U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8959965

Date: DEC. 16, 2020

Appeal of California Service Center Decision

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

The Petitioner, an agent, seeks to classify the Beneficiary, a [redacted] tattoo artist, as an O-1 nonimmigrant, a visa classification available to foreign nationals who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements 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 Form I-129, Petition for a Nonimmigrant Worker, concluding that the Petitioner did not establish that the Beneficiary satisfied the initial evidentiary criteria applicable to individuals of extraordinary ability in the arts: nomination for or receipt of a significant national or international or award, or at least three of six possible forms of documentation.

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

I. LAW

As relevant here, section 101(a)(15)(O)(i) of the Act establishes O-1 classification for an individual who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. Department of Homeland Security (DHS) regulations define "extraordinary ability in the field of arts" as "distinction," and "distinction" as "a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts." 8 C.F.R. § 214.2(o)(3)(ii).

Next, DHS regulations set forth alternative initial evidentiary criteria for establishing a beneficiary's sustained acclaim and the recognition of achievements. A petitioner may submit evidence either of nomination for or receipt of "significant national or international awards or prizes" such as "an Academy Award, an Emmy, a Grammy, or a Director's Guild Award," or at least three of six listed categories of documents. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B). If the petitioner demonstrates that the listed criteria do

not readily apply to the beneficiary's occupation, it may submit comparable evidence to establish eligibility. 8 C.F.R. § 214.2(o)(iv)(C).

The submission of documents satisfying the initial evidentiary criteria does not, in and of itself, establish eligibility for O-1 classification. See 59 Fed. Reg. 41818, 41820 (Aug. 15, 1994) ("The evidence submitted by the petitioner is not the standard for the classification, but merely the mechanism to establish whether the standard has been met."). Accordingly, where a petitioner provides qualifying evidence satisfying the initial evidentiary criteria, we will determine whether the totality of the record and the quality of the evidence shows extraordinary ability in the arts. See section 101(a)(15)(o)(i) of the Act and 8 C.F.R. § 214.2(o)(3)(ii), (iv).[1]

II. ANALYSIS

Absent evidence the Beneficiary has been nominated for, or received, a significant national or international award or prize, the Petitioner seeks to demonstrate the Beneficiary's sustained acclaim and recognition of achievements through evidence corresponding to at least three of the six initial evidentiary criteria at 8 C.F.R § 214.2(o)(3)(iv)(B). The Director determined that the Petitioner provided evidence relating to four criteria, but the Beneficiary did not satisfy any of them. The Petitioner maintains on appeal that the Beneficiary fulfills those four criteria. For the reasons discussed below, we find that the Beneficiary does not meet at least three of the evidentiary categories.

> Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements. 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

The Petitioner argues eligibility for this criterion based on that "[the Beneficiary] was hired to perform a tattoo on world-renowned [redacted]" and it "is only required to show that evidence regarding [redacted]s notoriety probably indicates that tattooing someone so famous is considered a distinguished event." In addition, the Petitioner asserts that "[g]iven [redacted]'s stature, a letter from her is not readily available," and [redacted] requested absolute confidentiality from [the Beneficiary]." To support these claims, the Petitioner submitted "a photo of [the Beneficiary] with [redacted]," "a post on [the Beneficiary's] professional Instagram page showing the before and after photo of [redacted]s tattoo," "an article discussing [redacted]s tattoos," and "a letter from [redacted]'s former au pair who has first-hand knowledge of the event confirming the facts."

The regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) requires the Petitioner to demonstrate that the Beneficiary "has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements." Here, the Petitioner has not established that the documentation reflects "critical reviews, advertisements, publicity releases, publications contracts, or endorsements" as required by the regulation. In fact, the Petitioner contends that "given

[1] See also Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010), in which we held that, "truth is to be determined not by the quantity of evidence alone but by its quality."

the particular facts surrounding the event, advertisements, publicity releases, publications, magazine articles, written reviews from critics, contracts, endorsements, [and] materials from trade journals do not readily apply." In addition, the Petitioner argues that "the best evidence, comparable evidence, which confirm [the Beneficiary's] lead role in the distinguished event should be considered credible and probative evidence."

The regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C) provides that "[i]f the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility."[2] However, the Petitioner did not demonstrate that this regulatory criterion does not readily apply to the Beneficiary's occupation as a tattoo artist. Instead, the Petitioner argues that it cannot produce required regulatory evidence to support its own claim, which is not a basis to consider comparable evidence. If the petitioner establishes that a particular criterion is not readily applicable to the beneficiary's occupation, the petitioner may then use the comparable evidence provision to submit additional evidence that is not specifically described in that criterion but is comparable to that criterion.[3] For comparable evidence to be considered, the petitioner must explain why a particular evidentiary criterion listed in the regulations is not readily applicable to the beneficiary's occupation as well as why the submitted evidence is "comparable" to that criterion.[4] Here, the Petitioner did not show that the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) does not readily apply to the Beneficiary's occupation. In fact, as discussed further below, the Petitioner makes additional arguments of eligibility based on the Beneficiary's previous and future roles in productions or events, indicating that the criterion does apply to the Beneficiary's occupation. Thus, the Petitioner's failure to present regulatory evidence to support its own claim does not necessarily mean the inapplicability of the criterion to the Beneficiary's occupation.[5]

As the Petitioner did not establish that the photos, Instagram post, and former au pair letter satisfy the regulatory evidence of critical reviews, advertisements, publicity release, publications contracts, or endorsements, the Petitioner did not demonstrate that the claim of tattooing [redacted] meets this criterion, including through the submission of comparable evidence.

The Petitioner also contends that the Beneficiary "performed as the only [redacted] tattoo artist in flash days for two of the most prestigious tattoo studios in Brazil, [redacted] and [redacted]." The Petitioner references an article from marketplace.org reflecting that "[t]attoo flash days are not only a way to draw in more traffic, but a way for customers to get a chance to collect tattoos from prominent tattoo artists, who can be booked for months or even years." In support of the flash day event at [redacted] the Petitioner submitted screenshots from facebook.com/events entitled, [redacted] advertising the event and listing the Beneficiary as 1 of 11 tattoo artists attending the event. Similarly, regarding [redacted] the Petitioner provided an advertisement document for [redacted] listing the Beneficiary as 1 of 10 tattoo artists scheduled to appear at the occasion. In addition, the Petitioner presented screenshots from

[2] See also 2 USCIS Policy Manual M.4(D), https://www.uscis.gov/policymanual.
[3] Id.
[4] Id.
[5] Id (instructing that officers do not consider comparable evidence if the petitioner submits evidence in lieu of a particular criterion that is readily applicable to the beneficiary's occupation simply because the beneficiary cannot satisfy that criterion).

estudioteix.blogspot.com entitled [redacted]' in which the Beneficiary is listed as 1 of 10 tattoo artists expected at the affair.

The documentation, however, does not show that the Beneficiary performed as a lead or starring participant. For instance, the evidence does not distinguish the Beneficiary from the other tattoo artists at either event. Moreover, the exhibits do not feature the Beneficiary as a leading or starring participant, such as receiving top billing or advertising her as the highlight of the events. Here, the Petitioner did not demonstrate that simply being listed as 1 of 10 or 11 tattoo artists scheduled to appear at a flash day event in advertising material reflects evidence of the Beneficiary's leading or starring participation. Furthermore, the Petitioner did not establish that the evidence represents the distinguished reputations of [redacted]" and [redacted]" While the above-mentioned screenshots advertise the respective flash day events, the Petitioner did not explain, nor do they show, how they illustrate their distinguished reputations.

The Petitioner also indicates the submission of recommendation letters "from [redacted] owner of [redacted]; [redacted] owner of [redacted] and [redacted] co-founder of the [redacted] and "[a]ll of the letters confirmed [the Beneficiary's] critical role as the only [redacted] artist in the flash-day events." However, the Petitioner did not demonstrate how recommendation letters qualify as "critical reviews, advertisements, publicity releases, publications contracts, or endorsements" consistent with this regulatory criterion. In addition, this regulatory criterion requires the Beneficiary's participation in a leading or starring capacity rather than in a critical role, as argued by the Petitioner.

Finally, this regulatory criterion requires that the Beneficiary will prospectively perform for services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements. The Petitioner argues that "the record contains publications that confirm that [redacted] has celebrity clientele and the deal memo signed by the studio confirming that [the Beneficiary] will perform tattoos as a [redacted] Tattoo Artist" and "[t]his credible and probative evidence proves that it is more likely than not that [the Beneficiary] will be tattooing [redacted] A-list clientele in the future." The record reflects that in response to the Director's request for evidence, the Petitioner submitted a "Deal Memo," signed by [redacted] studio manager for [redacted] on July 22, 2019, signed by the Petitioner on July 24, 2019, and signed by the Beneficiary on July 28, 2019. However, the Petitioner filed the petition on June 6, 2019. The Petitioner must establish that all eligibility requirements for the immigration have been satisfied from the time of the filing and continuing through adjudication. See 8 C.F.R. 103.2(b)(1). Here, the Petitioner did not demonstrate that at the time of filing of the petition the Beneficiary would be performing services at [redacted]

Nonetheless, the Deal Memo does not show that the Beneficiary will be performing services as a lead or starring participant in productions or events that have a distinguished reputation. Although the document indicates that the Beneficiary "will work at [redacted] as [redacted] Tattoo Artist" and "will work at our studio during various one-week periods," the Petitioner did not establish how the evidence reflects the Beneficiary's prospective leading or starring participation in a production or event with a distinguished reputation. The Deal Memo does not indicate how the Beneficiary's position as a [redacted] tattoo artist represents a leading or starring role, nor does it demonstrate that

"various one-week periods" portrays productions or events with distinguished reputations. In addition, the Deal Memo does not support the Petitioner's assertion on appeal that the Beneficiary "will be tattooing [redacted]'s A-list clientele in the future."

For the reasons discussed above, the Petitioner did not establish that the Beneficiary satisfies this criterion.

> Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications. 8 C.F.R. § 214.2(o)(3)(iv)(B)(2).

The Petitioner contends that it provided "[a]n article which discusses a list of about 100 women tattoo artists that everyone should know about lists [the Beneficiary] as one of these artists" and "an article in which [the Beneficiary] explains her one-of-a-kind technique." The record contains two articles posted on blog.tattoo2me.com. The first blog article entitled, '[redacted]' lists the Beneficiary's name along with other numerous tattoo artists in Brazil. The article does not discuss any of the Beneficiary's achievements evidencing national or international recognition. In fact, the article provides no discussion of the Beneficiary besides listing her name among others. The second blog article entitled, '[redacted]' discusses the Beneficiary, including quoting her on various opinions and topics. Although the article provides '[redacted]' it does not reflect that her technique resulted in national or international recognition. The article, for instance, does not indicate that the Beneficiary garnered national or international recognition or became nationally or internationally known for her "one-of-a-kind technique."

Further, while the Petitioner asserts that "[c]irculation figures provided . . . demonstrate that tattoo2me is a leading publication in the field," the Petitioner did not demonstrate that blog.tattoo2me.com represents a major newspaper, trade journal, magazine, or other publication. Although the Petitioner submitted a screenshot from tattoo2me.com claiming that the blog has "over 110,00 monthly readers," the Petitioner did not submit independent, objective evidence establishing the blog figures. In addition, the Petitioner offered screenshots from blog.feedspot.com regarding "[t]he Best Tattoo blogs from thousands of top Tattoo blogs in our index using search and social metrics." Notwithstanding that blog.tattoo2me.com is not listed among them, the screenshots list numbers of "Facebook fans" for the blogs. While the majority of the indexed blogs maintain hundreds of thousands to millions of fans, tattoo2me.com claims "over 30,000 followers," which the Petitioner has not shown constitutes major status.

The Petitioner also argues that "[i]n an article by Diariodonordeste, a leading publication, about the tattoo industry, [the Beneficiary] is quoted as an expert, providing her own experience in the field." The record contains screenshots of an article from diariodonordeste.verdesmares.com.br entitled, '[redacted]' in which the Beneficiary is quoted regarding relationship and identity tattooing, but the article makes no references to her achievements or to her national or international recognition. Here, the Petitioner did not establish that the article shows the Beneficiary's national or international recognition for her achievements. Moreover, while the Petitioner provided the website's statistics

relating to "views per month," "home page views per month," "sessions per month," and "users per day/average" from Google Analytics, the Petitioner did not demonstrate the significance of the figures, indicating diariodonordeste.verdesmares.com.br's major standing.

Finally, the Petitioner asserts that it "provided credible and probative evidence that one of the beneficiary's [redacted] tattoo designs was accepted to the only tattoo museum in Brazil." The record reflects that the Petitioner submitted a letter from [redacted], who stated that Beneficiary's "work is showcased in our museum's collection"; a "Confirmation of Donation to Collection" signed by [redacted] a photograph of the Beneficiary with a handwritten caption indicating that her work is showcased in the museum; and screenshots from vejasp.abril.com.br, sisemsp.org.br, atlasobscura.com, and naosoogato.com.br about the museum. On appeal, the Petitioner offers the same photograph with the handwritten caption, screenshots from the Beneficiary's Instagram page posting the tattoo, and screenshots from artworkarchive.com regarding the donation of art collections.

The Petitioner did not demonstrate that the evidence reflects critical reviews or other published materials by or about the Beneficiary in major newspapers, trade journals, magazines, or other publications. Furthermore, none of the screenshots mention the Beneficiary or her work, let alone indicate her national or international recognition for achievements. In fact, as mentioned above, the screenshots relate to coverage of the museum and to donating art collections. Moreover, the Petitioner did not supplement the record with documentation showing that any of the websites qualify as major newspapers, trade journals, magazines, or other publications.

Accordingly, the Petitioner did not demonstrate that the Beneficiary meets this criterion.

III. CONCLUSION

The Petitioner did not establish that the Beneficiary meets the criteria relating to services as a lead or starring participant in production or events at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) and national or international recognition for achievements at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2). Although the Petitioner claims the Beneficiary's eligibility for two additional criteria on appeal, relating to lead, starring, or critical role for organizations and establishments at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3) and significant recognition for achievements at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5), we need not reach these additional grounds. As the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 214.2(o)(3)(iv)(B), we reserve these issues.[6] Consequently, the Petitioner has not demonstrated the Beneficiary's eligibility for the O-1 visa classification 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.

[6] 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 L-A-C-, 26 I&N Dec. 516, n.7 (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).