U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9570850

Date: AUG. 10, 2020

Motion on Administrative Appeals Office Decision

Form I-129, Petition for Nonimmigrant Worker (Extraordinary Ability – O)

The Petitioner, a talent management agency, seeks to classify the Beneficiary, an actress, as an individual with a demonstrated record of extraordinary achievement in the motion picture or television industry. To do so, the Petitioner seeks O-1 nonimmigrant classification, available to foreign nationals whose achievements in this industry have been recognized in the field through extensive documentation. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i).

The Director of the California Service Center denied the petition, concluding that the Petitioner did not satisfy any of the six initial evidentiary criteria, of which it must meet at least three. We dismissed the Petitioner's appeal from that decision. The matter is now before us on a combined motion to reopen and reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss both motions.

I. LAW

A motion to reconsider is based on an *incorrect application of law or policy*, and a motion to reopen is based on documentary evidence of *new facts*. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3), and the requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.[1]

[1] The Petitioner did not include the required "statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding." 8 C.F.R. § 103.5(a)(1)(iii). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

In dismissing the appeal, we determined that the Petitioner satisfied only one of the initial evidentiary criteria, relating to high salary or remuneration at 8 C.F.R § 214.2(o)(3)(v)(B)(*6*). In the Petitioner's motion to reconsider, it argues that it submitted evidence showing that it satisfied four additional criteria, relating to lead or starring participant in productions or events at 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*), published material at 8 C.F.R. § 214.2(o)(3)(v)(B)(*2*), lead, starring, or critical role for organizations and establishments at 8 C.F.R. § 214.2(o)(3)(v)(B)(*3*), and commercial or critically acclaimed successes at 8 C.F.R. § 214.2(o)(3)(v)(B)(*4*).[2] In its motion to reopen, the Petitioner presents additional documentation. Although its motion brief does not indicate which criteria this evidence is intended to support, we will nevertheless consider this evidence as it pertains to the relevant criterion. For the reasons discussed below, the Petitioner's motion to reconsider does not establish that we erred in our prior decision. Further, the new evidence submitted in support of the motion to reopen does not demonstrate that the Petitioner satisfied at least three of the six categories listed at 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*)-(*6*).

A. Motion to Reconsider

First, the Petitioner asserts that the Director did not apply the appropriate standard of proof, the "preponderance of the evidence" standard, an argument it previously advanced in its appeal. The Petitioner cites to *Matter of Chawathe*, 25 I&N Dec. 360 (AAO 2010), in which we explained that the proper standard of proof is the "preponderance of the evidence" standard, and to *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), discussing "more likely than not" as a greater than 50 percent chance of an occurrence taking place. The Petitioner states: "the Petitioner does not have to establish the Beneficiary's eligibility beyond a reasonable doubt or even by clear and convincing evidence. However, the mentioned higher evidentiary standards appeared to be applied by the Director during [the] adjudication process in the instant case." Here, the Petitioner's contentions pertain to the Director's decision, and therefore do not show how our dismissal of its appeal was incorrect as a matter of law or policy. Regardless, the Petitioner does not discuss or point to any specific examples of how the Director applied a standard higher than the "preponderance of the evidence" standard, and a review of the decision does not reveal that the Director applied a higher standard of proof.

The Petitioner also asserts on motion that we "appear to apply the higher standard than it is set at the current regulations, effectively requiring the [P]etitioner to prove that the [B]eneficiary is one at the top of her profession." Our appellate decision, however, did not mention or impose such a requirement. Regardless, we will address below the Petitioner's assertion that we may have gone beyond the regulatory requirements. The Petitioner contends that it meets four additional criteria. We will discuss the Petitioner's submission of new evidence under the motion to reopen section.

Regarding the criterion relating to lead or starring role in productions or events at 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*), in our appellate decision we determined that although the record reflects that the Beneficiary *has performed* in a lead or starring role in the short films [redacted] and [redacted] the Petitioner had not submitted, as required, critical reviews, advertisements, publicity

[2] On motion, the Petitioner does not claim to meet the previously claimed criterion related to significant recognition for achievements at 8 C.F.R. § 214.2(o)(3)(v)(B)(*5*).

releases, publications, contracts, or endorsements to establish that the productions themselves have a distinguished reputation. The Petitioner disputes our conclusions without directing to a particular law, regulation, or policy that specifically shows that we erred in our determinations. Instead, the Petitioner makes the general, unsupported assertion that "[i]t is hard to imagine that the productions mentioned in the record will not satisfy this [distinguished reputation] requirement." However, disagreeing with our conclusions without establishing that we erred as a matter of law or policy or pointing to precedent decisions that contradict our analysis of the evidence is not a ground to reconsider our decision. *See Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (finding that a motion to reconsider is not a process by which the party may submit, in essence, the same brief and seek reconsideration by generally alleging error in the prior decision). While we acknowledged that the record contains documentation that [redacted] was screened at the [redacted] Film Festival [redacted] and the [redacted] Movie Festival, we concluded that the scope and significance of being screened at those festivals had not been explained or documented. The Petitioner has not shown how we erred in determining that the record does not establish that those productions have a distinguished reputation.

In addition, although our appellate decision concluded that the evidence reflects that Beneficiary *will perform* the lead role of [redacted] in the feature film [redacted] we determined that the record, when viewed in its totality, does not establish that the upcoming film is a production or event that enjoys a distinguished reputation, as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements. Our prior decision indicated that at the time the petition was filed it appeared that the project [redacted] was in its nascent stages. The deal memo overview indicated the production had a budget of $250,000, [redacted] will be its director, and it was anticipated that the film's distribution will be through [redacted] and [redacted] We also noted that it is not unusual for a distinguished motion picture or television production to generate press within the industry during pre-production, such as when it casts lead roles or hires a director. We determined that although the record on appeal demonstrated that [redacted] will direct and possibly distribute [redacted] it did not establish the distinguished reputation of the project itself. Further, we could not conclude, based on the limited evidence submitted, that [redacted] is of such renown that any project he considers placing into development can also be considered to have a distinguished reputation. On motion, the Petitioner asserts that because [redacted]'s film [redacted] "is available on [redacted]" this "indicates distinguished reputation for both [redacted] and his work product in the field."[3] Without evidence, in the form required, establishing that the upcoming production [redacted] has a distinguished reputation, the Petitioner has not demonstrated that it meets this criterion.

In reference to the lead, starring, or critical role for organizations and establishments criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(*3*), our appellate decision noted that the Petitioner claimed that the Beneficiary satisfies this criterion based upon her past roles in film and television productions. We agreed with the Director that the fact that the Beneficiary may have played a leading role in some of those productions is not sufficient to satisfy this criterion's requirements. We concluded that the Petitioner did not demonstrate how such productions qualify as organizations, or that the Beneficiary played a lead, starring or critical role for the production companies of any of those productions. In addition, we determined that the record does not provide background information or documentation regarding those production companies establishing the reputation of those organizations. The Petitioner

[3] Although the Petitioner's motion indicates that its submission includes documentation establishing that [redacted] is available on [redacted], the record before us does not include this evidence.

provided screenshots from www.pro.imdb.com for [redacted] and [redacted] the production companies for [redacted] and [redacted] respectively, but it did not provide independent evidence to establish that they have a distinguished reputation, and the testimonial letters submitted do not address the reputation of those organizations. Our appellate decision further noted that the Petitioner must also establish that the Beneficiary will prospectively provide services in a lead, starring, or critical role for organizations or establishments that have a distinguished reputation. We concluded that, although the Petitioner has established the Beneficiary's job title on [redacted] the submitted evidence does not describe how she will contribute to the film's production company as a whole, or how her position fits within the overall hierarchy of the company. In addition, as previously mentioned, our prior decision determined that the Petitioner did not provide sufficient evidence to demonstrate that [redacted] enjoys a distinguished reputation. The Petitioner does not identify any specific error of law or policy in our appellate decision relating to this criterion.

Regarding the published material criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(*2*), the Petitioner asserts that it previously provided "evidence including the newspaper circulation and traffic statistics." In our prior decision, we concluded that, although the Petitioner provided information about several publications from their websites, a screenshot from SimilarWeb pertaining to the rankings and viewing statistics of Rafu.com, and screenshots from SiteWorthTraffic pertaining to the rankings and viewing statistics of Rafu.com, glendalenewspress.com, and japanconnection.us, it did not show the significance of those publications' rankings and viewing statistics or explain how such information reflects status as major media. We further determined that the provided articles and press release pertaining to the Beneficiary from the websites articles.glendalenewspress.com, onstagelosangeles.blogspot.com, japanconnection.us, and latimes.com are about productions in which the Beneficiary performed and are not about the Beneficiary. Rather, they only briefly mention the Beneficiary. In addition, while the authors of the published material may speak positively of her performances, the articles do not recognize the Beneficiary's individual achievements in the motion picture industry as an actress or the national/international recognition she received for such achievements. The article from japanconnection.us reflects that the actors in the [redacted] acting company, of which the Beneficiary is a member, are "[a] group of young and ambitious actors" who "have taken their careers into their own hands and have created a workshop" and "produce and appear in a production of their own," indicating that the Beneficiary was an up-and-coming actress, rather than an actress who is already nationally recognized for her achievements in the field. The Petitioner has not shown that our determination for this criterion was incorrect.

In reference to the commercial or critically acclaimed successes criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(*4*), our appellate decision noted that this criterion specifically requires documentation of commercially or critically acclaimed successes as reported in publications, and that in the Beneficiary's field, evidence satisfying this criterion would reasonably include evidence of box office revenue, video sales, and similar evidence of tangible achievements in the motion picture industry. The Petitioner asserted that the Beneficiary satisfies this criterion based upon her performances in [redacted] and [redacted] We determined that, while [redacted] and [redacted] were the recipient of awards at film festivals, and [redacted] was screened at the Sundance 2014 [redacted] sidebar, the plain language of this criterion specifically requires documentation of the Beneficiary's commercially or critically acclaimed success as reported in published format. We concluded that the Petitioner had not shown that the Beneficiary received those awards, or that those awards or the aforementioned film festival

screenings are an indicator of a record of commercial or critical success. Assuming that correlation had been established, the record does not include evidence that such critical or commercial success was memorialized in trade journals, major newspapers, or other publications such that her achievement was acknowledged in the industry at-large. On motion, the Petitioner argues that the Beneficiary satisfies this criterion because she has performed in the "commercially . . . sellable" film [redacted] which it claims is available for purchase at Best Buy.[4] Without evidence showing the Beneficiary's record of commercially or critically acclaimed successes as reported in publications, the Petitioner has not established that it meets this criterion.

For the reasons discussed above, the motion does not establish that our latest decision was incorrect based on the evidence of record at the time of the decision. Therefore, the motion to reconsider is dismissed.

B. Motion to Reopen

In its motion to reopen, the Petitioner presents additional documentation. As mentioned previously, the Petitioner does not indicate which criteria this evidence is intended to support. The record shows that the film [redacted] in which the Beneficiary performed, was a finalist for the Grand Prize at the [redacted] Film Festival and received nominations for [redacted] at the [redacted] Film Festival and the [redacted] International Film Expo. With the current motion, the Petitioner submits articles from the online encyclopedia *Wikipedia* about the [redacted] Film Festival, [redacted] Film Festival, and the [redacted] International Film Expo, however, those articles are insufficient to establish the distinguished reputation of that film.[5] While its selection for screening at film festivals is an indicator of some measure of success, the evidence submitted falls significantly short of establishing that [redacted] has enjoyed a distinguished reputation as of the date of filing.[6] Therefore, the Petitioner has not overcome our finding that it does not meet the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*). As the evidence does not demonstrate eligibility, the motion to reopen is dismissed.

III. CONCLUSION

The assertions made by the Petitioner on motion do not establish that our previous decision was grounded in an incorrect application of law or policy. In addition, the new evidence submitted on motion does not overcome the grounds underlying our previous decision or demonstrate eligibility for this classification.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.

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[4] Although the Petitioner's motion indicates that its submission includes documentation establishing that [redacted] is available at Best Buy, the record before us does not include this evidence.

[5] We note that Wikipedia is an online, open source, collaborative encyclopedia that explicitly states it cannot guarantee the validity of its content. *See General Disclaimer, Wikipedia* (July 27, 2020) https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer; *Badasa v. Mukasey*, 540 F.3d 909 (8th Cir. 2008).

[6] On motion, the Petitioner suggests that this evidence also establishes "the distinguished reputation in the field for [redacted] the director of [redacted]" however, the record reflects that film was directed by [redacted]