countries should be evaluated based on the wage statistics or comparable evidence in that country, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States.⁷

The Petitioner provided his 2018 Brazil individual income tax return; wage data for photographers and production directors from online sources, including Salary Explorer and Salary Expert; and an article discussing photographer salaries in European countries and Brazil. We agree with the Petitioner that the income tax return is for an individual, the Petitioner, as opposed to the Director's categorization of it being for a business.

However, we agree with the Director that the Petitioner's income tax return shows the income he received as an owner of the company, [REDACTED] instead of as a Director of Photography. The tax return indicates that the Petitioner's nature of occupation is "company owner or sole proprietor or employer-owner" with a main occupation as "[m]anager, president and director of an industrial, commercial or service provider company," and that he derived R\$311,448 in taxable income from [REDACTED]. The Petitioner has not submitted sufficient evidence demonstrating that his income from [REDACTED] is for his work as a Director of Photography. The record does not show the nature of the business of [REDACTED] or the income derived from that business.

The record includes evidence relating to the Petitioner's work as a photographer with a business, [REDACTED] Photography. Although the Petitioner argues on appeal that [REDACTED] is doing business as [REDACTED] Photography, the record does not include independent evidence demonstrating the nature and scope of the business of [REDACTED] the income derived from the business, and the relationship between the two businesses. The Petitioner did not submit sufficient evidence that his compensation stated in the tax return from [REDACTED] is based on his work in the field of endeavor, a Director of Photography. Without sufficient evidence of the Petitioner's compensation as a Director of Photography, we are unable to compare the Petitioner's income with the submitted wage data.

⁶ See generally 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); see also *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings versus other PGA Tour golfers); *Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding salary information for those performing lesser duties is not a comparison to others in the field); *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. III. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. III. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen).

⁷ See generally 6 USCIS Policy Manual, *supra*, at F.2(B)(2) appendix.

On appeal, the Petitioner argues that although the Director issued a request for evidence on this issue, the notice “was irrational and failed to provide a reasonable explanation for the determination that [the Petitioner] did not meet this criterion.” The Petitioner argues that the Director did not sufficiently explain the issues with the submitted evidence. However, the request for evidence points out that the income tax return submitted is insufficient evidence as it relates to income from a business, instead of a photographer position, and requests evidence of the Petitioner’s remuneration in the field of endeavor.

We find that the evidence in the record is insufficient to demonstrate that he has commanded a high salary in relation to others in his field. Accordingly, for the reasons discussed above, we conclude that the Petitioner’s evidence did not establish that he satisfies 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).

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.⁸

The Director found that the Petitioner did not submit evidence to meet the plain language of this criterion pointing out that the submitted evidence did not show “commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.” Although the Director did not provide analysis of the submitted evidence, we agree that it is not sufficient to establish this criterion.

The Petitioner submitted evidence relating to the artist, [redacted] including a website print out indicating a video by [redacted] ranked number three as the most viewed videos by Brazilian artists with 880,391,002 views; marketing publications for [redacted] related to his iTunes music sales and album sales, each recognizing the Petitioner; articles discussing the importance of YouTube videos for an artist’s success; and YouTube screen shots of [redacted] video indicating over a billion views. While the record includes evidence of [redacted] commercial success as a performing artist, the Petitioner’s involvement through direction, photography and production of the videos and album covers is not sufficient to demonstrate the Petitioner’s commercial success as a performing artist. The plain language of the regulation does not allow for submission of evidence other than box office receipts, video sales, or sales of other recorded media, and that such receipts and sales must be attributable to his own work in the performing arts.

On appeal, the Petitioner does not directly address the criterion or the Director’s reasons for concluding that he did not establish that he meets this criterion. Therefore, we will consider his claim to this

⁸ See generally 6 USCIS Policy Manual, supra, at F(2) appendix.

criterion abandoned.⁹ We affirm the Director’s conclusion that the Petitioner did not demonstrate his commercial successes in the performing arts.

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 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. See *Matter of Price*, 20 I&N Dec. at 954 (concluding that even major league level athletes do not automatically meet the statutory standards for classification as an individual of “extraordinary ability,”); *Visinscaia*, 4 F. Supp. 3d at 131 (internal quotation marks omitted) (finding that the extraordinary ability designation is “extremely restrictive by design,”); *Hamal v. Dep’t of Homeland Sec. (Hamal II)*, No. 19-cv-2534, 2021 WL 2338316, at *5 (D.D.C. June 8, 2021) (determining that EB-1 visas are “reserved for a very small percentage of prospective immigrants”); see also *Hamal v. Dep’t of Homeland Sec. (Hamal I)*, No. 19-cv-2534, 2020 WL 2934954, at * 1 (D.D.C. June 3, 2020) (citing *Kazarian*, 596 at 1122 (upholding denial of petition of a published theoretical physicist specializing in non-Einsteinian theories of gravitation) (stating that “[c]ourts have found that even highly accomplished individuals fail to win this designation”)).

Here, the Petitioner has not shown that the significance of his 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 sustained national or international acclaim in the field, and he 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 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.

⁹ See *Matter of R-A-M-*, 25 I&N Dec. at 658 n.2; see also *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9.