U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12464811

Date: MAR. 29, 2021

Appeal of Vermont Service Center Decision

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

The Petitioner, an 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 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).

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal.

I. LAW

As relevant here, section 101(a)(15)(O)(i) of the Act establishes O-1 classification for an individual who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. Department of Homeland Security (DHS) regulations define "extraordinary ability in the field of arts" as "distinction," and "distinction" as "a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts." 8 C.F.R. § 214.2(o)(3)(ii).

Next, DHS regulations set forth the evidentiary criteria for establishing a beneficiary's sustained acclaim and the recognition of achievements. A petitioner must submit evidence either of "significant national or international awards or prizes" such as "an Academy Award, an Emmy, a Grammy, or a Director's Guild Award," or of at least three of six listed categories of documents. 8 C.F.R.

§ 214.2(o)(3)(iv)(A)-(B). If the petitioner demonstrates that the listed criteria do not readily apply to the beneficiary's occupation, it may submit comparable evidence to establish eligibility. 8 C.F.R. § 214.2(o)(iv)(C).

The submission of documents satisfying the initial evidentiary criteria does not, in and of itself, establish eligibility for O-1 classification. See 59 Fed. Reg. 41818, 41820 (Aug. 15, 1994) ("The evidence submitted by the petitioner is not the standard for the classification, but merely the mechanism to establish whether the standard has been met.") 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 documentation submitted indicates that the Beneficiary has been performing in Russia as a guitarist and composer since at least 2010. The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation, seeking to have the Beneficiary perform as a guitarist and composer for a period of three years. It asserts that the Beneficiary is a guitarist and composer of exceptional ability. The Petitioner provided its agency agreement with the Beneficiary. The Petitioner also submitted the employment agreements between the Beneficiary and [redacted], setting forth the Beneficiary's proposed duties during the requested period and authorizing the Petitioner to act as the agent for those establishments for the purpose of filing this petition. The Beneficiary's proposed itinerary as of the date of filing also indicated that the Beneficiary will be recording music at [redacted]

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 determined that the Petitioner provided evidence relating to five criteria but did not satisfy any of them. On appeal, the Petitioner maintains that the evidence satisfies those five criteria. For the reasons discussed below, 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 Petitioner has provided posters, album covers, photographs, reviews, and letters from colleagues regarding events at which the Beneficiary has performed in Russia, including the 2015 documentary

[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."

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 Beneficiary has been the composer and musician on several of his own productions, including his debut album [redacted] (2018), the EP [redacted] (2019), and the singles [redacted] (2019) and [redacted] (2019). A 2019 review of [redacted] on the website www.circlepit.com describes it as "a considerable chunk of instrumental greatness," and the Beneficiary as "an exciting, new solo artist rising up through the ranks of the instrumental metal world."

Upon review, although we find that the evidence establishes that the Beneficiary has performed in a lead or starring role for productions or events, the Petitioner has not submitted critical reviews, advertisements, publicity releases, publications or other evidence to establish that the events themselves have a distinguished reputation, as required pursuant to the plain language of this criterion. 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. In addition, while 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. Further, although on appeal the Petitioner submits 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.[2]

Moreover, to meet this criterion the Petitioner must 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. The evidence of record indicates that if the requested classification is granted the Beneficiary, as a guitarist and composer, will perform at music clubs and participate in studio work at recording studios. The Petitioner has not submitted critical reviews, advertisements, publicity releases, publications, or other evidence to establish that the productions on the Beneficiary's proposed itinerary have a distinguished reputation. In sum, the Petitioner has neither identified nor documented, through submission of the evidence prescribed by regulation, the Beneficiary's previous or forthcoming lead or starring role in events with a distinguished reputation.

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

[2] The Petitioner also provides evidence that the Beneficiary's single [redacted] was streamed on Spotify more than 10,000 times as of April 2020 and received 2,357 views after its 2020 premiere on YouTube. As the Petitioner must establish eligibility at the time of filing (September 2019) in accordance with 8 C.F.R. §103.2(b)(1), we will evaluate evidence that pre-dates the filing of the petition.

individual in major newspapers, trade journals, magazines, or other publications. 8 C.F.R. § 214.2(o)(3)(iv)(B)(2)

The Director determined that the Petitioner did not satisfy this criterion. We agree. Specifically, the Petitioner did not demonstrate published material about the Beneficiary in major newspapers, trade journals, magazines, or other major media. The Petitioner submitted 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. The Petitioner asserts that the program was broadcast on the regional radio station [redacted] in Russia. However, 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, the issue is whether the radio show is a major medium.

The Petitioner also submitted screenshots from the YouTube channel of Russian blogger [redacted] The Petitioner asserts that the screenshots show that the Beneficiary was interviewed by [redacted] on two occasions in 2018, in which it claims he discussed, respectively, different techniques of guitar strumming and the [redacted] One screenshot contains a picture of the Beneficiary and an untranslated caption. The other screenshot contains a picture of a guitar and the partial caption [redacted] However, the Petitioner did not provide a transcription of the interviews demonstrating published material about the Beneficiary relating to his work. In addition, the Petitioner indicated that [redacted]'s YouTube channel has over 20 million total views. However, although the Petitioner provides information from www.growthtraffic.com and www.tubics.com about how YouTube counts views, the Petitioner did not demonstrate the significance of 20,000,000 total views on a YouTube channel.

In addition, the Petitioner provided a screenshot from the webpage www.1tv.ru that shows the Beneficiary accompanying [redacted] on guitar during a recording session. A letter from [redacted] an actor and musician, indicates the Beneficiary took part in the documentary film [redacted] and that "[w]e recorded one of my songs together, that appeared in the program on the most important central television channel of Russia in 2015." The Petitioner claimed that "[t]he fact that [the Beneficiary] has appeared on Russia's most popular TV channel [redacted] along as the main music player for Russia's famous actor [redacted] also demonstrates that he has achieved the level of recognition required under the regulations . . . ." Further, the Petitioner references under this criterion 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." The Petitioner did not establish, however, how the screenshot and letters reflected published material by or about the Beneficiary. The letters will be considered under the appropriate criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3) and (5).

Finally, the Petitioner submitted an article dated [redacted] 2020 about the Beneficiary which was published on the website www.musiccrowns.org, and a screenshot of an interview of the Beneficiary dated [redacted] 2020 from the website www.theericalper.com. Again, the Petitioner cannot rely on those materials to establish his 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).

Based on the above, the Petitioner has not established that the Beneficiary satisfies the eligibility 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)

The Petitioner maintains 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." The record shows that [redacted], a Swedish company, specializes in the manufacture of 6, 7, and 8-string headless electric guitars, and that [redacted] is a U.S. company that manufactures musical instruments and sound equipment. The record contains screenshots of several video clips the Beneficiary posted on YouTube and the social media websites of [redacted] and [redacted] in 2018. For instance, videoclips on YouTube and the Instagram account o[redacted] show the Beneficiary performing with and reviewing [redacted] guitars and the [redacted]. In addition, the Instagram account of [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 . . . ."

The Petitioner also submitted a letter 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 note, 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. 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). Further, a letter from [redacted] of the [redacted], an official partner and distributor of [redacted] in Russia, provides 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." On appeal, the Petitioner provides additional documentation about [redacted] and [redacted] including an interview with [redacted] from www.inc.com indicating that the company is a global brand with a reported $270 million in annual revenue. A review of the [redacted] from www.musicradar.com states that the company's "impressive user base includes [redacted] and [redacted]."

A lead 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 the materials submitted do not satisfy this criterion. Specifically, the documentation submitted establishes 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. Here, 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,[3] 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.

In addition, the Petitioner must establish that the Beneficiary will provide services as a lead or starring participant for organizations or establishments that have a distinguished reputation. The employment agreements and itinerary establish that the Beneficiary will perform as a guitarist and composer at events at [redacted], and [redacted] The plain language of the regulation requires "[e]vidence that the alien has performed, and will perform, in a lead, starring or critical role for organizations or establishments that have a distinguished reputation." (Emphasis added.) The evidence does not demonstrate how the Beneficiary's role as a guitarist and composer rises to the level of a lead, starring or critical role for those establishments. While 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. The Petitioner also has not provided evidence, in the form required, sufficient to demonstrate that those establishments enjoy 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 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 Petitioner contends that it provided testimonial letters to show that the Beneficiary has received significant recognition for his achievements. While the letters summarized the Beneficiary's musical work and highlighted his personal accomplishments, they do not demonstrate that he has "received significant recognition."[4] For instance, in her aforementioned letter, [redacted] confirms that in 2018 the Beneficiary played guitar on her concert tour in Russia, and praises his "technique, charisma, professionalism, [and] musicality . . . ." [redacted] did not explain, however, that he received significant recognition for his performances at her concerts. [redacted] states the Beneficiary took part in the production [redacted] 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, [redacted] and [redacted] established the Beneficiary's role as an endorser for [redacted] and [redacted] but

[3] The record indicates that other musicians who have provided endorsements for [redacted] include [redacted] and [redacted]

[4] Although we discuss a sampling of letters, we have reviewed and considered each one.

do not provide that he garnered significant attention for his work. Moreover, musicians [redacted] and [redacted] note their participation on the Beneficiary's CD [redacted] without indicating whether he garnered significant attention from the CD.

Here, the letters do not sufficiently explain how the Beneficiary has received significant recognition in the field for his work, nor has the Petitioner shown that the letters themselves constitute such recognition. Although the Petitioner emphasizes that the Beneficiary is "one of very few guitarists in Russia who plays on an [redacted]," 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. The record lacks documentary evidence showing that the Beneficiary has received such recognition.

Further, we acknowledge that the Petitioner provided a "no objection" labor consultation letter from [redacted] of the American Federation of Musicians (AFM), stating that "the Draft I-129 Petition and supporting documentation . . . . clearly establishes that [the Beneficiary] is a guitarist/composer of extraordinary ability, which has been demonstrated by sustained international acclaim" and "meets the recently revised standards of distinction in the arts to qualify for an O-1 visa." While the letter satisfies the Petitioner's burden to submit a written 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 AFM reached its conclusions based on the evidence submitted with the petition.

On appeal, the Petitioner asserts that the Beneficiary's membership in the [redacted]) is evidence that "organizations attribute high and significant recognition for [the Beneficiary's] achievements." It submits two letters from [redacted] president of [redacted] who states the Beneficiary is a "full member" of the association. He does not indicate when the Beneficiary became a member of [redacted]. He provides that the Beneficiary's candidacy for membership in the association was introduced by the "famous Russian guitarist" and [redacted] board member [redacted], and was accepted "based on his creative achievements, professional skills, participation in national and international competitions and festivals, as well as the popularization of instrumental guitar music in Russia and abroad." The record contains no evidence (such as bylaws or rules of admission) showing that [redacted] requires of its members the receipt of significant recognition for achievements, nor has the Petitioner shown that membership in [redacted] constitutes such recognition.

Without further information and evidence, the above-referenced letters are not sufficient to demonstrate that the Beneficiary's achievements have received significant recognition. 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. In addition, such 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. It remains the Petitioner's burden to show the Beneficiary's significant recognition for achievements in the

field. As discussed, the testimonial evidence submitted does not meet this burden. Overall, while the Beneficiary has earned the respect of his colleagues, the material is insufficient to establish that he has received significant recognition for achievements in the field. The Petitioner has, therefore, not established that the Beneficiary satisfies this evidentiary 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 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 concert performance as a guitarist for [redacted]
- Contract dated June 2016 showing the Beneficiary was paid 170,000 RUB per month for concert performances between June 2015 and December 2017 at the [redacted]
- Contract indicating the Beneficiary received 200,000 RUB to perform at the [redacted] on December 22, 2015.

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. The contracts do not identify an hourly rate of pay or indicate that the Beneficiary was paid by the hour. Here, 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.

The Petitioner also 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, however, 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. Without such evidence, we cannot properly evaluate the Beneficiary's previous earnings in Russia. Although on appeal, the Petitioner states that it is 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 does not contain this documentation. Regardless, the Petitioner must compare the Beneficiary's income with income earned by those in his field during the same time period. The Petitioner offers no basis for comparison showing that the Beneficiary's earnings are high compared to other musicians or composers during the same time period. For the foregoing reasons, the Petitioner has not submitted sufficient evidence to establish that the Beneficiary meets this criterion.

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.