U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12463638

Date: MAR. 17, 2021

Appeal of California Service Center Decision

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

The Petitioner, a church, seeks to classify the Beneficiary, a music 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 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). The Director also determined that the Petitioner provided insufficient information regarding the Beneficiary's proposed duties in the United States. 8 C.F.R. § 214.2(o)(2)(ii).

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]

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(ii) provides that petitions for O foreign nationals shall be accompanied by the following:

(A) The evidence specified in the particular section for the classification;

(B) Copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed;

(C) An explanation of the nature of the events or activities, the beginning and end dates for the events or activities, and a copy of any itinerary for the events or activities; and

(D) A written advisory opinion(s) from the appropriate consulting entity or entities.

II. ANALYSIS

The record reflects that the Beneficiary has performed as a guitarist, vocalist, and composer in Colombia, including with his band [redacted]. The Petitioner requests that the Beneficiary be granted O-1 classification so that it may employ him for a three-year period as a music composer, responsible for the production and composition of all music associated with the Petitioner's music ministry, including the development of six mini-albums, or EPs. The Petitioner submitted its job offer, signed by the parties, setting forth the Beneficiary's proposed duties and album development schedule. The Petitioner asserts that the Beneficiary is a "top composer in Colombia" and "an internationally prominent artist in the music industry."

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). In denying the petition, the Director determined that the Petitioner did not fulfill any of the initial evidentiary criteria. On appeal, the

[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."

Petitioner submits a brief claiming to meet four of those criteria, relating to lead or starring participant in distinguished 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), significant recognition for achievements under 8 C.F.R. § 214.2(o)(3)(iv)(B)(5), and high salary under 8 C.F.R. § 214.2(o)(3)(iv)(B)(6). After reviewing all the evidence, we conclude that the record does not support a finding that the Petitioner satisfies the requirements of at least three criteria. We will analyze the evidence submitted under each of those criteria below.[2]

> 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 his past work as a guitarist and composer, and his proposed work for the Petitioner. The record shows that since at least 2014 the Beneficiary performed in the role of guitarist, vocalist, and composer for several productions or events. To demonstrate this criterion, the Petitioner submitted evidence including an article, promotional flyers, album covers, photographs, and several testimonial letters from colleagues. Upon review, the documentation submitted is insufficient to establish that the Beneficiary performed in a lead or starring role in those productions or events.

The Petitioner provided the cover for the 2014 CD [redacted] by [redacted] that shows the Beneficiary performed as a guitarist and vocalist. A letter from [redacted] confirms that the Beneficiary played guitar on three of the album's songs. A review of [redacted] dated 2014 from www.revistas.elheraldo.co describes the content of the CD and notes [redacted] composed, produced, and directed the production. The record also contains CD covers for additional past productions on which the Beneficiary performed as a guitarist, including [redacted] by [redacted] Band, the single [redacted] by [redacted], [redacted], [redacted], and the single [redacted] by [redacted] In addition, a promotional flyer indicates the Beneficiary performed as a guest guitarist for [redacted] at the 2015 youth concert [redacted] The above documentation does not establish that the Beneficiary's role as a guitarist and vocalist was as a lead or starring participant in those productions.

Further, promotional flyers dated 2017 and 2019 and a letter from [redacted], pastor of [redacted] Church, show that the Beneficiary and his band [redacted] performed at an event with [redacted] titled [redacted] at the [redacted] Theater in [redacted] The Petitioner has not presented evidence sufficient to establish that the Beneficiary's role as a guitarist and vocalist for [redacted] received the level of recognition attributed to the event's star, [redacted] such that he was considered a lead or starring participant in the production. In addition, although a promotional flyer for the 2018 event [redacted] at the [redacted] and a letter from [redacted] pastor of [redacted] indicate that the Beneficiary's group [redacted] performed at that event, they do not establish his role as a lead or starring participant.

[2] On appeal, the Petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

Further, the cover of the EP [redacted] (also referred to in the record as [redacted]), indicates that the Beneficiary was the composer and executive producer for that production, consistent with a lead or starring level of participation. However, the record does not contain critical reviews, advertisements, publicity releases, publications, or other evidence showing that music production composed and produced by the Beneficiary has a distinguished reputation in the field. The Petitioner provided a letter from the Beneficiary, explaining that in his EP [redacted] he "developed Sound/Music that affirms the hope of the [redacted] and their families." A letter from [redacted], the director of the non-profit [redacted] in Colombia, confirms that since 2019 the Beneficiary has performed the [redacted] Project [redacted]" in hospitals for cancer patients, and asserts that it has "been very helpful to them, reducing anxiety and facilitating he waiting periods in their room or operating theater." In addition, although the Petitioner provided the transcripts of several radio interviews with the Beneficiary in which he discusses his role as composer of the EP [redacted] and his goal to restore hope to people with cancer, those items do not establish the distinguished reputation of the Beneficiary's production in the music field. Finally, while the Petitioner submitted evidence that [redacted] and the Beneficiary's [redacted] are available on digital streaming services and social media websites such as Spotify, iTunes, and Facebook, 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 and social media websites is evidence of the distinguished reputation in the field of albums posted on those sites.

Based on the foregoing, the Petitioner has not submitted evidence that the Beneficiary has served as a lead or starring participant in productions or events that have a distinguished reputation and, therefore, does not satisfy this criterion, which requires evidence of both past and upcoming lead or starring participation in distinguished productions. Nevertheless, the Director also considered whether the Beneficiary will perform services as a lead or starring participant in events or productions with a distinguished reputation. As mentioned previously, at the time of filing, the Petitioner submitted its job offer, indicating that his proposed projects will include performing as a composer for album production. Within the Petitioner's response to the Director's request for evidence (RFE), the Petitioner stated that it "has a record in the music industry" and submitted evidence that its music is available on digital streaming services such as Soundcloud. On appeal the Petitioner maintains that "[the petitioning organization] and its music group has a distinguished reputation and record of producing music" that is "available to hundreds of thousands of people via the dedicated website for music streaming, Soundcloud." Even if it were established that those materials demonstrate that the Petitioner enjoys a distinguished reputation, which they do not, it would not automatically follow that their albums are a production or event with a distinguished reputation, absent evidence, in the form required, demonstrating their distinguished reputation in the field.

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 to published materials about the Beneficiary. The Director determined, and we agree, that those materials did not satisfy this criterion. The Petitioner provided the transcripts of several radio interviews with the Beneficiary and other members of [redacted] in 2018 and 2019, in which he discusses his role as composer and vocalist on the EP [redacted] and his goal to restore hope to people with cancer. Three of those interviews were for the [redacted] programs '[redacted]' and '[redacted]." A letter from [redacted] content director for [redacted] confirms that the Beneficiary was interviewed for those programs. Those transcripts indicate that the interviews were also posted on the Facebook page of [redacted] Official. Three additional interviews were by Spanish-language radio stations in [redacted]; one for [redacted]'s program '[redacted]' and two for [redacted]'s programs '[redacted]" and '[redacted]."[3] The evidence indicates that the Beneficiary's interviews with [redacted] were also posted on the radio station's Facebook page.

The Petitioner, however, did not demonstrate that the aforementioned radio programs or social media websites represent major media. Relating to [redacted]s programs '[redacted]" '[redacted]" and '[redacted]" the Petitioner submitted an article from www.elespectador.com that indicates that the [redacted] is the third most powerful network in the country. The Petitioner did not demonstrate that such information regarding the network is indicative that those programs have the status of a major medium. In addition, the Petitioner did not offer any evidence of the major media status of [redacted]'s '[redacted]' program, [redacted]'s '[redacted]" or '[redacted] programs, or the Facebook pages of [redacted] or [redacted].

For these reasons, the Petitioner has not submitted documentation that satisfies this 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 this criterion, the Petitioner submitted various testimonial letters from music professionals and those working in the music field, stating that the Beneficiary has extraordinary skills in the field of music composition.[4] We determine that those testimonials do not satisfy this criterion. Upon review of the evidence, we note that the letters submitted are from the Beneficiary's own current and former colleagues and, therefore, do not demonstrate his significant recognition outside of that circle. In addition, while the authors discuss his talent and dedication, the letters do not discuss the Beneficiary's achievements in the field beyond confirming that he performed his work admirably in prior projects.

For instance, the Petitioner provided several letters from [redacted], a Venezuelan singer-songwriter and composer, who confirms that the Beneficiary participated in pre-production and

[3] We note that the aforementioned interview transcriptions are on letterhead that contains the logo for [redacted] in addition to that of the respective radio stations.

[4] Although we discuss those letters that the Petitioner addresses in its appeal brief, we have reviewed and considered each one.

production of his 2014 album [redacted] specifically, playing guitar on the three songs [redacted]" [redacted]" and [redacted]" In addition, he asserts that the Beneficiary "worked on different live music projects for the years 2011 through 2014." He states that the Beneficiary is an excellent artist, musician and a highly creative and versatile composer."

Further, in several letters [redacted] pastor of [redacted] Church in Colombia, states that between 2012 and 2017 the Beneficiary was in charge of youth concerts as a lead singer and lead guitarist and participated in a live music production with [redacted] providing guitar and vocal arrangements. He asserts that the Beneficiary's musical compositions and productions are highly creative, "mixing and fusing jazz, funk, R&B, HipHop and orchestral sounds."

[redacted] a musician, asserts that the Beneficiary "has been key in shaping the Christian music scene in Colombia," and describes the Beneficiary's [redacted] as "a highly interesting work that contains a handful of good tracks."

[redacted] a music producer, indicates he has "listened critically to some of the productions of [the Beneficiary]" and describes him as "an extraordinary musician, who places his talents in order to serve and help people who truly need help, as is the case in the [redacted] project."

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See Matter of Caron International, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding a foreign national's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the foreign national's eligibility. USCIS may give less weight to an opinion that is not corroborated, or in accord with other information. Furthermore, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F. 2d 41 (2d. Cir. 1990). The reference letters all praise the Beneficiary's talent and abilities. Such letters can provide useful information about a foreign national's qualifications or help in assigning weight to certain documents. Here, they do not explain how the Beneficiary's achievements to date have received significant recognition from organizations, critics, government agencies, or other recognized experts in the field for those achievements. Overall, while the Beneficiary has earned the respect of his colleagues in the field of music composition, the exhibits are insufficient to demonstrate that he has received significant recognition for achievements in the field.

Further, the Petitioner asserted that the Beneficiary meets this criterion through his membership in the American Society of Composers and Publishers (ASCAP). The Petitioner submitted the Beneficiary's ASCAP membership card and information about certain distinguished members of the ASCAP Board of Directors. On appeal, the petitioner argues that the Beneficiary's membership in ASCAP satisfies this criterion because membership requires "outstanding achievement in the field" as judged by "a panel of industry experts with years of experience in the field of music . . . ." We note, however, that the instant petitioner was filed in December 2019, and the Beneficiary's membership in ASCAP began in 2020, subsequent to the filing of the petition. 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). Regardless, the success of some of ASCAP's members does not impute a

requirement that all its members must exhibit and maintain a similar level of success prior to becoming a member. The evidence presented indicates that membership is open to anyone working in the industry as opposed to limiting membership only to those who have received significant recognition for achievements. Further, the documentation submitted does not establish any threshold of success for the membership applicant, rather they reveal that to be eligible to be elected to membership composers need only demonstrate "one work regularly published." Therefore, the record does not support the Petitioner's assertions that membership in ASCAP constitutes significant recognition for achievements in the field.[5]

For these 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 determined that the Petitioner did not satisfy this criterion. The Petitioner did not initially claim that the Beneficiary satisfies this criterion. Within the Petitioner's RFE response it asserted that the Beneficiary satisfies this criterion based upon his past salary as a composer in Colombia. It included the following evidence regarding the Beneficiary's past earnings:

- Letter from [redacted] stating that in 2018 he concluded an employment contract with the Beneficiary for his work on the single '[redacted]' in the amount of 3,700,000 COP
- Letter from [redacted] stating that in 2018 he concluded an employment contract with the Beneficiary for his work on the single [redacted]' in the amount of 3,700,000 COP
- Contract between the Beneficiary and [redacted] dated 2018 for his work on a live concert at [redacted] in the amount of 22,000,000 COP
- Contract between the Beneficiary and [redacted] dated 2018 for musical services for the one-year period beginning February 1, 2018 for the [redacted] church in the amount of 48,000,000 COP
- Webpage article from www.tusalario.org indicating the minimum, average, and maximum salary for "Creative and Performing Artists"

As noted by the Director, the evidence regarding salaries in Colombia did not provide data regarding the salaries of other music composers in Colombia, and thus did not provide a basis of comparison to allow a determination that the Beneficiary's salary is high.

On appeal, the Petitioner provides a webpage article from www.tusalario.org dated 2020, reflecting the minimum, average, and maximum salaries for "Musicians, singers and songwriters," indicating a maximum monthly gross salary of 4,892,874 COP. The Petitioner asserts that "when comparing annual salary reported by Tu Salario (58,714, 488 Colombian Pesos) against that earned by [the

[5] Moreover, as noted by the Petitioner, although ASCAP has a higher level of membership, Honorary Membership, limited to those who have "rendered to the art or industry of music, or to this Society, a notable or conspicuous service," we need not inquire as to how the society interprets "notable or conspicuous," as the Petitioner has not demonstrated that the Beneficiary is an Honorary Member.

Beneficiary] (77,400,00 Colombian Pesos), [the Beneficiary] earns a remuneration significantly above that paid to the top 10% of composers in the field." The record does not include, however, information regarding the compensation of composers in Colombia in 2018. The Petitioner must compare his income with income earned by those in his field as a composer during the same time period. In addition, we note that the Petitioner did not submit verifiable evidence in support of the aforementioned letters, such as foreign tax documentation of the Beneficiary's salary, in the form of copies of pay receipts, revenue declarations, bank statements, or other reliable evidence. The submitted evidence is insufficient to establish the amount of the Beneficiary's salary.

Therefore, the Petitioner has not established that the Beneficiary meets this criterion.

B. Nature of Proposed Employment

We will next address the Director's finding that documentation submitted did not establish sufficiently the terms and conditions of the Beneficiary's employment. The regulation at 8 C.F.R. § 214.2(o)(2)(ii)(B)-(C), which applies to all O petitions, requires a copy of any written contract between the Petitioner and the Beneficiary, an explanation of the nature of the events or activities, the beginning and end dates for the events or activities, and a copy of any itinerary. In addition, the regulation at 8 C.F.R. § 214.2(o)(2)(iv)(A) states that "a petition which requires the alien to work in more than one location must include an itinerary with the dates and locations of work." We find the record inconsistent and incomplete with respect to the nature of the Beneficiary's proposed activities in the United States.

The Petitioner indicated on the Form I-129 that the Beneficiary will work as a composer for the Petitioner off-site at another company or organization's location, however, the Petitioner's signed job offer indicated that the Beneficiary would work at the Petitioner's address. Although the job offer and itinerary included a description of the nature of the Beneficiary's activities, the itinerary did not include the dates and locations the Beneficiary will work offsite at another company or organization during the requested validity period. The Petitioner has, therefore, not fulfilled the regulatory requirements set forth at 8 C.F.R. § 214.2(o)(2)(ii)(C). The appeal will be dismissed on this additional basis.

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. 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.