U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8792203

Date: JULY 14, 2020

Appeal of California Service Center Decision

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

The Petitioner, an entertainment management business, seeks to classify the Beneficiary, a singer, as a foreign national of extraordinary ability in the arts. To do so, the Petitioner seeks O-1 nonimmigrant 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 the petition, concluding that the Petitioner did not satisfy, as required, the evidentiary criteria applicable to individuals of extraordinary ability in the arts, either a significant national or international award or at least three of six possible forms of documentation. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B).

On appeal, the Petitioner asserts that the previously submitted evidence establishes that the Beneficiary meets at least three of the initial evidentiary criteria and is otherwise qualified for the benefit sought.

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).

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

The record reflects that since at least 2016 the Beneficiary has worked as a singer in Iraq. The record indicates that the Beneficiary released two solo albums in 2016, [redacted] The Petitioner requests that the Beneficiary be granted O-1 classification for a period of approximately one month so that he may perform as a singer at two live concerts at the [redacted] in [redacted] Michigan. The Petitioner provided a summary of the terms of its oral agreement with the Beneficiary, setting forth his proposed duties during the requested period, and its rental agreement with the [redacted] Banquet Hall for the two events. The Petitioner asserts that the Beneficiary is "an internationally renowned singer."

A. The Beneficiary's Eligibility under the Evidentiary Criteria

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, it must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*). The Director found that the Petitioner met only one of those evidentiary criteria, the criterion relating to high salary at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*6*). On appeal, the Petitioner maintains that the evidence satisfies five additional alternate criteria. After reviewing all the evidence in the record, we find that the exhibits do not satisfy at least three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B).

> *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 Director determined that the record establishes that the Beneficiary has performed as a lead or starring participant in productions or events which have a distinguished reputation. In addition to his past positions, this criterion requires the Petitioner to submit evidence that the Beneficiary "*will*

[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."

perform" services as a lead or starring participant in productions or events which have a distinguished reputation upon approval of the petition, as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements. The Director concluded that the evidence submitted was insufficient to establish the Beneficiary's upcoming lead or starring participation in distinguished productions. We agree.

As mentioned previously, at the time of filing the Petitioner submitted a summary of the terms of its oral agreement with the Beneficiary, indicating that his proposed projects in the United States will include performing as a singer at two concerts at the [redacted] Banquet Hall. While it appears that the Beneficiary would be a featured performer at the engagements that the Petitioner has arranged for him, it has not provided evidence in the form of advertisements, publicity releases, publications, contracts, or endorsements establishing that the productions or events in which the Beneficiary will participate have a "distinguished reputation." On appeal, the Petitioner cites to three promotional flyers previously submitted regarding the Beneficiary's 2019 [redacted] tour, and provides the Beneficiary's contracts with [redacted] Club in [redacted] and [redacted] Company in Germany for, respectively, a 2019 [redacted] party and a five-concert 2020 [redacted] tour. While that documentation shows that the Beneficiary would be a featured performer at those productions it does not establish that such engagements could be considered events with a distinguished reputation. In addition, the Petitioner's claim that the Beneficiary is an internationally renowned singer is insufficient to meet the evidentiary requirements set forth in this criterion.

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

To meet this criterion, the Petitioner cites an undated interview with the Beneficiary published in the print edition of *Mashaher Al Iraq (Iraqi Celebrities)* magazine in issue [redacted]. Additional evidence shows the Beneficiary appeared on the cover of that issue of the magazine. In the article, the Beneficiary indicates he has been working with the "music writer and singer [redacted] and poet [redacted]" and that he "lean[s] toward classic songs." The interviewer asserts that the Beneficiary has become "famous" and "successful," and the Beneficiary credits his production company "[redacted]" with contributing to his success. He describes his first album, [redacted] as "a good start.," and states he is working on a new album.

In the request for evidence (RFE), the Director acknowledged the Petitioner's submission of the article, but noted that it did not establish that the interview was published in a major newspaper or magazine with a national or international circulation and was undated. Within its response, the Petitioner stated that "[i]nsofar as exact circulation figures, the [P]etitioner . . .ha[s] been unable to obtain such figures. . . ." The Petitioner provided a screenshot of the magazine's Instagram and Facebook pages, showing its number of followers on those social platforms. The Director determined that the evidence submitted did not establish that the interview was published in a major medium.

On appeal, the Petitioner maintains that it "is unable to obtain circulation figures because as of 2014 *Mashaher Al Iraq* became a digital magazine that publishes its articles through its Instagram and Facebook pages." However, the Petitioner's claim is not supported by other evidence in the record. The Petitioner submits a *Wikipedia* article[2] indicating that *Mashaher Al Iraq* is "an Iraqi magazine published weekly from [redacted] . . . first published in 2008 as an entertainment and sports magazine." This documentation does not indicate, as asserted, that as of 2014 the magazine became a digital publication. In addition, the Petitioner's claim is inconsistent with a letter it submits on appeal from [redacted] of the Iraqi Celebrities Agency, confirming that the date of publication of the Beneficiary's interview in the print version of *Mashaher Al Iraq* was "[redacted]/2017." The Petitioner must resolve any inconsistency 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). The Petitioner has not provided supporting evidence indicating that the print edition of *Mashaher Al Iraq* qualifies as major media, such as evidence that the circulation of *Mashaher Al Iraq* is high compared to other circulation statistics.

In light of the above, the Petitioner has not established that the Beneficiary satisfies the requirements of this regulatory criterion.

> *Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*3*).

To meet this criterion, the Petitioner cites to evidence pertaining to the Beneficiary's past work as a singer. A leading or starring role should be apparent by its position in the overall organizational hierarchy and through the role's matching duties. A critical role should be apparent from a beneficiary's impact on the organization or the establishment's activities. A beneficiary's performance in this role should establish whether the role was critical for the organization or establishment as a whole. The Director concluded, and we agree, that those materials do not satisfy this criterion. Specifically, the Director determined that the Beneficiary's performances were consistent with those of a singer but did not establish that he performed in a lead, starring, or critical role for a distinguished organization.

In support of this criterion, the Petitioner provided an employment verification letter dated 2018 from [redacted] the president of [redacted] Foundation for Media and Arts, stating that the Beneficiary was a performing artist employed by the company as of the date of his letter. On appeal, the Petitioner provides an additional letter dated 2018 from [redacted] stating that the Beneficiary is an "[redacted] channel star" whose "accomplishments for the channel are of creative value and he has many clips on all channels."

While a company's staff may consider the Beneficiary's achievements to be of great benefit to the company, the focus of this criterion, based on the plain language of the regulation, is the Beneficiary's role itself. Although [redacted]s letters speak highly of the Beneficiary's performance for [redacted]

[2] 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* (accessed June 30, 2020) https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer; *Badasa v. Mukasey*, 540 F.3d 909 (8th Cir. 2008).

[redacted] Foundation for Media and Arts, they do not establish his "lead," "starring," or "critical" role. The letters show that his work was consistent with that of a singer, and they describe him as having achieved results that met or exceeded the company's expectations. The letters do not establish that his role as a singer has been a lead, starring, or critical role for the company. For example, [redacted] does not distinguish the Beneficiary's position from those of the company's other singers or demonstrate that he was responsible for the company's success or standing to a degree consistent with the meaning of a "critical role." In addition, the fact that the Beneficiary may have played a lead or starring role in several performances is not sufficient to satisfy this criterion's requirements.

In addition, the Petitioner has not submitted evidence to establish how the Beneficiary's proposed work as a singer will be in a lead, starring or critical role for the petitioning organization. As stated previously, the submitted summary of the terms of the Petitioner's oral agreement with the Beneficiary indicates that he will be performing in two live concerts at the [redacted] This evidence does not establish how the Beneficiary's proposed work as a singer rises to the level of a lead, starring, or critical role for the petitioning company, or that it has a distinguished reputation.

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

> *Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*4*).

This criterion specifically requires documentation of commercially or critically acclaimed successes as reported in publications. In the Beneficiary's field, evidence satisfying this criterion would reasonably include evidence of album or single sales, radio airplay rankings, evidence of concert revenues and similar evidence of tangible achievements in the music industry. The Director determined the evidence submitted does not satisfy this criterion, and the record supports that conclusion.

The Petitioner asserts that the Beneficiary satisfies the requirements of this criterion based upon his past CD sales. The Petitioner relies on a statement in one of [redacted]'s letters that the Beneficiary's "sales exceed 100 Thousand CDs per month." However, [redacted]'s claim is inconsistent with that of [redacted] of [redacted] Institution, the Beneficiary's distribution company, whose letter indicates that the Beneficiary "has achieved a percentage of sales inside Iraq and outside in amounts nearing (50) thousand copies annually." As stated previously, the Petitioner must resolve inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The claims of [redacted] and [redacted] are not supported by evidence such as reliable documentation of sales figures. Further, the Petitioner has not shown that attaining CD sales at either claimed level is an indicator of a record of commercial or critical success.

The Petitioner further claims that the Beneficiary's record of major commercial or critically acclaimed successes is also evidenced by "views" of videos of his songs [redacted]' [redacted]' and others, posted

by his employer on YouTube.[3] Again, the Petitioner did not demonstrate the significance of these figures or show how such data reflects the Beneficiary's record of major commercial or critically acclaimed successes, as required by the plain language of the regulation. Assuming the 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 his achievement was acknowledged in the industry at-large. On appeal, counsel asserts that "[d]ue to the current security and political conditions in Iraq, the Petitioner is unable to obtain documentation from trade journals, major newspapers, or other publications that reported [the Beneficiary's] major commercial or critically acclaimed successes." However, assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

Based on the above, the Petitioner has not established that the Beneficiary satisfies this evidentiary criterion.

> *Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*).

In support of the requirements of this criterion, the Petitioner submitted a testimonial letter from [redacted] Chief of the Iraqi [redacted] stating that the Beneficiary is "one of the Iraqi singers who is predominate names in the art and media sector and he's well-know by the Iraqi [redacted]." We determine that the testimonial of [redacted] does not satisfy this criterion.

We may, in our discretion, use as advisory opinions statements offered as expert testimony. *See Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we are ultimately responsible for making the final determination regarding a beneficiary's eligibility for the benefit sought. *Id.* The submission of letters of support from the Beneficiary's personal contacts is not presumptive evidence of eligibility; we may evaluate the content of those letters as to whether they support the foreign national's eligibility. *Id.* at 795-796. Here, the reference letter from [redacted] does not address any specific achievements of the Beneficiary and explain how the Beneficiary's achievements to date have received significant recognition from organizations, critics, government agencies or other recognized experts in the field.

Further, we acknowledge that the Petitioner provided a "no objection" labor consultation letter from [redacted] of the American Guild of Musical Artists (AGMA), stating that "the draft I-129 Petition and supporting documentation regarding [the Beneficiary] . . . . appears to meet the standard of distinction set forth at 8 CFR [§] 214.2[(o)]." While the letter satisfies the Petitioner's burden to submit a written

[3] We note that the Beneficiary's video for [redacted] was published on YouTube subsequent to the filing of the petition in June 2019. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1).

advisory opinion from an appropriate consulting entity pursuant to 8 C.F.R. § 214.2(o)(2)(ii)(D), it cannot be used for the dual purpose of satisfying the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). Consultations are advisory and are not binding on USCIS. *See* 8 C.F.R. § 214.2(o)(5)(i)(D). Regardless, the letter does not constitute a letter from an expert attesting to the Beneficiary's receipt of significant recognition for achievements, as [redacted] does not explain how AGMA reached its conclusions based on the evidence submitted with the petition.

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

> *Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*6*).

The Director concluded that the Petitioner satisfied the requirements of this criterion based on its submission of evidence that the Beneficiary has been offered a salary of $10,000 per engagement for each of his two scheduled performances in the United States. We agree with the Director's determination that this criterion has been met.

III. CONCLUSION

The record does not satisfy, as required, the evidentiary criteria applicable to individuals of extraordinary ability in the arts: a significant national or international award or at least three of six possible forms of documentation. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B). Consequently, the Petitioner has not established that the Beneficiary is eligible for the O-1 visa classification as an individual of extraordinary ability in the arts. 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.