U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16957459

Date: MAY 25, 2021

Motion on Administrative Appeals Office Decision

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

The Petitioner, a music group, seeks to classify the Beneficiary, a musician, 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 Petitioner's Form I-129, Petition for Nonimmigrant Worker. We dismissed its appeal[1] and subsequently dismissed its motion to reconsider and motion to reopen.[2]

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 will dismiss the motion.

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 alternative initial evidentiary criteria for establishing a beneficiary's sustained acclaim and the recognition of achievements. A petitioner may submit evidence either of

[1] *See* ID# 7701074 (AAO Feb. 28, 2020).
[2] *See* ID# 11063779 (AAO Nov. 30, 2020).

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). If the petitioner demonstrates that the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, it may submit comparable evidence in order to establish the individual's 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).[3]

Further, a motion to reconsider must establish that our 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. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider. We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

II. PROCEDURAL HISTORY

The Director of the California 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. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B). Specifically, the Director determined that the Petitioner did not indicate or establish that the Beneficiary satisfied the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(A), and the Beneficiary did not meet any of the six alternative initial evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(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). We dismissed the Petitioner's subsequent appeal from that decision. Although in our appellate decision we withdrew the previous finding pertaining to the Beneficiary's proposed duties in the United States, we concluded that the documentation submitted did not satisfy any of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). Subsequently, we dismissed the Petitioner's motion to reconsider and motion to reopen, determining that it did not demonstrate that we erred as a matter of law or policy and its new evidence did not show the Beneficiary's eligibility for classification as an individual of extraordinary ability.

In the current motion to reconsider, the Petitioner maintains that the Beneficiary fulfills three criteria.[4]

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[3] *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."

[4] The Petitioner contends that the Beneficiary meets the following three criteria: lead or starring participant in distinguished productions or events at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*), lead, starring, or critical role for distinguished 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*).

III. ANALYSIS

As stated previously, a motion to reconsider must establish that our 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. 8 C.F.R. § 103.5(a)(3). In the current motion, the Petitioner argues the Beneficiary's eligibility relating to three criteria without demonstrating how we erroneously applied law or policy in our prior decision.

Regarding the criterion relating to lead or starring role in distinguished productions or events at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*), in our prior decision on motion we determined that while the submitted promotional posters and photographs indicate that the Beneficiary has been a [redacted] for several bands and the music arranger and/or performer on several CDs, the documentation did not establish that the Beneficiary performed services in a lead or starring role in those productions or events, or their distinguished reputation. In addition, our prior motion decision determined that the Petitioner had not submitted, as required, critical reviews, advertisements, publicity releases, publications or other evidence that would distinguish the Beneficiary's proposed role, developing several albums and performing at various venues in Texas, as leading or starring within its upcoming productions, or their distinguished reputations.

In the current motion, the Petitioner states that under 8 C.F.R. § 214.2(o)(iv)(C) it "may submit comparable evidence if the other criteria do not readily apply to the [Beneficiary's] occupation." It urges us "to consider the evidence presented in its totality, including the evidence that does not necessarily neatly fall under the description of critical reviews, advertisements, publicity releases or publications," that would "indicate that the [redacted] role filled by the Beneficiary would more likely be recognized in other ways, such as the testimony of fellow musicians . . . documented in the supporting evidence in his case." The Petitioner does not specifically address our conclusions regarding this criterion and does not direct to a particular law, regulation, or policy that specifically shows that we erred in our determinations. 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). Although the Petitioner newly claims comparable evidence relating to this criterion, it does not establish that our prior decision on motion was based on an incorrect application of the law, regulation, or policy, nor does the current motion demonstrate that our latest decision was erroneous based on the evidence before us at the time of the decision.[5]

In reference to the lead, starring, or critical role for distinguished organizations and establishments criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*3*), in the current motion, the Petitioner paraphrases guidance provided in a policy memorandum for a similar criterion in the regulations pertaining to immigrants of extraordinary ability at 8 C.F.R. § 204.5(h)(3)(viii), stating that "letters from individuals with personal knowledge of the significance of [the Beneficiary's] leading or critical role can be particularly helpful

[5] Because the Petitioner did not previously assert to the Beneficiary satisfying the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*) through comparable evidence, we did not err by failing to consider such claim.

in making the determination as long as the letters contain detailed and probative information." [6] We do not disagree with the Petitioner's statement; our prior motion decision, however, determined that the letters submitted did not detail sufficiently the Beneficiary's past and proposed lead, starring, or critical role for distinguished organizations or establishments. For instance, we noted that the Petitioner claimed that the Beneficiary satisfies this criterion based upon his past role with [redacted] in [redacted]. We concluded that, although the Petitioner provided a letter from that organization's founder, [redacted] confirming that the Beneficiary was a teacher and "head of the [redacted] chair" for 10 years, and praising his "talent, professionalism and responsibility with his students," the letter did not detail sufficiently the Beneficiary's starring or leadership position, or the critical nature of his role with the organization. Our previous decision also concluded that the documentation submitted did not establish that the Beneficiary's proposed work as a musician for the petitioning band will be in a lead, starring, or critical role for the organization; the letters submitted from the Petitioner's president, asserting that the Beneficiary's "extensive" experience as a [redacted] "is of vital importance to the shows offered by our group," do not describe how the Beneficiary will contribute to the petitioning organization as a whole, how his position fits within the overall hierarchy of the group, or how the Beneficiary will be responsible for the Petitioner's success or standing to a degree consistent with the meaning of a "critical role." The Petitioner disputes our conclusions without directing to a particular law, regulation, or policy that specifically shows that we erred in our determinations. The Petitioner has not shown that our determination for this criterion was incorrect.

Finally, with respect to the Petitioner's most recent motion to reopen, in our prior decision on motion we acknowledged that the Petitioner submitted new evidence that it claimed satisfied the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*), relating to significant recognition for achievements; specifically, a certificate of excellence the Beneficiary received from [redacted] at [redacted] for his participation as a featured musician in its [redacted] workshop and master class, and an award certificate for outstanding service the Beneficiary received from the [redacted] University jazz department for his participation as a featured artist in its [redacted] jazz master class. We determined that the Petitioner could not rely on the certificates, conferred on the Beneficiary in 2020, to establish his eligibility at the time of filing this petition in November 2018. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). We also determined that, even if we could consider evidence that post-dates the filing of the petition, the Petitioner had not offered supporting evidence indicating that the Beneficiary's receipt of those certificates constitutes significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field. Therefore, we determined that the Petitioner had not presented new facts sufficient to overcome our prior determination that he did not meet this criterion. In the current motion, the Petitioner asserts that "[a]lthough we would agree that the certificates were created after the O-1 filing date, we would note that the commendations refer to the overall status as a performer of extraordinary ability as of the filing date, though the recognition themselves came later." The Petitioner does not identify any specific error of law or policy in our motion decision relating to this criterion.

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[6] *See* USCIS Policy Memorandum PM 602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 10 (Dec. 22, 2010), https://www.uscis.gov/policymanual/HTML/PolicyManual.html.

As 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, the Petitioner did not establish that the motion meets the regulatory requirements. Therefore, we will deny the motion to reconsider.

IV. CONCLUSION

The Petitioner has not shown that our previous decision dismissing the motion was incorrect based on the record before us.

ORDER: The motion to reconsider is dismissed.