U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30154384

Date: MAR. 12, 2024

Appeal of Vermont Service Center Decision

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

The Petitioner, a talent agency, seeks to classify the Beneficiary as a photographer 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 Vermont Service Center denied the petition, concluding that 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. 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 Petitioner's initial letter described the Beneficiary as "one of the most talented photographers in Argentina currently" with "extensive photographic knowledge despite his young age." The Beneficiary indicates in his resume that he is a professional photographer with more than 10 years of work experience pertaining to artists, music videos, album covers, magazines, social networks, clothing campaigns, television programs, and gastronomy. According to the Form I-129, the Petitioner seeks to employ the Beneficiary as a photographer "responsible for creating the visual image of the company (photography, video, graphic design) for its clients at events, concerts, recording studio, etc.," for a one-year period at a weekly wage of $500.[1]

A. Extraordinary Ability in the Arts

Because the Petitioner has not indicated or established that the Beneficiary satisfies the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), it must show that the Beneficiary satisfies at least three of the six categories listed at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*). In denying the petition, the Director determined that the Petitioner submitted evidence related to the criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*), (*2*), (*4*), (*5*), and (*6*), but did not meet any of those alternative regulatory criteria. On appeal, the Petitioner maintains that the Beneficiary meets those five criteria.[2] As discussed below, we find that the Petitioner has not established that the Beneficiary meets three of the claimed criteria.

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[1] We note that there are inconsistencies regarding the Beneficiary's proposed salary in the record. Specifically, according to the Form I-129, the Petitioner will pay the Beneficiary a weekly wage of $500 per year, which equates to a monthly salary of $2,167. However, according to the Petitioner's proposed employment contract, the Beneficiary will be paid a monthly salary of $4,000. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[2] The Petitioner did not claim the Beneficiary's eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*3*) before the Director or on appeal. As the Petitioner provides no evidence or arguments addressing this criterion on appeal, we consider this issue to be abandoned. *See Matter of R-A-M-*, 25 l&N Dec. 657. 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). *See also Sepulveda v. U.S. Atty. Gen*., 401 F.3d 1226. 1228 n. 2 (11th Cir. 2005). citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (finding plaintiff's claims abandoned as he failed to raise them on appeal to the AAO).

> *Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the beneficiary 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 must provide evidence that demonstrates the beneficiary is recognized for achievements nationally or internationally, in the form of critical reviews or other published materials in major newspapers, trade journals, magazines, or other publications, which may include online publications or transcripts of radio or video coverage.[3] The record does not establish the Beneficiary qualifies for this criterion, as discussed below.

The Petitioner provided material posted on vocescriticas.com, radiostucuman.com, clarin.com, notinor.com.ar, semanarioargentino.miami, and estatodobientuc.com.[4] In determining whether the submitted evidence demonstrates that the beneficiary has achieved national or international recognition for achievements, officers consider both the content of the published material and the level of recognition enjoyed by the publication in which it appears.[5] For example, favorable coverage or publication of the beneficiary's work in major media, as demonstrated by high relative circulation, readership, or viewership figures, could establish national or international recognition of the beneficiary's achievements.[6]

Here, the postings on vocescriticas.com, radiostucuman.com, clarin.com, notinor.com.ar, semanarioargentino.miami, and estatodobientuc.com contain information reflecting the Beneficiary and his work and discussing his achievements. However, the record does not reflect the Petitioner offered evidence establishing that these websites represent "major newspapers, trade journals, magazines, or other publications." The Petitioner, for instance, did not submit circulation, readership, or viewership figures demonstrating the standings of the websites as major online publications.[7] As a result, the Petitioner did not show the level of recognition of vocescriticas.com, radiostucuman.com, clarin.com, notinor.com.ar, semanarioargentino.miami, and estadobientuc.com. Further, we note that all the above articles appear to be English translations, but are not accompanied by the required certification from the translator.[8] Accordingly, the Petitioner did not establish the Beneficiary satisfies this criterion.

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[3] *See generally* 2 *USCIS Policy Manual* M.4(D)(2)(appendix), https://www.uscis.gov/policy-manual).

[4] The Petitioner also submitted, within its response to the Director's request for evidence, an additional article from semanarioargentino.miami and articles from fusionradio.mx, latinosengeorgia.com, circuitonnoticias.com, and alpuntonoticias.com, all published on those websites in 2023, after the petition was filed in July 2022. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), further provides that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. We will therefore not consider these articles in our analysis.

[5] *See generally* 2 *USCIS Policy Manual*, *supra*, at M.4(D)(2)(appendix).

[6] *Id.*

[7] *Id.*

[8] Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.*

> *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*).

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. As evidence under this criterion, the Petitioner provided several letters from colleagues with whom the Beneficiary worked on various projects.[9] The Director considered the letters and concluded that, although they discussed the Beneficiary's skills and knowledge, they were insufficient to establish that his work has received significant recognition for achievements in the field. We agree with the Director's determination. Here, we find that the record includes insufficient documentary evidence that the Beneficiary has received such recognition.

On appeal, the Petitioner maintains that the submitted letters satisfy the requirements of this criterion. For example, G-M-, a photographer, praises the Beneficiary's "excellent way of communicating the simplicity and naturalness of capturing an image with little equipment." He asserts that the Beneficiary "has really shown that at his young age and with great knowledge you can capture fantastic images portraying people in a spontaneous and fresh way." He opines that he "is one of the most talented photographers of recent times in our country." M-S-, a photographer, indicates he worked with the Beneficiary on a music video for the song [redacted] by the music duo [redacted], and that he "has a way of capturing moments spontaneously and naturally." While the aforementioned references discuss the Beneficiary's talent and experience, they do not detail any specific achievements of the Beneficiary in the field of photography. In addition, G-M- does not explain the basis of his knowledge of the Beneficiary's work the field.

Further, the Petitioner submitted recommendation letters from singers A-B- and M-E- of [redacted] fashion model V-F-; actor S-M-; actor R-G-D-; and fashion retailers K-K- and M-K- of the clothing brand [redacted] However, these letters do not satisfy the regulatory standard, which states that affidavits from experts "shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information." 8 C.F.R. § 214.2(o)(2)(iii)(B). The Petitioner has not shown that these individuals, as singers, actors, fashion retailers, and a fashion model, are recognized experts in the field of photography. Although they praise the Beneficiary's artistry, these individuals do not establish their credentials as recognized experts in the field. Nonetheless, these authors do not specifically describe in factual terms the Beneficiary's achievements beyond their own companies and organizations.

Finally, as noted by the Director, most of the aforementioned letters contain almost identical statements regarding the Beneficiary, specifically, that "[h]is acclaim and popularity in Latin America will be a great asset to any entertainment production." These almost identical statements suggest that their language was not written independently. While it is acknowledged that the authors have provided their support for this petition, it is unclear whether the letters reflect their independent observations and thus an informed and unbiased opinion of the Beneficiary's work. In evaluating the evidence, the

[9] While we do not discuss each letter individually, we have reviewed and considered each one.

truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe*, 25 I&N Dec. at 376. In light of all the above, the Petitioner has not established 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 determined that the Petitioner had not demonstrated the Beneficiary's high salary in relation to others in the field. To demonstrate eligibility for this criterion, the petitioner should provide appropriate evidence establishing that the beneficiary's past or future compensation is or will be high relative to others working in the field.[10]

At initial filing, as evidence of the Beneficiary's past compensation the Petitioner submitted an unsigned statement from the Beneficiary dated July 14, 2022, indicating that between January 1, 2018, and June 30, 2020, he received professional fees averaging Arg$2.322.0000 annually and totaling Arg$5.805.000,00. The Petitioner also submitted a letter from accountant A-M-C- who states that, at the Beneficiary's request, she compared the income reported in his statement with "a publicity contract with [redacted] and an agency agreement with [redacted] and the incomes declared by [the Beneficiary] . . . agree with the records checked ...."[11] The record shows that the submitted contracts with [redacted] and [redacted] were for the positions, respectively, of photographer and digital content creator in Argentina.

However, the Petitioner did not demonstrate that the Beneficiary earned a high salary compared to other photographers in Argentina. The Petitioner does not offer salary statistics or other documentation as bases for comparison showing that the Beneficiary commanded a high salary relative to other photographers. Without evidence such as statistical documentation reflecting the salaries of photographers, the Petitioner did not demonstrate that the Beneficiary has commanded a high salary. In addition, the Petitioner does not explain how the Beneficiary's salary in the different occupation of digital content creator shows that the Beneficiary commanded a high salary as a photographer. Thus, the Petitioner did not establish the Beneficiary has commanded a high salary in relation to others in the field. For the reasons discussed above, the Petitioner did not demonstrate the Beneficiary fulfills this criterion.

B. Consultation

Finally, although not discussed by the Director, the record does not contain the required consultation from an appropriate peer group or labor consultation. Pursuant to sections 214(c)(3)(A) and (6)(A)(i) of the Act, an O-1 petition for extraordinary ability in the field of arts requires a petitioner to provide an advisory opinion from a "peer group" (or other person or persons of its choosing, which may include a labor organization) with expertise in the specific field involved. The implementing regulation clarifies that the consultation should describe the beneficiary's ability and achievements in the field of endeavor, describe the nature of the duties to be performed, and state whether the position requires the

[10] *See generally* 2 *USCIS Policy Manual*, *supra*, at M.4(D)(2)(appendix).

[11] We note that the letter from the accountant appears to be an English translation, but is not accompanied by the required certification from the translator. 8 C.F.R. § 103.2(b)(3).

services of a person of extraordinary ability, or may state "no objection." 8 C.F.R. § 214.2(o)(5)(ii)(A). If the petitioner establishes that no appropriate peer group exists, including a labor organization, USCIS renders a decision on the evidence of record. *Id.*[12]

The Petitioner indicated that at Section 1 of the O classification supplement, under 8 and 9, that an appropriate labor organization for the petition exists, the required consultation or written advisory opinion was not being submitted, and a copy of the request was attached. However, the Petitioner's initial submission did not contain a copy of such request, and the record does not contain the required written advisory opinion. As such, the Petitioner has not submitted a consultation from an appropriate peer group or labor consultation as required under 8 C.F.R. § 214.2(o)(5). The appeal will be dismissed on this additional basis.

III. CONCLUSION

The Petitioner did not establish the Beneficiary meets any of the criteria discussed above. Although the Petitioner also claims the Beneficiary's eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*) and 8 C.F.R. § 214.2(o)(3)(iv)(B)(*4*) we need not address these grounds, because it cannot fulfill the initial evidentiary requirement of at least three criteria. We also 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).[13] Accordingly, we reserve these issues.[14] Further, the Petitioner has not submitted a consultation from an appropriate peer group or labor consultation as required under 8 C.F.R. § 214.2(o)(5)(ii)(A). 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.

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[12] *See generally* 2 *USCIS Policy Manual*, M.7(B)(4), https://www.uscis.gov.policymanual.

[13] *See* generally 2 USCIS Policy Manual, supra, at M.4(D).

[14] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *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 an applicant is otherwise ineligible).