U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28694371

Date: NOV. 16, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a makeup artist, seeks classification as an individual of extraordinary ability in the arts. 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 Nebraska Service Center denied the petition, concluding the record did not establish the Petitioner qualifies as an individual of extraordinary ability either as the recipient of a major, internationally recognized award, or at least three of the ten regulatory criteria listed at 8 C.F.R. § 204.5(h)(3)(i) – (x). 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.

On appeal, the Petitioner submits a brief and additional evidence.[1] She asserts the Director erred in finding she did not satisfy the criteria related to judging the work of others, publications about the Petitioner, high salary, membership in professional associations, playing a leading or critical role, and lesser-known awards.[2]

[1] USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit they seek at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). Therefore, we do not consider publications that postdate the petition filing as evidence that establishes the Petitioner's eligibility at the time of filing. However, were we to engage in a final merits determination, we could consider this evidence as support for a finding of sustained acclaim.

[2] Although an introductory paragraph of the appellate brief states the Petitioner is eligible under the original contributions of major significance criterion, the brief contains no evidence or arguments addressing the Director's determination under this criterion. Therefore, we consider this issue to be abandoned. 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'v Gen.*, 401 F.3d 1226. 1228 n. 2 (11th Cir. 2005), citing United States v. Cunningham, 161 F.3d 1343, 1344 (11th Cir. 1998); Hristov v. Roark, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

We adopt and affirm the Director's decision. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994); see also Giday v. INS, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); Chen v. INS, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

The Petitioner cites Buletini v. INS, 850 F. Supp. 1222 (E.D. Mich. 1994) for the proposition that the evidentiary criteria for establishing eligibility as an individual of extraordinary ability is more qualitative than a mere counting exercise.[3] We do not disagree this contention. The Buletini opinion indicates the court considered the possibility that a petitioner can submit evidence satisfying three criteria and still not meet the extraordinary ability standard if USCIS provides specific and substantiated reasoning for its conclusion. See Buletini, 860 F. Supp. at 1234. The court in Buletini did not reject the concept of examining the quality of the evidence presented to determine whether it establishes a Petitioner's eligibility for this highly restrictive classification.[4]

The Petitioner asserts the Director applied the wrong standard when considering the criterion at 8 C.F.R. § 204.5(h)(3)(viii), related to a leading or critical role for distinguished organizations; however, the Petitioner does not explain how specifically this occurred. Likewise, for the criterion at 8 C.F.R. § 204.5(h)(3)(i), related to lesser nationally or internationally recognized prizes or awards, the Petitioner contends the record does not support the Director's conclusions, but she does not explain how or in what way. The Petitioner has not identified a specific error related to these criteria but rather broadly disagrees with the Director's conclusions of her eligibility under them. Moreover, she has not addressed the evidentiary deficiencies the Director identified. As such, she has not overcome the Director's determination under these criteria.

Regarding the judging criterion at 8 C.F.R. 204.5(h)(3)(iv), the Petitioner asserts the Director erred in assuming the [redacted] Academy was an educational institution with cosmetology and fashion curriculum where the Petitioner served in an instructor role. However, the Petitioner provided a letter from the founder of the academy, stating the Petitioner worked as "a make-up teacher." Therefore, we conclude the Director's assumption had some basis. Nevertheless, the Petitioner states on appeal that she participated in a fashion project as a jury member or a makeup artist and relies upon the evidence previously provided, including the letter from the founder. Based upon the Petitioner's use of the word "or," it is unclear whether the Petitioner served in a jury role or a makeup artist role. In addition, the Petitioner does not address the evidentiary deficiencies the Director identified under this criterion and therefore she does not overcome them.

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[3] In contrast to the broad precedential authority of the case law of a United States circuit court (such as with Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010)), we are not bound to follow the published decisions of a United States district court in cases arising within the same district. See Matter of K-S-, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law. Id. at 719.

[4] The Petitioner also cites Gulen v. Chertoff, No. 07-2148, 2008 WL 2779001 (E.D. Pa. July 16, 2008) to conclude that if a petitioner meets three criteria, it is contrary to law if USCIS concludes that such a petitioner is not an individual of extraordinary ability. However, as our decision explains, the Petitioner does not meet at least three criteria. In addition, even if this case were applicable to the Petitioner, it would still constitute a pre-Kazarian federal district court decision that we need not follow.

Regarding 8 C.F.R. § 204.5(h)(3)(iii), related to published material about the Petitioner in trade publications or other major media, the Petitioner asserts on appeal that Aquarelle is a trade publication or major medium. However, the Petitioner has not provided independent and objective evidence to support this claim. We will not rely upon the assertions of Counsel as evidence. See, e.g., Matter of S-M-, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). Nor will we rely on the publisher's self-promotional material. See Braga v. Poulos, No. CV 06 5105 SJO (C.D.C.A. July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (concluding that a magazine cover's self-serving assertions regarding the magazine's status are not reliant evidence of a major medium); see also, e.g., Victorov v. Barr, No. CV 19-6948-GW-JPRX, 2020 WL 3213788, at *8 (C.D.C.A. Apr. 9, 2020). For the reasons the Director already explained, the Petitioner has not established eligibility under this criterion.

Regarding 8 C.F.R. § 204.5(h)(3)(ix), related to high salary, the Petitioner provides a letter from her accountant, [redacted] Although [redacted] lists the Petitioner's salary and provides comparative salaries for Moldovan women working in "artists/entertainment and recreation," we conclude that, for numerous reasons, the letter does not overcome the deficiencies the Director identified. Some of the reasons include that it does not corroborate the Petitioner's annual income with evidence such as payroll, bank, or tax statements, nor does it include documentation explaining how the general category of "artists/entertainment and recreation" is the comparative "best match" for the Petitioner's occupation and field. It also does not describe how [redacted] has a "personal" and "working" knowledge of average salaries for makeup artists in Moldova.

Regarding 8 C.F.R. § 204.5(h)(3)(ii), related to membership in organizations that require outstanding achievements of their members, the Petitioner asserts the Director should have determined the evidence established eligibility because (1) the Theater Union of Moldova (UNITEM) is a professional association; (2) its membership extends to makeup artists; and (3) the qualifying requirement of "any creative person" establishes that the association requires outstanding achievements of its members. Regarding (1), the documents in the record about UNITEM state it is a "public association." There is little indication of what specifically the Petitioner relied upon for her conclusion that the association is "professional," nor does the Petitioner explain how UNITEM's purported professional nature establishes her eligibility under this criterion. Regarding (2), we reviewed the Petitioner's membership certificate and do not dispute the Petitioner's conclusion that makeup artists can be members of UNITEM. Regarding (3), the Petitioner states that the "creative person" qualifier "calls for discretionary decision voted by majority of Senate where prospective applicant must supply recommendation from at least three members of" UNITEM and that "creative" is a judgment in relationship to a prospective member for which "it is reasonable to conclude that an evaluator or rather a group of evaluators should be of advance knowledge (experts)" (errors in original). While we acknowledge these assertions, we conclude that the evidence is insufficient to establish eligibility under this criterion for the reasons the Director already articulated.

For the reasons the Director discussed and those explained above, the Petitioner has not demonstrated eligibility as an individual of extraordinary ability.

ORDER: The appeal is dismissed.