U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29530636

Date: FEB. 13, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a visual artist, seeks classification as an individual of extraordinary ability. Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification (EB-1) 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. 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 withdraw the Director's decision and remand this matter for the entry of a new decision consistent with the following analysis.

I. LAW

An individual is eligible for the extraordinary ability classification if they have extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and their achievements have been recognized in the field through extensive documentation; they seek to enter the United States to continue work in the area of extraordinary ability; and their entry into the United States will substantially benefit prospectively the United States. Section 203(b)(1)(A) 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 may demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). Absent such an achievement, a petitioner must provide sufficient qualifying documentation demonstrating that they meet at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

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 Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner is a visual artist who specializes in creating large-scale murals. He intends to continue working as an artist in the United States.

As a preliminary matter, we acknowledge that the Petitioner has been the Beneficiary of an approved O-1B petition. Although USCIS has approved at least one O-1B nonimmigrant visa petition filed on behalf of the Petitioner, this 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. "Extraordinary ability in the field of arts" in the nonimmigrant O-1B 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. 8 C.F.R. § 204.5(h)(2).

Because the Petitioner has not indicated or shown that he 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). The Director determined that the Petitioner met two of the criteria he claimed to have satisfied: display of his work at exhibitions or showcases and his performance in leading and critical roles for organizations or establishments of distinguished reputation. *See* 8 C.F.R. § 204.5(h)(3)(vii) and (viii). The record supports this determination. The Director concluded, however, that the Petitioner did not establish that he met the criteria at 8 C.F.R. § 204.5(h)(3)(iii) or (ix).

On appeal, the Petitioner states he does not contest the Director's conclusion regarding his qualifications under 8 C.F.R. § 204.5(h)(3)(ix). An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-,* 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-,* I&N Dec. 657, 658 n.2 (BIA 2012)). He asserts on appeal that he meets the criteria at (iii), contending material about him and his work has been published in major trade publications and major media. He alleges that the Director failed to explain why the evidence submitted was insufficient to satisfy the criterion and that the Director failed to properly apply the preponderance-of-the-evidence standard. Upon review, we conclude that the Petitioner has met the criterion at 8 C.F.R. § 204.5(h)(3)(iii).

> *Published material about the individual in professional or major trade publications or other major media, relating to the individual'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 Petitioner has submitted articles in which he is interviewed or in which his work is discussed in online and print publications in Argentina such as C-, P-, and I-. The Director determined in part that as the foreign language translations of these articles were largely insufficient, the evidence did not satisfy the plain language of the criterion. Any document provided to USCIS in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that they are competent to translate from the foreign language into English. *Id.* We reviewed the foreign language articles and the accompanying English translations and conclude that the English translations comport with the regulatory requirements at 8 C.F.R. § 103.2(b)(3). We also observe that, with the exception of one article, the foreign language articles are about the Petitioner and his work as required by the plain language for the criterion.

The Director also determined that the Petitioner did not submit sufficient evidence to establish circulation data or unique site visit numbers to demonstrate that the articles were from professional or major trade publications or other major media. We disagree. The Petitioner submitted circulation and readership data from independent data collection and consolidation companies and a business collaboration platform showing high readership for publications in which articles about the Petitioner and his work appeared. Notably, one third-party source in the record for this information is a federally funded organization promoting freedom of the press; this organization—which is verifiable through a search of open sources—monitors media platforms throughout the world primarily using publicly available data and data obtained directly from media companies, political representatives, and research institutes. The evidence of record is sufficient to show that several of the publications in which material about Petitioner and his work appeared are recognized nationally in Argentina—including some operated by G-C-, a major media conglomerate. We conclude that the Petitioner has satisfied this criterion.

III. CONCLUSION

Because the Petitioner has established his qualifications under criteria at 8 C.F.R. § 204.5(h)(3)(iii), (vii), and (viii), we will withdraw the Director's denial of the petition and remand the matter for further review and entry of a new decision. On remand, the Director should conduct a final merits review of the evidence of record. The new decision should include an analysis of the totality of the evidence evaluating whether the Petitioner has demonstrated, by a preponderance of the evidence, his sustained national or international acclaim, his status as one of the small percentage at the very top of his field of endeavor, and that his achievements have been recognized in the field through extensive documentation. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2), (3); *see also Kazarian*, 596 F.3d at 1119-20.

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