U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23034491

Date: MAY 22, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a singer, seeks classification under the first-preference, immigrant visa category as a noncitizen of "extraordinary ability." *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This category requires a noncitizen to demonstrate sustained national or international acclaim and to provide extensive documentation of their recognized achievements in the claimed field of extraordinary ability. *Id.*

After initially granting the Petitioner's filing, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that, contrary to the Act, the Petitioner did not demonstrate that he: seeks to continue working in the United States as a singer; and has extraordinary ability in the field. On appeal, the Petitioner contends that the Director: lacked "good and sufficient cause" to revoke the petition's approval; impermissibly relied on evidence of events that occurred after the petition's approval; and "arbitrarily and capriciously" sought revocation about four years after the petition's approval.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Ho,* 19 I&N Dec. 582, 589 (BIA 1988) (citation omitted). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Director erred in finding insufficient evidence of the Petitioner's intent to continue his U.S. singing career and did not adequately explain his finding regarding the Petitioner's claimed extraordinary ability. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To qualify for the requested immigrant visa category, a petitioner must demonstrate that:

- They have "extraordinary ability in the sciences, arts, education, business, or athletics;"
- They seek to continue work in their field of extraordinary ability in the United States; and
- Their work would substantially benefit the country.

Section 203(b)(1)(A)(i)-(iii) of the Act.

The term "extraordinary ability" means a level of expertise commensurate with "one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). Evidence of extraordinary ability must demonstrate a noncitizen's receipt of either "a major, international recognized award" or satisfaction of at least three of ten lesser evidentiary standards. 8 C.F.R. § 204.5(h)(3). If a petitioner meets either of these requirements, U.S. Citizenship and Immigration Services (USCIS) determines whether the record establishes sustained national or international acclaim and achievements demonstrating a noncitizen's ranking among the small percentage at the very top of their field. *See Kazarian v. USCIS*, 596 F.3d 1115, 1119-20 (9th Cir. 2010) (requiring a two-part analysis of extraordinary ability).

II. ANALYSIS

The record shows that the Petitioner, a native and citizen of Uzbekistan, began to receive acclaim as a singer in 2004 when, at age 13, he won a Ukrainian singing competition. He won another singing contest in Russia in 2005 and released his first album in 2007 and his first music video in 2011. The following year, he finished as a finalist in a televised European songwriting competition and, in 2015, won a talent show on Russian TV. The Petitioner boasts a 3.5-octave vocal range and describes his singing style as "pop opera."

The Petitioner stated that a U.S. entertainment agent contacted him, telling him that he could make him a star in this country. With the agent's support, the Petitioner came to the United States in 2016 on a nonimmigrant work visa as a noncitizen of extraordinary ability. *See* section 101(a)(15)(O) of the Act, 8 U.S.C. § 1101(a)(15)(O). He filed this immigrant visa petition in October 2017, and, by the end of that month, USCIS approved it. But, in October 2021, after a USCIS officer interviewed the Petitioner regarding his application for adjustment of status, the Director mailed the Petitioner a notice of intent to revoke (NOIR) the filing's grant.

A. The NOIR

"[A]t any time" before a petitioner obtains lawful permanent residence, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, a petition's erroneous approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

Unless circumstances automatically revoke a petition's approval under 8 C.F.R. § 205.1(a)(3)(iii), USCIS must notify a petitioner of intended revocation grounds and afford them a reasonable opportunity to respond with rebuttal evidence or argument. 8 C.F.R. § 205.2(b). USCIS properly issues a NOIR if the unrebutted and unexplained record at the time of the NOIR's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). The Agency may revoke a petition's approval if a petitioner's NOIR response does not overcome the stated revocation grounds. *Id.* at 451-52

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The Director based the Petitioner's NOIR on the following "issues:"

- In December 2019, the Petitioner's agent told USCIS that the Petitioner terminated their business agreement in early 2018, shortly after the Petitioner "failed" an audition for a singing competition on U.S. television.

- A successful U.S. music producer who invited the Petitioner to his studio told USCIS that he decided not to record or produce the Petitioner. He purportedly stated that he did not believe the Petitioner's "sound" matched the type of music he produces and that the Petitioner "might not be right for the U.S. market."
- The Petitioner auditioned for the U.S. TV singing competition in 2018, and all three judges voted "No."
- At the Petitioner's adjustment interview in September 2020, he told the USCIS officer that: his agreement with his agent ended in November 2017; he had not yet hired another agent; he last performed at a private function about nine months earlier; and he had worked as a food deliverer.

In the NOIR, the Director found that the Petitioner meets at least three of the 10 preliminary, regulatory requirements for extraordinary ability. *See* 8 C.F.R. § 204.5(h)(3). But the NOIR asserts that the evidentiary issues discussed above do not demonstrate his intent to continue working in the United States as a singer or his claimed extraordinary ability in the field.

B. The Timing of the Revocation

The Petitioner contends that USCIS' revocation of his petition more than four years after its approval is "arbitrary and capricious." He cites the following legal authority:

> [E]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise to modify its judgment, decree, or error. In the administrative context, this right is generally limited to "a short period after the making of the decision and before an appeal has been taken or other rights vested."

Gorbach v. Reno, 219 F.3d 1087, 1102 (9th Cir. 2000) (*en banc*) (Thomas, J., concurring) (citations omitted). "What is a short and reasonable period will vary with each case, but, absent unusual circumstances, the time period would be measured in weeks, not years." *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 613, (N.D. Cal. 1992) (citation omitted).

The Petitioner also notes that a U.S. district court applied this reasoning, in part, in a case involving a petition like his: an immigrant visa petition for a noncitizen of extraordinary ability. *Doe 1 v. U.S. Dep't of Homeland Sec.*, No. 20-cv-07517-BLF, 2021 WL 3402311 (N.D. Cal. Aug. 4, 2021). In *Doe 1*, USCIS revoked the petition's approval more than three years after its grant. *Id.*, 2021 WL 3402311 at *1. The court ordered the Department of Homeland Security to complete the proceeding's administrative record, finding that "it is reasonable, and non-speculative, for Plaintiffs to believe that there are documents in the record that shed light on why Defendants reversed their three-year-old decision on Doe 1's I-140 Petition." *Id.* at *3.

As the record indicates the Petitioner's residence in New York, the Ninth Circuit cases that he cites do not bind us in this matter. Also, in another case, the Ninth Circuit suggested that section 205 of the Act does not limit the time within which USCIS may revoke a petition's approval. "The statute permits revocation 'at any time,' so there plainly was no time constraint on when the agency could revoke the approval." *Herrera v. USCIS*, 571 F.3d 881, 886 (9th Cir. 2009) (affirming revocation of an immigrant visa petition more than two years after its approval).

Like the Ninth Circuit, the U.S. Circuit Court of Appeals for the Second Circuit, which has jurisdiction over New York, has ruled that a federal agency generally can reconsider a decision "only if it does so within a reasonable time period." *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991) (citation omitted) (considering a dispute over a request for a postage refund). But we found no cases of revocations under section 205 of the Act, like the Petitioner's case, where the Second Circuit followed that reasoning. *See Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015) (reviewing the revocation of an immigrant visa petition that occurred about six years after the filing's grant).

Thus, in the absence of controlling case law, we interpret the plain language of section 205 of the Act to allow USCIS to revoke an immigrant visa petition's approval "at any time" before a beneficiary obtains lawful permanent residence. The Petitioner's contrary argument is unavailing.

C. Intent to Continue Working in the United States

The evidentiary issues cited in the Director's NOIR do not support the finding that the Petitioner no longer intends to continue his U.S. singing career.

> In determining what is "good and sufficient cause" for the issuance of a notice of intention to revoke, we ask whether the evidence of record at the time the notice was issued, if unexplained and unrebutted, would have warranted a denial based on the petitioner's failure to meet his or her burden of proof.

Matter of Estime, 19 I&N Dec. at 451.

As the Petitioner argues, the Director did not consider the Petitioner's work as a food deliverer in the proper context. The Petitioner's statement at the 2020 adjustment interview suggests that he worked as food deliverer that year, the first year of the COVID-19 pandemic when few live-music performances occurred in the United States. *See, e.g.*, August Brown, "The year the music died," *Los Angeles Times*, Dec. 11, 2020, www.latimes.com/entertainment-arts/music/story/2020-12-11/music-covid-pandemic-nightclubs-2020 (estimating that the COVID pandemic cost the U.S. music industry $9 billion in 2020). Thus, under the unusual circumstances of a pandemic, the Petitioner's nine-month period without a performance and employment as a food deliverer in 2020 does not sufficiently indicate a lack of intent to continue his U.S. singing career after pandemic restrictions. Moreover, a beneficiary need not begin working pursuant to their approved immigrant visa petition until they obtain lawful permanent residence. *Matter of Rajah*, 25 I&N Dec. 127, 132-33 (BIA 2009) (citations omitted).

Also, evidence of a noncitizen's intent to work in the United States in their field of extraordinary ability may include "a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States." 8 C.F.R. § 204.5(h)(5). Although disregarded by the Director, the Petitioner provided a November 2020 letter detailing his intent to continue working as a singer in the United States. The letter states that he terminated his former agent because the agent tried to make him sign what the Petitioner believes was an unfair contract that would have required him to work with the agent for nine years. He said his termination of their representation agreement angered the agent, who reportedly yelled at him: "Without me, you are nobody, and you will be nobody

here!" The Petitioner said the break with his agent shook his confidence. But he said he eventually recovered and "still believes there is great opportunity for [him] in the music business."

The Director also disregarded other evidence of the Petitioner's intent to continue his U.S singing career. The Petitioner submitted a 2022 letter from his former agent, in which the agent conceded that he primarily booked the Petitioner for performances in Florida, which was "too small a market for him." The agent also stated that the music producer offered the Petitioner a recording deal but that the Petitioner - not the producer - declined the deal because he did not like the producer's focus on "pop" music. The agent also said that he told a USCIS officer that "musicians like [the Petitioner] are only born once in a generation and he can bring an instrumental change to the music industry worldwide." He described the Petitioner as "a musician of global standard, he makes people happy, and he makes people smile by taking their breath away with his talents."

Further, the Director did not address: an October 2020 letter from a Russian singer, stating her intention to collaborate with the Petitioner on a musical featuring the works of the classical composer Rachmaninoff; a November 2020 letter from another U.S. music producer, stating his plans to work with the Petitioner on an English-language album for the U.S. market; and an October 2020 contract for the Petitioner's performances at a [redacted] restaurant three days a week over a 12-month period. Thus, the Director disregarded evidence that the Petitioner continued seeking to work as a singer in the United States.

For the foregoing reasons, the record does not support the revocation of the petition's approval based on insufficient evidence of the Petitioner's intent to continue his U.S. singing career. We will therefore withdraw the Director's contrary finding.

D. Extraordinary Ability

An NOIR "must include a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. at 452. USCIS must also provide a petitioner with a written decision "that explains the specific reasons for the revocation." 8 C.F.R. § 205.2(c). A conclusory statement supports neither a NOIR's issuance nor revocation of a petition's approval. *Matter of Arias*, 19 I&N Dec. 568, 570 (BIA 1988).

The Director found that the Petitioner "is not one of that small percentage who have risen to the top of the field of endeavor." But the decision does not explain how the evidentiary issues cited in the NOIR support that determination. The decision also does not explain why the petition's supporting evidence did not demonstrate the Petitioner's extraordinary ability as a singer.

As the record does not sufficiently explain the Director's finding regarding the Petitioner's claimed extraordinary ability, we will remand the matter. On remand, the Director should reconsider the Petitioner's qualifications for the requested immigrant visa category. If the Director believes that the Petitioner has not established his claimed extraordinary ability, the Director should issue a new NOIR explaining the evidentiary deficiency and allowing the Petitioner an opportunity to respond.

If supported by the record, a new NOIR may include any additional potential revocation grounds. The Director, however, must afford the Petitioner a reasonable opportunity to respond to all issues raised

on remand. Upon receipt of a timely response, the Director should review the entire record and issue a new decision.

III. CONCLUSION

The record includes sufficient evidence of the Petitioner's intent to continue his U.S. singing career. If the Director believes the Petitioner has not demonstrated extraordinary ability as a singer, the Director must notify him, explain why, and afford him an opportunity to respond.

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