U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28156055

Date: OCT. 5, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a fashion model, 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 Nebraska Service Center denied the petition, concluding that the Petitioner satisfied only one of the ten initial evidentiary criteria, of which she must meet at least three. 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

To establish eligibility as an individual of extraordinary ability, a petitioner (or anyone on the petitioner's behalf) must establish that they:

- Have extraordinary ability in the sciences, arts, education, business, or athletics;
- Seek to enter the United States to continue work in their area of extraordinary ability; and
- Their entry will prospectively substantially benefit the United States.

Extraordinary ability must be demonstrated by evidence of sustained national or international acclaim as well as extensive documentation that the individual's achievements have been recognized in the field. Section 203(b)(l)(A) of the Act. The implementing regulation further states that 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). It also sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit

this evidence, then they 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 commercial success).

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

The Petitioner has been working as a fashion model since 2015. She is currently represented by [redacted] and has attained O-1 nonimmigrant status in this occupation. Her modeling experience includes print and commercial work, with appearances in locations such as [redacted] and [redacted] magazine covers and editorial shoots, and commercial and promotional work.

Because the Petitioner has not indicated or established that she has received a major, internationally recognized award, she must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). Before the Director, she asserted that she met four of the regulatory criteria. The Director decided that the Petitioner satisfied the high remuneration requirement at 8 C.F.R. § 204.5(h)(3)(ix), but that she had not satisfied the criteria associated with published material (iii), leading or critical role (viii), or artistic display (vii).

On appeal, the Petitioner discusses her eligibility for the three criteria that the Director concluded that she did not meet. However, in the proceeding before the Director and now on appeal, she does not assert (and the record does not establish) that she meets the criteria relating to awards (i), membership (ii), judging (iv), significant original contributions (v), scholarly articles (vi), or commercial success (x). Therefore, we deem these issues to be waived and will not them further. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

A. Comparable Evidence

The Petitioner asserts on appeal that the Director failed to apply the preponderance of the evidence standard by disregarding her claim that she has established her eligibility as an individual of extraordinary ability through an "alternative argument" in which she contends "the 8 C.F.R. § 204.5(h)(3) factors would not readily apply [to her occupation because of] the age old argument that [a fashion model] is basically a replaceable object, who [is] merely in a fashion publication or fashion show to highlight the work of the brand and/or the fashion designer."

She asserts that she "is a model of extraordinary ability under 'the final merits determination,' 8 C.F.R. § 204.5(h)(3) factors, or no factors." We have carefully considered the Petitioner's assertions and conclude that her reliance upon this "alternative argument" is misplaced.

To begin with, it appears that the Petitioner is asking us to ignore the regulatory requirement at 8 C.F.R. § 204.5(h)(3) which provides that she must demonstrate international recognition of her achievements in the field through a one-time achievement (a major, internationally recognized award), or in the alternative that she has satisfied at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). We lack the authority to waive or disregard any of the Act's requirements, as implemented by regulation. *See United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as this regulation is extant it has the force of law."). Immigration regulations carry the force and effect of law. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954).

Further, the regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable evidence if they are able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)–(x) do not readily apply to their occupation, which in this case involves performing the work of a fashion model. While the Petitioner suggests that the regulatory criteria "may not" apply to her occupation, she does not discuss for instance, why the criteria relating to judging, awards, significant original contributions, or commercial success is inapplicable to the fashion model occupation.

Also, contrary to the Petitioner's contention that she "is a model of extraordinary ability under 'the final merits determination'" regardless of whether she meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3), we only decide whether a petitioner received sustained national or international acclaim in her field of endeavor in a final merits determination *after* we have determined she has garnered a major, internationally recognized award, or has satisfied at least three of the criteria. *See Kazarian* 596 F.3d at 1115; 6 *USCIS Policy Manual* F.2, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2. For all of these reasons, we conclude that the Petitioner's reliance on the comparable evidence clause at 8 C.F.R. § 204.5(h)(4) as an acceptable "alternative" to meeting at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) prior to USCIS conducting a final merits determination is without merit.

B. Evidentiary Criteria

Because the Petitioner has satisfied one criterion's requirements, she must meet at least two more within this first procedural step of the adjudication. On appeal, the Petitioner relies on previous arguments the Director considered in denying the petition. After considering all the evidence in the record, we conclude she has not satisfied at least three regulatory criteria. While we may not discuss every document submitted, we have reviewed and considered each one.

> *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).

In order to determine whether a petitioner's evidence meets the plain language requirements of this criterion, we examine the evidence and decide whether the published material in the record is related to the person and the person's work in the field. The published material should be about the person, relating to the person's work in the field, not just about the person's employer and the employer's work or another organization and that organization's work.

Any materials the petitioner submits must demonstrate the value of the person's work and contributions and must not be solely focused on the employer or organization that the person is associated with. Marketing materials created for the purpose of selling products or promoting the person's services are not generally considered to be published material about the person (this includes seemingly objective content about the petitioner in major print publications that the petitioner or the petitioner's employer paid for). *See* 6 *USCIS Policy Manual, supra.*

In denying the petition, the Director expressed concern that the Petitioner offered "self-manufactured evidence that was not objective or probative" in support of her eligibility for this criterion. Specifically, he noted that the Petitioner had provided copies of "digitized material, possibly scanned and some altered with handwriting on the copies." The Director also concluded that as some of the submitted material did not mention the Petitioner, it did not meet the plain language requirements of the criterion.

On appeal, the Petitioner contests the Director's conclusions about the probative value of her evidence, pointing to the initial evidence requirements at 8 C.F.R. § 204.5(g)(1), which provides in pertinent part: "[i]n general, ordinary legible photocopies of [evidence] will be acceptable for initial filing and approval." She contends that the Director erred in "rejecting our scans of [the Petitioner's] original appearances in magazines."

In the initial filing, the Petitioner provided copies of her modeling photographs that appeared to be pasted into a digitized document from another source, accompanied by text that she added alongside the photos to indicate the date the picture was published, the media that published it, and the names of the individuals credits with the work involved in creating the photos, such as the model(s), photographer, stylist, hair stylist, and makeup artists. The Petitioner also noted:

> [I]n submitting the evidence in this section, we genuinely feel that [English] translations, given the extremely small amount of text in these [f]ashion [e]ditorial proofs (they're all about the pictures, after all), were patently unnecessary. As such we did not include translations, because we did not deem them to be "necessary" pursuant to the language of the regulatory criteria.

The Director issued a request for evidence (RFE) discussing his concerns about this material. He asked that the Petitioner submit evidence that comports with the plain language requirements outlined in 8 C.F.R. § 204.5(h)(3)(iii) and with 8 C.F.R. § 103.2(b)(3), which outlines the requirements for English translations of foreign language documents. In response, the Petitioner submitted photocopies of the magazine pages that included her modeling photos as well as covers of the magazine issues that they appeared in, along with pages that provided the "credits" for the photoshoot - which identified the date, location, and parties involved in the production. She provided similar information for other published materials that she performed modeling services for, such as her work as a model for advertisements ultimately posted on billboards. Additionally, she provided certified English translations for the materials that were published in a language other than English.

Considering the evidence submitted in the RFE response, we conclude that the submitted materials partially meet the plain language requirements at 8 C.F.R. § 204.5(h)(3)(iii) in that they supply the title, date, and author of the published material, and are accompanied by acceptable certified English

translations. Therefore, we withdraw the Director's conclusion in the denial that the Petitioner's evidence was largely limited to "self-manufactured" documentation.

However, based on our review of the record we agree with the Director that the documentation submitted does not ultimately meet the plain language requirements of the criterion. The record reflects that some of the magazines that published the Petitioner's modeling photographs qualify as "major trade publications, or major media," (e.g., [V-], [C-], [M-], and [H-]). But the Petitioner has not submitted sufficient evidence to show that this published material is *about* her and specifically relates to her work in the field of fashion modeling.

For instance, H- published a magazine issue which contains an article featuring pictures of the Petitioner modeling clothing and fashion accessories. The title of the article is [redacted] The article includes several pages of photographs of the Petitioner modeling clothing and accessories from various fashion houses. One such page is entitled [redacted] and contains a photograph of the Petitioner modeling a pink dress, and the underlying caption identifies the companies that designed her dress, shoes, and jewelry. The other pages are similarly captioned with a fashion theme, and the names of the companies that designed the products that the Petitioner is wearing.

Likewise, the Petitioner submitted copies of pages from V- magazine which contains her modeling photos. According to the English translation, one of her photos was captioned: "[s]lant shoulder top with gathered tie waistband and tight skirt in the same color, ornamented with splendid geometric earrings to outline feminine curves and personality. Dangling earrings [designer's name,]. Off shoulder top [designer's name]." While the Petitioner is "credited" as being the model in the photos in the "credits" page, the article does not otherwise discuss or mention the Petitioner or her work as a fashion model.

We conclude that these magazine articles and similar articles such as those that appeared in C- and M- magazines were published for the purpose of reporting on current fashion trends and marketing designer clothing for purchase by retail establishments and the public. While the Petitioner provided her modeling services as part of the creation of this published material, the published content is not focused on her and her work in the field. As noted above, marketing materials created for the purpose of selling products or promoting a person's services are not generally considered to be published material *about* the person. *See* 6 *USCIS Policy Manual, supra.*

On appeal, the Petitioner states that USCIS holds to an "antiquated and superficial argument that [the fashion model] is basically a fully replaceable object, whose merely in a fashion publication or fashion show to highlight the work of the brand and/or the fashion designer." She asserts that the Director overlooked the caliber of the photographers who have taken her modeling photos, and the stature of the fashion magazines that have published her photographs in a way that implies that these factors are part of this criterion's plain language requirements when they are is not. But we must adhere to the criterion's requirements and to agency policy in evaluating whether the evidence submitted satisfies the criterion. Those requirements specify, among other things, that the published material must be about the Petitioner and the content must relate to the Petitioner's work in the field. Here, the Petitioner does not provide evidence or argument sufficient to overcome our conclusion that the

evidence presented constitutes articles focused on fashion trends, or marketing and press materials created for the ultimate purpose of selling or reviewing products, not published material about her and her work in the field as required by the criterion.

The Petitioner also asserts "in the alternative" on appeal that this criterion is not applicable to the fashion model occupation, even though she has sought to establish her eligibility for it as a fashion model throughout this proceeding. She maintains that she has presented "evidence in fair satisfaction" of this and other criterion while at the same time indicating the "8 C.F.R. § 204.5(h)(3) factors might not 'readily apply' to a model's occupation." She asks that we consider the evidence submitted in support of this criterion as part of a "final merits determination" under the comparable provisions at 8 C.F.R. § 204.5(h)(4), disregarding whether or not it applies to the criteria at 8 C.F.R. § 204.5(h)(3). We incorporate our previous discussion explaining why the Petitioner has not justified her reliance on the comparable evidence clause at 8 C.F.R. § 204.5(h)(4) as an acceptable "alternative" to meeting at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) prior to USCIS conducting a final merits determination under this and the other criterion analyzed in this decision.

For the reasons discussed above, considered both individually and collectively, the Petitioner has not shown that the evidence that she provided constitutes published material about her according to the plain language of this criterion. This criterion is not met.

> *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)

In general, a leading role may be evidenced from the role itself, and a critical role is one in which an individual is responsible for the success or standing of the organization or establishment. In addition, it is the Petitioner's burden to demonstrate the organization or establishment, or the department or division for which she holds or held a leading or critical role, has a distinguished reputation.

In the evidence before the Director, the Petitioner contended she qualifies for this criterion based in part because E-, a fashion magazine, hired a well-established photographer (Q-) for a photo shoot focused on "[B-'s] latest 1945 bag" in which the Petitioner hired to provide services as a fashion model. The Petitioner provided information about Q- and asserts that E- and Q- "can work with anyone they want," suggesting that her participation in the production was critical to its success. Specifically, the Petitioner alleged that by participating in this photoshoot, she played a critical role for the handbag designer, the magazine in which this material was published, and the photographer who took the pictures. The Director denied the petition, in part, noting that the Petitioner is a self-employed fashion model who negotiates temporary contractual work in the occupation, and that the record did not demonstrate that she has held leading or critical roles for organizations with distinguished reputations.

On appeal, the Petitioner points to the fashion brands that she has performed modeling work for, but the evidence provided falls short in establishing, for example, how the Petitioner's involvement in a photoshoot for a marketing campaign that featured B-'s new handbags translates into her performing a leading or critical role for E- magazine or B-, the fashion house that designed the advertised products. The Petitioner provided copies of the photos taken during this and other photoshoots, and evidence that she was credited as the model in these marketing campaigns. The Petitioner posits "it would seem

that a model in a top [f]ashion magazine couldn't help but be "critical" to not only the top fashion magazine, but also the brands they are modeling," but she did not provide evidence to substantiate and explain how her claimed leadership and critical role contributions for E- and B- compares to others who are holding positions of authority and responsibility within these organizations. Notably, she has not provided supporting documentary evidence from E- or B- to substantiate that her involvement with these organizations was either leading or critical to them.

As discussed, the Petitioner also looks to her involvement as a fashion model in marketing campaigns for other fashion designers, which were published in various magazines. While the Petitioner asserts that the significance of this evidence was not given sufficient weight by the Director, without more, we agree with the Director that the evidence is insufficient to substantiate her assertions. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chaw*athe, 25 I&N Dec. at 376. This criterion is not met.

C. Summary and Reserved Issue

The record does not establish that the Petitioner meets the two evidentiary criteria discussed above. As such, the Petitioner has not met the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3). Detailed discussion of the one remaining criteria at 8 C.F.R. § 204.5(h)(vii) cannot change the outcome of the appeal. Therefore, we reserve and will not address this remaining issue. *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *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).

D. Prior O-1 Approval

We acknowledge that the Petitioner has been the beneficiary of an approved O-1 petition, a classification for nonimmigrants of extraordinary ability. Although USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the Petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different statute, regulations, and case law. The nonimmigrant and immigrant categories have different criteria, definitions and standards for persons working in the arts. For instance, the "Extraordinary ability in the field of arts" in the nonimmigrant O-1 category means distinction. 8 C.F.R. § 214.2(o)(3)(ii). But in the immigrant context, "extraordinary ability" reflects that the individual is among the small percentage at the very top of the field.

Finally, our authority over the USCIS service centers, the office adjudicating the nonimmigrant visa petition, is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of an individual, we are not bound by a decision of a service center or district director. *See La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *3 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001)

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 material in the aggregate, concluding that while we acknowledge the Petitioner has achieved success as an international fashion model, the record does not support a finding that she 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) of the Act. 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, the Petitioner has not demonstrated her 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.