U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18743372

Date: JAN. 14, 2022

Appeal of Vermont Service Center Decision

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

The Petitioner, an artist agent, seeks to represent the Beneficiary during her temporary employment in the United States as a fine artist. To do so, the Petitioner seeks to classify her 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 Vermont Service Center denied the petition, concluding that the Petitioner had not indicated or established that the Beneficiary had been nominated for or received a significant national or international award or prize at 8 C.F.R. § 214.2(o)(3)(iv)(A) or satisfied any of the evidentiary categories described at 8 C.F.R. § 214.2(o)(3)(iv)(B)-(C).

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 the evidentiary criteria for establishing a beneficiary's sustained acclaim and the recognition of achievements. A petitioner must submit evidence either of "significant national or international awards or prizes" such as "an Academy Award, an Emmy, a Grammy, or a Director's Guild Award," or of 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)(3)(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.") In *Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010), we held that, "truth is to be determined not by the quantity of evidence alone but by its quality." That decision explains that, pursuant to the preponderance of the evidence standard, we "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Id.* Accordingly, where a petitioner provides qualifying evidence satisfying the initial evidentiary criteria, we will determine whether the totality of the record shows eligibility under section 101(a)(15)(o)(i) of the Act and 8 C.F.R. § 214.2(o)(1)(ii).

II. ANALYSIS

A. Introduction

The petitioning agent, a graduate professor of studio arts at [redacted] University [redacted] and the Beneficiary's mentor, seeks to represent the Beneficiary during her employment in the United States as a fine artist for a period of three years. According to her resume, the Beneficiary received hers Bachelor of Fine Arts in painting from [redacted] University in [redacted] South Korea in 2015 and her Master of Fine Arts in studio art from [redacted] in 2019.

As a preliminary matter, on appeal the Petitioner contends that the Director applied the wrong standard of proof. As stated, in this proceeding, the correct standard of proof is a preponderance of the evidence, meaning that the Petitioner must show that her claims are "more likely than not" or "probably" true. *Chawathe,* 25 I& N Dec. at 375-76. He contends that the Director improperly imposed the higher standard of clear and convincing evidence. However, 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.

Additionally, we note that on appeal the Petitioner cites to both the regulations for individuals with extraordinary achievement within the motion picture and television field under the requirements of 8 C.F.R. § 214.2(o)(3)(v) and those for individuals of extraordinary ability in the arts pursuant to 8 C.F.R. § 214.2(o)(3)(iv). However, the Petitioner filed the petition asserting the Beneficiary has extraordinary ability in the field of arts, providing a labor consultation from a peer group in that field. Accordingly, we will examine the Beneficiary's eligibility under that requested classification.[1]

[1] We also note, upon review, that the record does not demonstrate the Beneficiary meets three of the required criteria as an individual with extraordinary achievement in the motion picture or television industry, which mirror the criteria for extraordinary ability in the arts. Nor does the record include sufficient evidence or information showing that the Beneficiary has achieved "a very high level of accomplishment in the motion picture or television industry evidenced by

B. The Beneficiary's Eligibility under the Evidentiary Criteria for Extraordinary Ability in the Arts

Because the Petitioner has not indicated or established that the Beneficiary has been nominated for or received a significant national or international award or prize, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*). In denying the petition, the Director determined that the Petitioner provided evidence relating to four criteria, but the Beneficiary did not meet any of them.[2]

On appeal, the Petitioner maintains that the Beneficiary meets four criteria, relating to lead or starring participant in productions or events under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*), national or international recognition for achievements evidenced by published materials under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*2*), lead, starring, or critical role for organizations under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*3*), and, significant recognition for achievements under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*).[3] After reviewing all the evidence in the record, we find that the Petitioner has not established that the Beneficiary satisfies at least three of the six listed categories of documents at 8 C.F.R § 214.2(o)(3)(iv)(B), as discussed below.

> *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 asserts that the Beneficiary satisfies this criterion based upon her past solo and group fine art exhibitions between 2016 and 2020 and future fine art showcases, artist residencies, and artist talks in which she will participate**.**

The Petitioner's initial letter and the Beneficiary's resume indicate her past participation in the following:

- Solo exhibition at [redacted] Content Culture Center ([redacted] 2020)
- [redacted] Artsy Online Exclusive Show (solo exhibition) at [redacted] (2020)
- [redacted] (group exhibition) at [redacted] Gallery ([redacted] 2020)

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a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field." 8 C.F.R. § 214.2(o)(3)(ii).

[2] The Director indicated that the Petitioner did not claim the Beneficiary's eligibility for the major commercial or critically acclaimed successes criterion under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*4*) and high salary criterion under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*6*), and the record supports that determination.

[3] We note that the Director determined that the Petitioner did not establish that the submitted letters of recommendation written by the Beneficiary's present or former colleagues and recognized experts may be used as comparable evidence under the criteria relating to lead or starring participant in productions or events at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*), national or international recognition for achievements evidenced by published materials under 8 C.F.R. § 214.2(o)(3)(iv)(B)(2), and lead, starring, or critical role for organizations under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*3*)**.** The Petitioner does not contest this issue on appeal or offer additional arguments. Therefore, we consider this issue to be abandoned. *See Sepulveda v. U.S. Att'y Gen.,* 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

- [redacted] (group exhibition) at [redacted] Gallery ([redacted] 2016)

The Petitioner provided documentation pertaining to those exhibitions, including testimonial letters, exhibition photographs, screenshots of materials from venue websites, and screenshots of materials from other promotional websites such as artsy.net. As explained below, we agree with the Director that the evidence submitted does not satisfy this criterion.

Some of the submitted testimonial letters contain information that is relevant to this criterion. For example, [redacted] deputy senior manager at [redacted], states that she "directly observed the process of selecting [the Beneficiary's] art pieces for [redacted] as well as her solo exhibition at [redacted]" which was held "to celebrate and appreciate the selection of the Beneficiary's artworks for [redacted]'s permanent collection." She explains that the organization, which supports artists-in-residence in the fields of TV shows, films, games, animation, fashion, and comics, recently decided to purchase a permanent art collection and chose several of the Beneficiary's artworks at the recommendation of two art professors. She indicates the Beneficiary's solo exhibition was "held in a public place with considerable traffic from [redacted] visitors and its artists-in-residence." [redacted] the Beneficiary's art professor at [redacted] University, confirms that her artwork was selected by two colleagues at the university, drawing professors [redacted] and [redacted], to be part of the permanent collection of [redacted]. He also indicates, regarding the Beneficiary's artwork in [redacted] exhibition, that he reviewed the work and felt that her creative interpretation of colors and spaces distinguished her from other participating artists.

The Petitioner's recommendation letter provides that the Beneficiary completed her solo online exhibition [redacted] and the group exhibition [redacted] in which her pieces were "exhibited along with others by internationally and domestically recognized artists such as [redacted] and [redacted]", [redacted], the director of contemporary art at the [redacted] Gallery, provides that she invited the Beneficiary to be in [redacted] after seeing her work in an "MFA grad show." She states that the Beneficiary was "the only artist new to our program and her paintings were an important addition to the show." [redacted] the Beneficiary's art professor at [redacted], confirms that the Beneficiary participated in the [redacted] "group exhibition of young contemporary artists." [redacted], an art professor at [redacted] University, states that the Beneficiary's work [redacted] was exhibited in [redacted] and is "strong evidence of her skill."

[redacted] the Beneficiary's professor at [redacted] provides that although the Beneficiary's past solo and group exhibitions were not large art events, the works she presented at those events were "very significant," for example, "contributing her two-dimensional modern abstract drawings" while other artists used different techniques such as sculpture. [redacted] the Beneficiary's professor at [redacted] states that the Beneficiary's works in [redacted] "stood out" among the abstract works from artists of the "new generation" through her "great skill, the beauty of her work, [and] the evocative color."

While the above letters suggest that the Beneficiary was a solo artist for some shows, consistent with a lead or starring level of participation, they do not clarify how the Beneficiary, as a participant in the aforementioned solo or group exhibitions, has performed in a lead or starring capacity for an event with a distinguished reputation. In addition, the regulation requires critical reviews, advertisements, publicity releases, publications, contracts, or endorsements. Among the advertisements submitted

under this criterion are two articles dated [redacted] 2016 from koreatimes.com and koreadaily.com about [redacted] at the [redacted] Gallery, and a press release dated 2020 from artsy.net about [redacted] at the [redacted] Gallery. The first article about [redacted] titled '[redacted] includes a copy of the artwork of several of the six Korean artists in the exhibition, including that of the Beneficiary, and their brief biographies. It indicates the exhibition will soon be closing, and that those exhibiting are "young artists who have actively worked in Korea, the United States, and Japan." The Beneficiary's biography provides that she is a graduate of [redacted] University and contains her statement that "[redacted]." The second article about [redacted], titled [redacted] mentions that the Beneficiary is among the artists whose work was being displayed. The press release about the group exhibition [redacted] states that the exhibition is "a presentation of recent work by gallery artists both new and familiar," and provides the Beneficiary's name and pictures of her artwork along with those of the other seven exhibited artists.

The above articles do not single out the Beneficiary as having performed as a lead or starring participant and do not corroborate the distinguished reputation of the Beneficiary's group exhibitions. Rather, like the aforementioned exhibition photographs, screenshots of materials from venue websites, and screenshots of materials from other promotional websites, they reflect that those exhibitions have recently occurred or recently opened. In addition, as discussed below under the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*2*), the Petitioner did not document sufficiently the reach of the aforementioned media such that a promotion on their websites is indicative of the distinguished reputation of the event.

Further, the Petitioner provided published materials about [redacted] Gallery from its website, news articles about [redacted] Gallery published on freep.com and metrotimes.com, a brochure about [redacted], published materials about [redacted] from its website, and news articles about [redacted] published on en.yna.co, koreatimes.co.kr, and koreajoongangdaily.joins.com. However, those published materials do not mention the Beneficiary's artwork and her past exhibitions. Therefore, they do not establish her lead or starring participation in specific productions or events which have a distinguished reputation. Moreover, we agree with the Director's determination that even though it appears that the above organizations enjoy a distinguished reputation, it does not automatically follow that their exhibitions are a production or event with a distinguished reputation. The record does not contain the required critical reviews, advertisements, publicity releases, publications, or other evidence showing that the exhibitions that featured the Beneficiary have a distinguished reputation in the field.

In order to meet this criterion, the Petitioner must also establish that the Beneficiary "will perform" services as a lead or starring participant in productions or events with a distinguished reputation. The Petitioner has not offered evidence sufficient to distinguish the Beneficiary's proposed role as leading or starring within the upcoming productions or their distinguished reputations. The Petitioner's three-year itinerary indicates that the Beneficiary will submit artworks to the [redacted] Art Fair, give artist talks at [redacted] apply to artist residencies at the [redacted] School of Painting and Sculpture and the [redacted] Studio Center, and participate in group exhibitions, including at the [redacted] Gallery and in the 2020-2021 [redacted] exhibition at the [redacted] Gallery guest-curated by [redacted]

In her above-referenced letter, [redacted] provides that the [redacted] exhibition will "exhibit a range of diverse, two-dimensional works by emerging and underrepresented artists" and approximately 50 artists, including the Beneficiary, have been selected to represent different art genres and techniques and diverse educational and cultural backgrounds. The Petitioner also supplied a copy of the Beneficiary's tendered contract from [redacted] Gallery for that exhibition. However, [redacted]'s letter and the tendered contract do not establish either that the Beneficiary's role in that project will be lead or starring or that the project is an event which has a distinguished reputation.

Regarding the proposed exhibition at the [redacted] Gallery, an additional letter from [redacted] addressed to the Beneficiary invites her to provide the gallery with several recent paintings for a group exhibition focusing on contemporary abstraction. The letter indicates the six-week exhibition may be in [redacted] 2021 and advises how the price of the artworks will be determined and any sales proceeds divided, but it does not distinguish the Beneficiary's proposed role as leading or starring within the upcoming production or demonstrate its distinguished reputation.

Further, the Petitioner referred to published materials in the record, including the aforementioned articles about the [redacted] Gallery, a press release advertising the prior, inaugural 2019-2020 [redacted] exhibition at [redacted] Gallery curated by [redacted] screenshots about the [redacted] Gallery from its website, news articles about [redacted] Gallery from hudsonvalley360.com, dailygazette.com, and timesunion.com, and news articles about the [redacted] Art Fair, the [redacted] Studio Center, and the [redacted] School of Painting and Sculpture. However, those published materials do not mention the Beneficiary's artwork and the upcoming events. Therefore, they do not establish her upcoming lead or starring participation in specific productions or events which have a distinguished reputation.

In sum, the Petitioner has neither identified nor documented, through submission of the evidence prescribed by regulation, the Beneficiary's previous or forthcoming lead or starring role in events with a distinguished reputation.

Finally, we acknowledge that with respect to this and other criteria, the Petitioner refers to several non-precedent decisions concerning other petitioners who have appealed the denial of their extraordinary ability petitions. The referenced decisions were not published as a precedent and therefore do not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy.

In light of the above, the Petitioner has not established that the Beneficiary satisfies the requirements of this evidentiary 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*).

In order to meet the plain language of the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*2*), the Petitioner must submit not only evidence of the Beneficiary's achievements, but evidence that the Beneficiary has received national or international recognition as a result of her achievements. Such recognition must be evidenced by published materials by or about the Beneficiary in major newspapers, trade journals, magazines and other publications. The Petitioner has submitted the aforementioned articles and press release from koreatimes.com, koreadaily.com, and artsy.net about the Beneficiary's group exhibitions [redacted] and [redacted]

In denying the petition, the Director determined that the Petitioner's evidence was insufficient to satisfy this evidentiary criterion. The Director found that the Petitioner did not submit adequate documentation in the form of published material from major newspapers, trade journals, magazines or other publications to show that the Beneficiary has received national or international recognition for any achievements she may have. The Director noted that the articles from koreatimes.com and koreadaily.com "advertise the exhibition" and indicate the Beneficiary is "an up-and-coming individual in the art community." On appeal, the Petitioner maintains that "articles that profile the exhibition listing the Beneficiary as a featured participant" published in "internationally distributed" online publications satisfy the requirements of this criterion.

We agree with the Director's determination that the Petitioner has not satisfied the evidentiary requirements of this criterion. First, although the articles from the websites koreatimes.com, koreadaily.com, and artsy.net confirm that the Beneficiary participated in the exhibitions [redacted] and [redacted] the articles are not specifically about the Beneficiary, nor are they critical reviews or other journalistic coverage recognizing her achievements in the field of art.

In addition, as it relates to the koreatimes.com, the Petitioner offered screenshots from similarweb.com dated April 2020 reflecting that the website had a global rank of 21,629, a country rank of 3,958, and "total visits" in the preceding six months of 2.39 million. Similarly, as it relates to the koreadaily.com, screenshots from similarweb.com dated April 2020 indicate the website had a global rank of 9,323, a country rank of 1,890, and "total visits" in the preceding six months of 5.63 million. Further, as it relates to the artsy.net, screenshots from similarweb.com dated April 2020 indicate the website had a global rank of 19,289, a country rank of 7,566 and "total visits" in the preceding six months of 2.97 million. The Petitioner did not demonstrate, however, that such Internet viewing statistics reflect status as a major medium.

The Petitioner has not submitted evidence that satisfies the plain language of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*2*). As noted above and as emphasized by the Director, the Petitioner is required to establish that the Beneficiary has received national or international recognition for her achievements as evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines or other publications. Although the Petitioner continues to claim that the Beneficiary meets this criterion, the record does not contain published materials by or about the Beneficiary. The evidence is insufficient to establish that the Beneficiary's achievements as a fine artist have earned her national or international recognition that resulted in major publicity, which is the basis for this criterion.

Based on the above, the Petitioner has not established that the Beneficiary satisfies the eligibility requirements of this regulatory criterion.

III. CONCLUSION

The Petitioner has not submitted qualifying material under 8 C.F.R. § 214.2(o)(3)(iv)(A) and the record does not establish that the Beneficiary meets the criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*) and (*2*). Although the Petitioner claims the Beneficiary's eligibility for two additional criteria on appeal, relating to lead, starring, or critical role for organizations under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*3*) and significant recognition for achievements under 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.[4] 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.

[4] *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).