U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25678862

Date: FEB. 28, 2023

Appeal of Texas Service Center Decision

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

The Petitioner is a musician who composes and performs music. He 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 Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding that the Petitioner did not establish that he received a major, internationally recognized award, nor did he demonstrate that he met at least three of the ten regulatory criteria. 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 (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

The Petitioner is a musician who blends traditional folk music with other genres such as R&B, pop, and jazz. He also invented a new form of a bass guitar reportedly expanding the abilities of the musician to be more versatile.

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 four of the regulatory criteria. The Director decided that the Petitioner satisfied the published material criterion, but he did not satisfy the criteria associated with original contributions, authorship of scholarly articles, or performing in a leading or critical role. On appeal, the Petitioner maintains that he meets the same criteria the Director denied. After reviewing all the evidence in the record, we conclude he has not demonstrated eligibility under this immigrant classification.

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v).

The Petitioner's claims under this criterion boil down to his invention of a "fretted/fretless hybrid bass guitar." His supporting evidence consisted of testimonial letters, articles, and his personal statement. The Director determined that the Petitioner did not meet the requirements of this criterion specifically noting a lack of evidence to demonstrate the originality of the Petitioner's instrument. After discussing testimonial letters, the Director determined that the authors failed to demonstrate how his work influenced the field as a whole that went beyond a group, an individual, or an organization. The Director continued discussing the bass guitar and indicated the Petitioner did not provide evidence that the guitar has resulted in significant commercial sales or had an impact on musicians or individuals in the field and how they perform.

The primary requirements here are that the Petitioner's contributions in his field were original and they rise to the level of major significance in the field as a whole, rather than to a project or to an organization. *See Amin*, 24 F.4th at 394 (citing *Visinscaia v. Beers*, 4 F. Supp. 3d 126, 134 (D.D.C. 2013)). The regulatory phrase "major significance" is not superfluous and, thus, it has some meaning. *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (finding that every word and every provision in a statute

is to be given effect and none should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence). Further, the Petitioner's contributions must have already been realized rather than being potential, future improvements. Contributions of major significance connotes that his work has significantly impacted the field. The Petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

On appeal, the Petitioner asserts the testimonial letters, articles, and his personal statements should amply demonstrate that his work has made groundbreaking and original contributions of major significance in the field of music. The only testimonial letter the Petitioner discusses under this criterion is from [redacted] that he provided when responded to the Director's request for evidence. [redacted] speaks of the Petitioner as a unique and original talent noting the methods in which he uses the bass "are completely new and are opening new doors in the music industry. These techniques have never been used before and are revolutionizing World Music as a genre. Both his playing and singing will surely continue to influence and inspire generations to come."

Despite [redacted] contention that the Petitioner's methods are opening new doors and his techniques are revolutionizing a particular genre, he does not offer specific examples of these effects in the field. Even though [redacted] claims the Petitioner's performance will continue to have an influence in the field, neither he nor the Petitioner adequately explain the present impact in the field nor do they corroborate that claim either through testimony or supporting evidence. This criterion requires more than for one to possess unique skills and knowledge and to have others attest to those aptitudes. The Petitioner must have demonstrably impacted his field in order to meet this regulatory criterion. *See* 8 C.F.R. § 204.5(h)(3)(v); *see also Amin*, 24 F.4th at 394 (citing *Visinscaia*, 4 F. Supp. 3d at 134).

The Petitioner's appeal brief also describes an article from *Bass Magazine*. This evidence is dated in August 2022, after the Petitioner filed the petition in February 2021. A request for an immigration benefit "must establish that he or she is eligible for the requested benefit at the time of filing the benefit request . . . ." 8 C.F.R. § 103.2(b)(1). Any additional evidence submitted in connection with a benefit request at a later date, including evidence responding to a request from USCIS, must also establish "eligibility at the time the benefit request was filed." 8 C.F.R. § 103.2(b)(12); *Robinson v. Napolitano*, 554 F.3d 358, 364 (3d Cir. 2009). "Under this rule, USCIS will deny [an immigration benefit] if the [filing party] becomes eligible only after the [benefit] was filed." *Tingzi Wang v. United States Citizenship & Immigr. Servs.*, 375 F. Supp. 3d 22, 27 (D.D.C. 2019) (citing 8 C.F.R. § 103.2(b)(12)). Because this article postdates the petition filing date, we will not consider it in this petition.

Finally, within the Petitioner's personal statement, he describes his bass guitar's original nature as it relates to its design and he explains that two years before he filed this petition, he was invited to showcase his invention at a popular trade show where he received significant interest in the instrument. But he does not detail how he parlayed any of that interest for this new instrument, nor does he explain how this invention has already impacted the field through any measurable means. This criterion requires more than simply introducing a newly designed instrument to the field. It also must have already made a significant impact within his field and that is where the Petitioner falls short in this filing.

We conclude the Petitioner has not submitted evidence that meets the plain language requirements of this criterion.

> *Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.* 8 C.F.R. § 204.5(h)(3)(vi).

This criterion contains multiple evidentiary elements the Petitioner must satisfy through the submission of evidence. The first element is that the Petitioner is an author of scholarly articles in his field in which he intends to engage once admitted to the United States as a lawful permanent resident. We consider these articles to fall within two distinct areas.

One area is within the academic arena in which a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college, university, or research institution. In general, it should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article. The next area lies outside of the academic arena in which a scholarly article should be written for learned persons in that field. "Learned" is defined as "having or demonstrating profound knowledge or scholarship." Learned persons include all persons having profound knowledge of a field. *See generally* 6 *USCIS Policy Manual* F.2 (Appendices), https://www.uscis.gov/policymanual.

The second evidentiary element this criterion requires is that the scholarly articles appear in one of the following: (1) a professional publication, (2) a major trade publication, or (3) in a form of major media. Regarding the medium in which the articles appear, the Petitioner should establish that the publication's circulation statistics are high relative to similar publications and should also establish the publication's intended audience. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2 (Appendices). The Petitioner must submit evidence satisfying each of these elements to meet the plain language requirements of this criterion.

The Petitioner provided one article under this requirement. The Director determined that the Petitioner did not meet the requirements of this criterion. First, the Director noted the evidence did not include the Petitioner's name as the author and instead identified the publication. The Director also determined that although the material appeared in a popular magazine, it was not seemingly intended for learned persons in the field.

On appeal, the Petitioner contests the Director's first point asserting that even though the evidence does not name him as the author, it is obvious that he penned the piece. As a result, the Petitioner has not shown that he is the article's author, nor did he provide corroborating evidence from the publisher that might aid in his eligibility claims. Nor has he offered a legal authority indicating this regulatory requirement may be set aside. 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 *Bridges v. Wixon*, 326 U.S. 135, 153 (1945).

An agency must adhere to its own rules and regulations, and ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned. *Blanton v. Office of the Comptroller of the Currency*, 909 F.3d 1162, 1176 (D.C. Cir. 2018) (quoting *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950–51 (D.C. Cir.

1986). Because the Petitioner has not sufficiently demonstrated that he is this article's author, he cannot prevail here based on this evidence and it is unnecessary for us to evaluate whether it appeared in one of the required publication types. *See Matter of M-M-A-*, 28 I&N Dec. 494, 497 (BIA 2022) (recognizing that we are not required decide on other eligibility factors when a filing party cannot satisfy one dispositive element). The Petitioner has not submitted evidence that meets the plain language requirements of this criterion.

We conclude that although the Petitioner claims he meets four criteria, because his arguments fail on the criteria we 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 claimed elements under the leading or critical role requirement. 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.