U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29204683

Date: FEB. 22, 2024

Appeal of California Service Center Decision

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

The Petitioner, a restaurant, seeks to classify the Beneficiary as an executive chef of extraordinary ability. To do so, the Petitioner pursues O-1 nonimmigrant classification, available to individuals 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 the petition, concluding the Petitioner did not establish the Beneficiary's satisfaction of the initial evidentiary criteria applicable to individuals of extraordinary ability in the arts: nomination for or receipt of a significant national or international award, or at least three of six possible forms of documentation. Subsequently, the Director dismissed the Petitioner's combined motion to reopen and motion to reconsider. 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

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." *See* 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. *See* 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B).

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).

II. ANALYSIS

The Director determined the Petitioner did not claim the Beneficiary's nomination for, or receipt of, significant national or international awards or prizes under 8 C.F.R. § 214.2(o)(3)(iv)(A). In addition, the Director concluded the Petitioner did not establish the Beneficiary's eligibility for any of the six claimed categories of evidence under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*). In discussing each criterion, the Director explained how the Petitioner did not demonstrate that the evidence either qualified for the regulatory evidence or established the Beneficiary's eligibility. Furthermore, the Director pointed out inconsistencies and credibility issues with the documentation submitted in response to the request for evidence (RFE). For instance, the Director determined that the Beneficiary's name and other information was inserted into articles submitted by the Petitioner when compared to the original articles found online. Moreover, the Director concluded the Petitioner provided evidence regarding events occurring after the initial filing of the petition.

On motion, the Petitioner did not challenge the Director's individual criterion determinations. Instead, the Petitioner made arguments regarding "knowledge" relating to willful misrepresentation under section 212(a)(6)(C)(i) of the Act, inappropriate application of case law pertaining to eligibility at time of filing, and consideration of "national or international recognition." The Director addressed each of these arguments:

> Your attorney states that the inadmissibility ground under INA 212(a)(6)(C)(i) requires a finding that the misrepresentation was deliberate and voluntary, and that the documents you submitted were summaries of the articles because "the layout and the inherent nature of ALL printed articles in newspapers/journals makes it too unwieldly to attach these write-ups in their entirety." USCIS first notes that it did not make an inadmissibility finding; rather, due to the unexplained discrepancies between the language in the documents you submitted and the language found in the articles online through public records searches, USCIS questioned the credibility and probative value of several of the documents and also whether they fell within the prescribed forms of evidence for the criteria. You now indicate that the documents you provided were summaries of the articles. However, with regard to the [redacted] article in spiceroverindia.com, you have not explained how replacing one name with the beneficiary's name from elsewhere in the article constitutes a "summary." Specifically, as noted in the denial, while you provided: [redacted] oriental cuisine restaurant

conceptualized by Chef [redacted] and Brand Chef [the Beneficiary]," the actual article states: [redacted] is an oriental cuisine restaurant conceptualized by Chef [redacted] in partnership with [redacted] (a hotelier with years of experience)." In the full article that you have now provided, you have shown that the beneficiary is mentioned in the article as the Brand Chef, but only to say that "We had a chat with the Brand Chef, Chef [the Beneficiary] who informed us that they make all the sauces in-house and they're not sourced from outside." There is no indication in the article that the beneficiary "conceptualized" the restaurant as asserted in your "summary." You also provided a complete copy of the [redacted] article, but it does not address or remedy the issues raised in the denial that the article "states that the beneficiary is a chef at [redacted] and provide some stir fry sauce recipes.["] While this article falls within the prescribed forms of evidence, the statement of the beneficiary's occupation does not demonstrate that the beneficiary played a lead or starring role in distinguished events.[] These are the only two articles for which you provided complete copies, and therefore, you have not addressed or remedied the issues raised in the denial regarding the credibility, probative value, and permitted forms of evidence of your summaries.

Next, your attorney argues that the denial analysis relies on Mater of Bardouille, 18 I&N Dec. 114 (BIA 1981), Matter of Drigo, 18 I&N Dec. 223 (BIA 1982), and Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Comm'r 1971), and that they are "predicated on adjudications that are completely removed from the present case." However, USCIS indicated that it could not consider evidence that did not establish eligibility at the time of filing based on the regulation at 8 CFR 103.2(b)(12). USCIS cited to the BIA decisions merely as further support of this regulation. In addition, your attorney argues that, based on Matter of F-M- Co., Adopted Decision 2020-01 (AAO May 5, 2020), articles dated after the filing date are appropriate because the beneficiary's role in the [redacted] expanded due to a subsequent acquisition of operation in other cities, and "Matter of F-M- Co. clarifies that in the event of a restructuring (or acquisition) affects the petitioning organization, a petitioner may establish that the role of the beneficiary is expanded after the acquisition commanding increasing leadership responsibilities and a higher salary." However, Matter of F-M- Co. is not about and does not mention a beneficiaries role following a restructuring event. Rather, it clarifies that for first preference multinational executives for managers, "the regulations require that a petitioner maintain its qualifying relationship [with the foreign employer] from the time of filing and through adjudication of the petition," and that "in the event a corporate restructuring affecting the foreign entity occurs prior to the filing of a first preference multinational executive or manager petition, a petitioner may establish that the beneficiary's qualifying foreign employer continues to exist and do business through a valid successor entity."

Finally, your attorney argues that "The service needs to consider the analysis presented in the Matter of T-O-S-U, Adopted Decision 2017 (AAO Jan 4, 2017). The phrase 'of national or international recognition…' in the statute has been interpreted in Taniguchi v. Kan Pacific Saipan Ltd., 132 S. Ct. 1997, 2002-03 (2012)… The respondent has provided relevant, credible and probative evidence regarding the beneficiary's

credentials and employments demonstrating that he is a highly experienced Brand Chef with several leadership skills. The evidence also establishes the volume and complexity of restaurant and brand management processes that the Beneficiary has excelled at with various employers." Your attorney then points to the two additional testimonials provided with the motion. Matter of T-O-S-U- involved an H-1B nonimmigrant worker petition, and clarifies that "for purposes of 8 C.F.R. § 214.2(h)(4)(viii)(C), a "physician of national or international renown is: (1) doctor of medicine or osteopathy, (2) who is widely acclaimed and highly honored in the field of medicine within one or more countries, (3) so long as the achievements leading to national renown are comparable to that which would result in national renown in the United States." The AAO noted that several terms were not defined in the statute or regulations, and therefore, consistent with Taniguchi v. Kan Pacific Saipan Ltd., it would look to their common usage and meaning within nonimmigrant and immigrant classifications. Regarding "national or international," the AAO found that the phrase means within one (whether foreign or the United States) or more countries. To help determine what kinds of evidence may demonstrate a physician of national or international renown, that AAO considered among other O-1 extraordinary ability criteria. However, the only O-1B option for criteria that use the term "national or international" are the qualifying award, which requires a nomination or receipt of a significant national or international award, and criterion 2, which requires evidence that the beneficiary 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. You have not claimed that the beneficiary meets the qualifying award option, and testimonials fall outside of the prescribed forms of evidence for criterion 2.

On appeal, the Petitioner submits a brief mirroring the previous motion brief without addressing the findings in the Director's motion decision. In addition, the Petitioner does not contest the Director's particular motion determinations or specifically identify any erroneous conclusion of law or statement of fact for the appeal of the Director's motion decision. Issues not raised on appeal are 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-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

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 Fr.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 this issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight U.S. Court of Appeals in holding the appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case). The Director's initial decision denying the petition reviewed and analyzed the Petitioner's evidence relating to each of the six claimed categories of evidence. The Director provided a sufficient explanation indicating why the Beneficiary did not qualify for any of the criteria, including evidence containing inconsistencies and credibility issues, as well as evidence submitted in response to the RFE reflecting events occurring after the initial filing of the petition. Moreover, as stated above, the Director thoroughly addressed the Petitioner's arguments and evidence on motion, which were not disputed on appeal.

Consequently, the Petitioner has not resolved inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*; *see also Matter of O-M-O-*, 28 I&N Dec. 191, 197 (BIA 2021) ("by submitting fabricated evidence, the appellant compromised the integrity of his entire claim").

Furthermore, although the Petitioner presents new evidence, we will not consider it for the first time on appeal because the Petitioner was put on notice and given a reasonable opportunity to provide this evidence. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial").

Accordingly, the Petitioner has not demonstrated the Beneficiary's eligibility for any of the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*), in which at least three are required.

III. CONCLUSION

The Petitioner did not establish the Beneficiary fulfills the initial evidentiary requirement of at least three criteria. Accordingly, we need not provide a totality determination to establish whether the Beneficiary has sustained national or international acclaim, has received a high level of achievement, and has been recognized as being prominent, renowned, leading, or well-known in the field of arts. *See* section 101(a)(15)(O)(i) of the Act and 8 C.F.R. § 214.2(o)(3)(ii) and (iv).[1] Accordingly, we reserve this issue.[2] 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.

[1] *See generally* 2 *USCIS Policy Manual*, M.4(D)(4), https://www.uscis.gov.policymanual.

[2] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7. (BIA 2015) (declining to reach alternative issues on appeal where applicants do not meet their burden of proof).