U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23841598

Date: JAN. 25, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a musician and singer, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner had satisfied at least three of ten initial evidentiary criteria, as required. 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

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals with extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation; who seek to enter the United States to continue work in the area of extraordinary ability; and whose entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement, that is, a major, internationally recognized award. If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)–(x), including items such as awards, published material in certain

media, and scholarly articles. The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable evidence if they are able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the individual's occupation.

Where a petitioner meets the initial evidence requirements through either a one-time achievement or meeting three lesser criteria, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner is a singer and songwriter specializing in Armenian pop and folk music. Because the Petitioner has not indicated or shown that he received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Petitioner initially claimed to have satisfied seven of these criteria, summarized below:

- (i), Lesser nationally or internationally recognized prizes or awards;
- (iii), Published material about the individual in professional or major media;
- (iv), Judging the work of others in the same or an allied field;
- (v), Original contributions of major significance;
- (vii), Artistic display;
- (viii), Leading or critical role for distinguished organizations or establishments; and
- (x), Commercial success.

The Director concluded that the Petitioner met the criteria relating to lesser awards and artistic display. On appeal, the Petitioner asserts that the Director failed to apply the preponderance of the evidence standard and maintains that he meets at least one further criterion through the submission of comparable evidence. The Petitioner does not pursue his initial claim that he meets the criteria relating to published material, judging, and leading or critical role on appeal, nor does he contest the Director's conclusions regarding these issues. We therefore consider those issues to be abandoned.[1]

After reviewing all of the evidence in the record, we conclude that the record does not support a finding that the Petitioner satisfies the requirements of at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

[1] *See Matter of R-A-M-*, 25 I&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. Att'y 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) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field. 8 C.F.R. § 204.5(h)(3)(v).

In order to satisfy the regulation at 8 C.F.R. § 204.5(h)(3)(v), a petitioner must establish that not only has he made original contributions, but that they have been of major significance in the field. For example, a Petitioner may show that the contributions have been widely implemented throughout the field, have remarkably impacted or influenced the field, or have otherwise risen to a level of major significance.

The Petitioner did not identify a specific original artistic contribution that he has made, but instead referred to evidence of his receipt of the title of "HONORED ARTIST" granted to him by the president of the Republic of Armenia and his solo performances at international concerts and events. While this evidence serves to verify the Petitioner's work as a musician and singer, it does not establish that he has made original contributions that have influenced other singers or otherwise been of major significance to the field.

The record also includes a number of reference letters discussing the Petitioner's musical work.[2] For example, the Petitioner submitted letters from several "honored artists" of Armenia, including [redacted] who state that the Petitioner "is one of the best performing artists in Armenia" and that "his concerts are overcrowded with spectators in different cities of the world." [redacted] of Armenia, states the Petitioner "is a motivated, very artistic, and responsible person with a high level of intelligence," and that "he is one of the best Armenian folk-pop entertainers of his generation." [redacted] Manager of the Armenian [redacted] states that the Petitioner was the headliner for the [redacted] in July 2019, and notes that the Petitioner's "name and esteem brought over 5,000 excited fans to see him perform for the first time in Canada."

Although the letters praise the Petitioner's skills and talents, simply having a unique or special skill set is not intrinsically a contribution of major significance. The record must be supported by evidence that the Petitioner has already used those skills and talents to impact the field at a significant level, which he has not shown. In addition, the letters do not demonstrate how the Petitioner's talents and skills have been a major influence in the field of endeavor. *See generally* 6 *USCIS Policy Manual*, F.2 (Appendix), https://www.uscis.gov/policy-manual.

The Petitioner has not sufficiently shown that his music constitutes "contributions of major significance in the field," as required under 8 C.F.R. § 204.5(h)(3)(v). While the record includes some evidence that the Petitioner's musical talents have been recognized, it is insufficient to confirm that his work has been widely implemented throughout the field, has remarkably impacted or influenced the field, or has otherwise risen to a level of major significance. Moreover, while the record demonstrates his popularity in Armenia, and while the letters indicate that the Petitioner has received some attention from the field for his performances and recordings in the Armenian music genre, they are insufficient to establish that the extent of his influence has risen to the level of "major significance in the field." For example, while Mr. [redacted] indicated that the Petitioner's performance at the [redacted] was well-received, the record is insufficient to demonstrate that the reception of his work supports a finding that it constitutes "major significance in the field." Neither the letter nor other evidence in the record

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

confirms that his performance at the festival or any other events or venues resulted in his musical style being widely adopted throughout the field, has remarkably impacted or influenced the field, or has otherwise risen to a level of major significance.

The opinions of the Petitioner's references are not without weight and have been considered above. Here, however, the Petitioner's letters do not contain specific, detailed information identifying his original contributions and explaining the unusual influence his musical work has had on the field. Letters that specifically articulate how a petitioner's contributions are of major significance in the field and its impact on subsequent work add value. *See id.* On the other hand, letters that lack specifics and use hyperbolic language do not add value, and are not considered to be probative evidence that may form the basis for meeting this criterion. *See id.* Moreover, U.S. Citizenship and Immigration Services (USCIS) need not accept primarily conclusory statements. *1756, Inc. v. The U.S. Att'y Gen.*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

The record, including the reference letters, does not sufficiently establish that the Petitioner's original work has been unusually influential, has substantially impacted the field, or has otherwise risen to the level of original contributions of major significance. As such, the Petitioner has not demonstrated that he meets this regulatory criterion. *See Visinscaia*, 4 F. Supp. 3d at 134-35 (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole).

On appeal, the Petitioner contends that he satisfies this criterion based on comparable evidence under the regulation at 8 C.F.R. 204.5(h)(4). Specifically, he asserts that evidence of his YouTube channel, "in the absence of databases for Armenian music comparable to the Billboard Top 100, etc.," should be considered as comparable evidence applicable to satisfy this criterion. The regulation at 8 C.F.R. § 204.5(h)(4) allows for comparable evidence if the listed criteria do not readily apply to a petitioner's occupation. *See* 6 *USCIS Policy Manual*, *supra*, at F.2 (Appendix). A petitioner should explain why he has not submitted evidence that would satisfy at least three of the criteria set forth in 8 C.F.R. § 204.5(h)(3) as well as why the evidence he has included is "comparable" to that required under 8 C.F.R. § 204.5(h)(3).

Here, the Petitioner does not establish why this evidence should be considered as comparable evidence under this same criterion that he claims to meet through the submission of reference letters and evidence of his performances and recordings. In addition, the Petitioner did not show how his evidence is "truly comparable" to the criteria listed in the regulation. The Petitioner has not submitted sufficient evidence showing that the original contributions of major significance criterion under 8 C.F.R. § 204.5(h)(3)(v) does not readily apply to his occupation as a musician and singer.

For the reasons discussed above, considered both individually and collectively, the Petitioner has not shown that he has made original contributions of major significance in the field.

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.* 8 C.F.R. § 204.5(h)(3)(x).

This criterion focuses on volume of sales and box office receipts as a measure of the individual's commercial success in the performing arts. Therefore, the mere fact that an individual has recorded

and released musical compilations or performed or participated in theatrical, motion picture, or television productions would be insufficient, in and of itself, to meet this criterion. The evidence must show that the volume of sales and box office receipts reflect the individual's commercial success relative to others involved in similar pursuits in the performing arts. *See* 6 *USCIS Policy Manual*, *supra*, at F.2 (Appendix).

In determining that the Petitioner did not meet this criterion, the Director acknowledged his claims regarding the commercial success of his musical recordings, but emphasized that the regulatory criterion calls for evidence of commercial success in the form of "sales" or "receipts," evidence which the Petitioner had not provided. On appeal, the Petitioner argues eligibility for this criterion based on comparable evidence in the form of the number of unique visitors to his YouTube channel.

As previously noted, the regulation at 8 C.F.R. § 204.5(h)(4) addresses comparable evidence and allows a petitioner the opportunity to submit "comparable" evidence to establish his or her eligibility, if USCIS determines that a criterion does not readily apply to the individual's occupation. *See id.* A petitioner should explain why he has not submitted evidence that would satisfy at least three of the criteria set forth in 8 C.F.R. § 204.5(h)(3), as well as why the evidence he has included is "comparable" to that required under 8 C.F.R. § 204.5(h)(3). *See id.* Here, the Petitioner does not show that the standard criteria do not readily apply to his occupation. Rather, he initially claimed to satisfy several criteria, and has in fact satisfied two of them, outright. The Petitioner has not adequately explained his contention that the comparable evidence clause applies in this matter.

The Petitioner further asserts that the wording of this regulatory criterion remains "stuck in the utterly outmoded and irrelevant world of obsolete consumer technology," and therefore the YouTube metrics should be considered. While the Petitioner's assertions are noted, the regulations, in their published form, are binding in this proceeding; the Petitioner has no right or privilege to declare those regulations "obsolete" and substitute a new standard more favorable to his interests. While the Petitioner's assertions are noted, further discussion of YouTube metrics would be more appropriate in the context of a final merits determination once a given individual has met the initial evidentiary threshold at 8 C.F.R. § 204.5(h)(3). Here, the Petitioner has not cleared that threshold, and therefore a more detailed discussion of the YouTube metrics would not affect the outcome of the proceeding.

However, assuming arguendo that the Petitioner established that this criterion does not apply to his occupation, and that the type of evidence he submitted is in fact comparable to that specifically called for under this criterion, the Petitioner has still not established that he has enjoyed commercial success as a performing artist. First, the majority of the evidence pertaining to his YouTube channel and the number of times his videos have been viewed or streamed post-dates the filing of the petition. For example, the Petitioner submits screenshots of his YouTube channel demonstrating the total number of views for videos such as "[redacted]," "[redacted]," "[redacted]" and "[redacted]," which were released in [redacted] 2020, [redacted] 2021 [redacted] 2021, and [redacted] 2021, respectively. As noted by the Director, the metrics for these videos do not support the Petitioner's assertion that he had achieved commercial success at the time the petition was filed in April 2020. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In addition, the Petitioner has not submitted evidence to establish that a certain quantity of streams or views of his videos, whether considered individually or as a whole, can serve as a gauge of commercial success. Although the Petitioner provided screenshots from YouTube, he did not offer evidence of his commercial successes through receipts or sales, and did not demonstrate that his presence on YouTube resulted in a volume of sales reflecting commercial successes compared to other musicians or singers. For that reason, the evidence submitted by the Petitioner is insufficient to show that his videos, which have been streamed and viewed on YouTube, have been commercially successful.

For all of the reasons stated above, the Petitioner has not established that he meets this criterion.

III. CONCLUSION

The Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten lesser criteria. As a result, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a conclusion that the Petitioner has established the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the record indicates that the Petitioner has enjoyed some success as a musician and signer, but it does not show that this success has translated into individual recognition for the Petitioner at a level that rises to sustained national or international acclaim or demonstrates a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

The Petitioner has not demonstrated eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.