U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24833125

Date: FEB. 14, 2023

Appeal of Texas Service Center Decision

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

The Petitioner is a television and motion picture producer who 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.

After deciding the Petitioner did not establish he had a major, internationally recognized award, nor did he demonstrate he met at least three of the ten regulatory criteria, the Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition). The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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 qualify under this immigrant classification, the statute requires the filing party demonstrate:

- The foreign national enjoys extraordinary ability in the sciences, arts, education, business, or athletics;
- They seek to enter the country to continue working in the area of extraordinary ability; and
- The foreign national's entry into the United States will substantially benefit the country in the future.

Section 203(b)(1)(A)(i)–(iii) of the Act. 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, 1121 (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 Amin v. Mayorkas*, 24 F.4th 383, 394 (5th Cir. 2022).

II. ANALYSIS

Because the Petitioner has not indicated or established that he has 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). Before the Director, the Petitioner claimed he met five of the regulatory criteria. The Director decided that the Petitioner did not satisfy any of the claimed criteria.

Specifically, his claims and evidence were not adequate relating to the criteria associated with prizes or awards, published material, judging, display of the Petitioner's work, or performing in a leading or critical role. On appeal, the Petitioner maintains they meet all five of the claimed evidentiary criteria. After reviewing all the evidence in the record, we conclude he has not satisfied at least three regulatory criteria meaning it is unnecessary that we perform a final merits determination on his case.

> *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 did not meet the requirements of this criterion. The Director discussed the material he submitted and noted that one article appeared in several publications reflecting the material had a different author in each publication. The Director then questioned whether the Petitioner established who actually authored the article and surmised that it was self-promoting material that is generally not considered to be published material about a foreign national. The determination that self-promoting material is generally not considered to qualify under this criterion is supported by agency policy. *See generally* 6 *USCIS Policy Manual* F.2 (Appendices), https://www.uscis.gov/policymanual (discussing marketing materials). The Director also noted two separate articles in which the evidence did not reflect the author's name, which falls short of meeting this criterion's requirements.

On appeal, the Petitioner first addresses the evidence determined to be self-promoting material. Here, the Petitioner notes while these may be marketing materials, that does not disqualify them as sufficient evidence under this criterion. The Petitioner does not address USCIS policy indicating that this type of documentation will generally be insufficient. As a result, he has not met his burden under this criterion.

To address the Director's concerns about who actually authored any of the submitted articles, the Petitioner explains that the author of each article are the editors of the individual publications who decide whether to publish these promotional materials. First, the regulation requires qualifying evidence to include the author, and the Petitioner has not offered documentation that satisfies that requirement. The regulations have the force and effect of law and are binding on all USCIS employees, and we cannot simply ignore those requirements. *Matter of L-*, 20 I&N Dec. 553, 556 (BIA 1992) (citing to *Bridges v. Wixon*, 326 U.S. 135, 153 (1945). So, setting aside the regulatory requirement that evidence include the author is not permissible.

Second, the Petitioner's explanation does not adequately address one of the Director's concerns, that the Petitioner presented evidence containing inconsistencies. The Petitioner must resolve inconsistent information in the record. Such a correction should be demonstrated through the submission of relevant, independent, and objective evidence that reveals which information is the truth. *See Matter of Ho*, 19 I&N Dec. 582, 591–92 (BIA 1988). For this reason alone, the Petitioner's arguments on appeal will not prevail as the author of the material is not only required by the regulation but it is also material to eligibility.

Third, the record lacks adequate support for the Petitioner's contention that all articles any publication publishes that lacks an individual author—especially relating to marketing materials—is authored by the editorial board. While this could be the case in some instances, for example the editorial board of a newspaper publishing an editorial article giving the editors' opinions, even the Petitioner's appeal brief admits the material in question is "self-promotional material" and that does not equate to an editorial article in a newspaper or periodical.

When applying for an immigration benefit, filing parties take on additional burdens as prescribed in several authorities (statutes, regulations, policy, etc.) that might not be present for the general public in other situations. For example, for someone in the general public to show they have been the subject of media coverage, they only need to possess proof of the coverage. However, those applying to be classified as an alien with extraordinary abilities, they must document that the coverage was about them, in a particular type of publication, and they have to show several aspects about the material itself. Here, the Petitioner has not shown that the Director erred in their adverse determination, nor has he satisfied his burden under 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 specification for which classification is sought.* 8 C.F.R. § 204.5(h)(3)(iv).

Before the Director, the Petitioner only claimed eligibility under this criterion based on his performance at a talent festival. The Director determined that the Petitioner did not meet the requirements of this criterion and concluded the evidence indicated he judged persons in an unrelated field instead of in his or an allied field. The Petitioner does not contest the Director's analysis or findings on appeal and instead shifts the focus of his claim to how his work as a television program producer qualifies him under this criterion.

Filing parties should develop the record for their claims before the lower adjudicative body because this affords the lower entity to apply its expertise on the matter in the first instance, giving the appellate

entity some reasoning to review. New assertions advanced for the first time to an administrative appellate body are not properly before us. *Matter of M-F-O-*, 28 I&N Dec. 408, 410 n.4 (BIA 2021) (refusing to consider an appellant's humanitarian claims that were presented for the first time on appeal). An appellant may not fill in the gaps in their previous arguments by presenting new arguments or material for the record that was not presented to the lower entity. *Chamu v. U.S. Att'y Gen.*, 23 F.4th 1325, 1332 (11th Cir. 2022). As the Petitioner did not offer this argument to the Director, the Director could not have erred on this issue and his new claims will not factor into our decision here.

> *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).

A leading role should be apparent by its position in the overall organizational hierarchy and 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 any role should establish whether it was leading or critical for organizations or establishments *as a whole*.

Ultimately, the leading or the critical role must be performed on behalf of the organization that enjoys a distinguished reputation, rather than for a subordinate group. *See Strategati, LLC v. Sessions*, No. 3:18-CV-01200-H-AGS, 2019 WL 2330181, at *7 (S.D. Cal. May 31, 2019); *Noroozi v. Napolitano*, 905 F. Supp. 2d 535, 545 (S.D.N.Y. 2012). USCIS policy reflects that organizations or establishments that enjoy a distinguished reputation are "marked by eminence, distinction, or excellence." *See generally* 6 *USCIS Policy Manual*, *supra*, F.2. (citing to the definition of *distinguished*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/distinguished). The Petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The Petitioner claimed his role for [redacted] the entity for which he works as a producer. The Director determined that the Petitioner did not meet the requirements of this criterion because he did not show this entity had a distinguished reputation. On appeal, the Petitioner claims that because [redacted] is responsible for interviewing two respected artists in Latin America, this "evidences its reputation in the industry." He further posits that because the organization has been the subject of media and trade publication articles, this supports the fact that it has a distinguished reputation. Finally, he states that the organization's work appearing on television networks should lead us to find in his favor relating to [redacted] reputation.

Simply performing an interview of a respected artist or public figure does not transform an entity into one that enjoys a distinguished reputation. As USCIS policy requires, the organization or establishment should be marked by eminence, distinction, or excellence, or alternatively being proper for an eminent person. *See generally* 6 *USCIS Policy Manual*, *supra*, F.2. And the Petitioner does not explain how the Director erred by not finding the media and trade publication articles to sufficiently aid his eligibility claims under this criterion.

We are also not persuaded by the Petitioner's view that a production company whose work appears on television networks should be considered distinguished simply through the act of the network's agreement to broadcast their content. This view does not take into account that lesser film and television production companies have productions that appeared on network television. Simply having

an organization's content broadcast falls short of demonstrating that company is marked by eminence, distinction, or excellence.

The regulation and agency policy require the production of evidence that preponderantly satisfies the attendant requirements. As a result, the Petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998). The Petitioner cannot simply assert that an organization enjoys a distinguished reputation based on a factor without offering evidence that adequately supports those claims. Again, here the Petitioner has not submitted evidence that meets the plain language requirements of this criterion.

We conclude that although the Petitioner claims he meets five criteria, because his arguments fail on any of the criteria discussed above, that means he cannot numerically meet the required number of criteria and it is unnecessary for us to reach a decision on his other claims relating to awards or the display of his work. As the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3), we reserve our evaluation of those requirements. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); *see also Matter of D-L-S-*, 28 I&N Dec. 568, 576–77 n.10 (BIA 2022) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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 do not need to 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 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 that goal. 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 the significance of their 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). Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and they are one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated their 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.