U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18440895

Date: JUL. 31, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, an entertainment agent, seeks to classify the Beneficiary, a musician and composer, 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 Vermont Service Center denied the petition, 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 the six possible forms of documentation. We dismissed the Petitioner's subsequent appeal. The matter is now before us on a motion to 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 conclude that the Petitioner has not met that burden. Accordingly, we will dismiss the motion to reconsider.

I. MOTION REQUIREMENTS

A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause

for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4). [1]

II. 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).

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).[2]

III. ANALYSIS

The issue before us is whether the Petitioner has established that our decision to dismiss his appeal was based on an incorrect application of law or USCIS policy. The Petitioner must specify the factual and legal issues raised on appeal that were decided in error or overlooked in our initial decision.

A. AAO Decision

In denying the petition, the Director determined that the Petitioner did not claim the Beneficiary met the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), and she further found that the Petitioner provided evidence relating to five criteria but did not satisfy any of the alternative regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*). On appeal, the Petitioner maintained that the evidence satisfies

[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).

[2] *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."

those five criteria. In dismissing the appeal, we determined that the Petitioner did not demonstrate that the Beneficiary meets any of the claimed alternative regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*).

B. Motion to Reconsider

On motion, the Petitioner asserts that we incorrectly determined that the previously submitted evidence was insufficient to satisfy the criteria relating to lead or starring participant in productions or events at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*), published materials at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*2*), lead, starring, or critical role for organizations or 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*), and high salary at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*6*).

> *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*).

In our appellate decision, we noted that the Petitioner provided posters, album covers, photographs, reviews, and letters from colleagues regarding events at which the Beneficiary has performed in Russia, including the 2015 documentary film the [redacted], the 2018 [redacted] Festival, and concerts with the musician [redacted] The posters specifically mention the Beneficiary by name, either as the solo artist or as one of many performers at the event. In addition, the record shows the Beneficiary has been the composer and musician on several of his own productions, including his debut album [redacted] (2018), the [redacted] (2019), and the singles [redacted] (2019) and [redacted] (2019). We noted that a 2019 review of [redacted] on the website www.circlepit.com describes it as "a [redacted] and the Beneficiary as "an exciting, new solo artist rising up through the ranks of the [redacted] world."

Although we found that the evidence establishes that the Beneficiary has performed in a lead or starring role for productions or events, we determined that the Petitioner has not submitted critical reviews, advertisements, publicity releases, publications or other evidence establishing that the events themselves have a distinguished reputation, as required pursuant to the plain language of this criterion. We noted that, as described above, the review and posters regarding events at which the Beneficiary has performed do not establish that the productions have distinguished reputations among industry publications that cover the Beneficiary's genre of music. The Petitioner disputes our conclusions without directing to a particular law, regulation, or policy that specifically shows that we erred in our determinations. 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). The Petitioner has not shown how we erred in determining that the record does not establish that those productions have a distinguished reputation.

Further, we determined that although the Petitioner submitted evidence that the Beneficiary's music is available on digital streaming services including Apple Music and Spotify, the Petitioner has not demonstrated how this evidence demonstrates that those productions have a distinguished reputation. The Petitioner has not established that publication on online streaming services is evidence of the distinguished reputation in the field of musical works posted on those sites. We further noted that although on appeal the Petitioner submitted a screenshot showing that the Beneficiary's songs have received 2,706 "all time plays" on the online platform Bandcamp, the significance of this amount of plays is not explained. On motion, the Petitioner does not contest our determination on these issues.

Moreover, our appellate decision explained that 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 which have a distinguished reputation upon approval of the petition. According to the record, the Petitioner intends that the Beneficiary, as a guitarist and composer, will perform at music clubs and participate in studio work at recording studios. On motion, the Petitioner does not address our conclusion that the Petitioner has not demonstrated, by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements, that those productions and events have a distinguished reputation.

For the reasons discussed, the Petitioner has not established that our prior determination with respect to this criterion was based on a misapplication of law or USCIS policy.

> *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*).

Our appellate decision determined that the Petitioner did not demonstrate published material about the Beneficiary in major newspapers, trade journals, magazines, or other major media.

First, we found that the record contained a screenshot from the webpage of the radio program [redacted] containing a picture of the Beneficiary, and a transcript of a 2010 interview of him from that program. The interview asks questions relating to the Beneficiary's musical career and education. However, we concluded that the Petitioner did not establish that '[redacted]' represents a major medium. Although the Petitioner provided untranslated information pertaining to the audience statistics of [redacted] radio stations, we explained that the issue is whether the radio show is a major medium. On motion, the Petitioner claims, regarding the audience statistics of [redacted] radio stations, that "[t]he translated version of these figures was inadvertently omitted from the appeal brief" and requests that we that we "kindly accept them attached to this brief."[3] We emphasize that a petitioner filing a motion to reconsider must establish that our decision was incorrect based on the evidence in the record at the time of our initial decision. 8 C.F.R. § 103.5(a)(3). The Petitioner cannot meet this burden by requesting an opportunity to submit additional evidence.

Next, we noted that the Petitioner submitted screenshots from the YouTube channel of Russian [redacted] It asserted that the screenshots show that the Beneficiary was interviewed by

[3] The record before us on motion does not include this evidence.

[redacted] on two occasions in 2018, in which it claims he discussed, respectively, different techniques of [redacted] and the [redacted] We noted that one screenshot contains a picture of the Beneficiary and an untranslated caption, while another screenshot contains a picture of a guitar and the partial caption [redacted] We found, however, that the Petitioner did not provide a transcription of the claimed interviews demonstrating published material about the Beneficiary relating to his work. The Petitioner does not address these specific deficiencies we addressed in our decision or explain how we misapplied the law or USCIS policy in evaluating the documentation referenced above.

In addition, although we acknowledged that the Petitioner provided documentation from [redacted] 's YouTube channel showing it has over 20 million total views information from www.growthtraffic.com and www.tubics.com about how YouTube counts views, we found that the Petitioner did not demonstrate the significance of 20,000,000 total views on a YouTube channel. On motion, the Petitioner maintains that the Beneficiary's appearance on [redacted] 's YouTube channel shows that the Beneficiary has significant national recognition. We previously and thoroughly addressed the same motion arguments in our prior decision and the Petitioner presents no new arguments showing that we erroneously applied law or policy on this issue.

Further, our appellate decision noted that under this criterion the Petitioner referenced letters from [redacted] and [redacted] companies for whom the Beneficiary has worked as an endorser, as evidence of the Beneficiary's "standing within the Russian music industry." We determined that the Petitioner did not establish how the letters reflected published material by or about the Beneficiary, as required under this criterion.[4] We found that, without evidence, in the form required, establishing that the Beneficiary has achieved national or international recognition for achievements, the Petitioner has not demonstrated that the Beneficiary meets this criterion.

For the reasons discussed, the Petitioner has not demonstrated that we misapplied the law or USCIS policy in concluding that it did not meet this criterion or that our decision was incorrect based on the evidence in the record at the time of our decision.

> *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*).

The Petitioner asserted that the Beneficiary meets this criterion by having been selected by [redacted] and [redacted] "to be the exclusive endorser of their products in the Russian market, through paid performances and advertisements." Our appellate decision noted that the record contains screenshots of several video clips the Beneficiary posted on YouTube and the social media websites of [redacted] and [redacted] in 2018 that show him performing with and reviewing [redacted] and the [redacted] In addition, the Instagram account of [redacted]

[4] The Petitioner previously also claimed eligibility under this criterion based on a screenshot from the webpage [redacted] that shows the Beneficiary accompanying [redacted] on guitar during a recording session, an article dated [redacted] 2020 about the Beneficiary which was published on the website [redacted] and a screenshot of an interview of the Beneficiary dated [redacted] 2020 from the website [redacted]. It has not pursued these claims on motion.

[redacted] indicates that the Beneficiary is a "newly added [redacted] artist . . . performing live on his [redacted] as part of our new dealer presence in Russia . . . ."

Our appellate decision reviewed a letter submitted from [redacted] president of [redacted] who states that "in 2017 [the Beneficiary] was chosen as the main endorser of our company in Russia. He is the only guitarist in Russia who represents our company." We noted, however, that correspondence submitted from the Beneficiary's email account indicates he first contacted [redacted] in October 2018 to inquire about becoming an endorser of the company and found that the Petitioner must resolve this 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). Our appellate decision also reviewed a letter from [redacted] of the [redacted] an official partner and distributor of [redacted] in Russia, who provided that since 2018 the Beneficiary "has been the endorser of [redacted] in the Russian Federation." He asserts that "[t]hanks to [the Beneficiary's] active performances and big following in Russia, we were able to significantly popularize our products, as well as sales of our brand in the territory of the Russian Federation."

We determined that the materials submitted do not satisfy this criterion. Specifically, the documentation submitted established that [redacted] and [redacted] have a distinguished reputation but did not establish that the Beneficiary performed in a lead, starring, or critical role for those organizations. Although the letters speak favorably of the Beneficiary's endorsements for [redacted] and [redacted], they do not establish that his role as an endorser of their products has been a lead, starring, or critical role for those companies. For example, [redacted] and [redacted] do not distinguish the Beneficiary's position from those of the companies' other endorsers,[5] to establish how his position fit within the overall hierarchy of the organizations or detail the manner in which his work has resulted in a measurable level of success for either company. The Petitioner does not identify any specific error of law or policy in our appellate decision relating to this criterion.

Moreover, our appellate decision explained that to meet this criterion the Petitioner must also establish that the Beneficiary *will perform* in a lead, starring or critical role for organizations and establishments that have a distinguished reputation upon approval of the petition. We noted that according to the employment agreements and itinerary contained in the record, the Beneficiary will perform as a guitarist and composer at events at [redacted] Music Bar, [redacted] Lounge, [redacted] Lounge Bar, [redacted], [redacted] Studios, and [redacted] Studio. On motion, the Petitioner does not address our concerns that the Petitioner has not demonstrated how the Beneficiary's role as a guitarist and composer rises to the level of a lead, starring or critical role for those establishments. We noted that although the Petitioner has indicated the Beneficiary's job title on the upcoming performance and recording projects, the submitted evidence does not describe how the Beneficiary will contribute to those establishments as a whole or how his position fits within their overall hierarchy. We further found that the Petitioner has not provided evidence, in the form required, sufficient to demonstrate that those establishments enjoy a distinguished reputation. On motion, the Petitioner does not address our concerns that the Petitioner has not demonstrated, by articles in

[5] We noted that the record indicates that other musicians who have provided endorsements for [redacted] include [redacted], and [redacted]

newspapers, trade journals, publications, or testimonials, that the Beneficiary will perform, in a lead, starring, or critical role for those establishments or their distinguished reputation.

For the foregoing reasons, the Petitioner has not established that our prior determination with respect to this criterion was based on a misapplication of law or USCIS policy.

> *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*).

Our appellate decision acknowledged the Petitioner's contention that it provided testimonial letters to show that the Beneficiary has received significant recognition for his achievements. We found that, although the letters summarized the Beneficiary's musical work and highlighted his personal accomplishments, they do not demonstrate that he has "received significant recognition." For instance, confirms that in 2018 the Beneficiary played guitar on her in Russia, and praises his "technique, charisma, professionalism, [and] musicality . . . ." did not explain, however, that he received significant recognition for his performances at . indicates the Beneficiary took part in the production and states "[w]e recorded one of my songs together, that appeared in the program," but his letter does not show that the Beneficiary received significant recognition from his participation in the project. Further, and established the Beneficiary's role as an endorser for and , but do not provide that he garnered significant attention for his work. Moreover, musicians and note their participation on the Beneficiary's CD , without indicating whether he garnered significant attention from the CD. We further noted that, although the Petitioner emphasizes that the Beneficiary is "one of very few guitarists in Russia who plays on an guitar," the issue for this regulatory criterion is whether the Beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field. Our previous decision concluded that the record lacks documentary evidence showing that the Beneficiary has received such recognition. The Petitioner has not shown that our determination for this criterion was incorrect.

On motion, the Petitioner maintains that a screenshot of an interview of the Beneficiary dated 2020 from the website "certainly qualifies as a significant recognition from a leading expert in the field." However, our appellate decision found that the Petitioner cannot rely on that item to establish the Beneficiary's eligibility at the time of filing this petition in September 2019. A 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); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

For the reasons discussed, the Petitioner has not demonstrated that we misapplied the law or USCIS policy in concluding that it did not meet 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*).

In our appellate decision, we noted that the Petitioner claimed that the Beneficiary satisfies this criterion based upon his previous salaries as a musician and composer, and included the following documentation:

- Contract showing the Beneficiary was paid 500,000 RUB to compose a musical work between March and June 2016
- Contract dated December 2018 indicating that the Beneficiary received 96,455 RUB for a [redacted] as a guitarist for [redacted]
- Contract dated June 2016 showing the Beneficiary was paid 170,000 RUB per month for [redacted] between June 2015 and December 2017 at the [redacted] Club
- Contract indicating the Beneficiary received 200,000 RUB to perform at the [redacted] [redacted]'s [redacted] on December 22, 2015.

We noted that the Petitioner converted the Beneficiary's salary for each of the aforementioned contracts to an hourly wage, respectively, of 177 RUB, 342 RUB, 254 RUB, and 228 RUB, based upon its claim of how much the Beneficiary worked on each project, and that the contracts do not identify an hourly rate of pay or indicate that the Beneficiary was paid by the hour. We concluded that the record does not support a conclusion, based on the Petitioner's unsupported testimonial evidence alone, as to the amount of the Beneficiary's hourly wage, absent reliable evidence to support the Petitioner's assertions.

We also found that, although the Petitioner provided comparative wage data from the U.S. Bureau of Labor Statistics showing that "Musicians and Singers" earned a mean hourly wage of $37.51, with the top ten percent earning at least $73.34 per hour, nationally, in 2018, the Petitioner did not provide independent evidence that would allow us to compare the Beneficiary's foreign salary to that of others working in his occupation and geographic area in Russia, such as wage statistics or comparable evidence in that country, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States. We concluded that without such evidence, we cannot properly evaluate the Beneficiary's previous earnings in Russia. We further noted that, although on appeal the Petitioner stated that it was submitting "a printout from a Russian Website Trud.com, which demonstrates that the average monthly income for musicians in Russia was between $900 and $375 in the period between August 2019 and March 2020," the record did not contain this documentation.

On motion, the Petitioner provides that the comparative wage information "that the [P]etitioner referred to from the website trud.com was also inadvertently omitted from the appeal package" and requests that we "kindly find it attached."[6] Again, we emphasize that a petitioner filing a motion to reconsider must establish that our decision was incorrect based on the evidence in the record at the time of our initial decision. 8 C.F.R. § 103.5(a)(3). The Petitioner cannot meet this burden by requesting an opportunity to submit additional evidence.

[6] The record before us on motion does not include this evidence.

For the reasons discussed, the Petitioner has not established that our determination with respect to this criterion was based on an incorrect application of law or USCIS policy, or that our decision was incorrect based on the evidence in the record at the time of our decision.

IV. CONCLUSION

The Petitioner has not established that our previous 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. Accordingly, the motion to reconsider will be dismissed.

ORDER: The motion to reconsider is dismissed.