U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33737185

Date: SEP. 10, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a fashion designer, seeks classification as an individual of extraordinary ability. 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 met the initial evidence requirements for the classification by establishing the Petitioner's receipt of a major, internationally recognized award, or by meeting three of the ten evidentiary criteria at 8 C.F.R. § 204.5(h)(3). 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

An individual is eligible for the extraordinary ability classification if they have extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and their achievements have been recognized in the field through extensive documentation; they seek to enter the United States to continue work in the area of extraordinary ability; and their entry into the United States will substantially benefit prospectively the United States. Section 203(b)(1)(A) of the Act.

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 may demonstrate international recognition of their achievements in the field through a one-time achievement (that is, a

major, internationally recognized award). Absent such an achievement, a petitioner must provide sufficient qualifying documentation demonstrating that they meet at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

Where a petitioner meets these initial evidence requirements, 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). 6 *USCIS Policy Manual* F.2, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2.

II. ANALYSIS

The Petitioner is a fashion designer who co-founded [redacted] (D-), [redacted][1] Her work with D- largely involves creating and marketing D-'s products using its patented and trademarked software, described on the patent as "Software-as-a-service (SaaS) featuring software for use in photo editing," providing [redacted] The record contains material documenting the sale of D-'s products on social media platforms, such as media articles discussing the creation of D-'s fashionable attire for [redacted] avatars for purchase by [redacted] end users. According to media reports, D- offered "more than 3,000 articles of digital clothing [], for people to outfit their own internet images or that of their avatars" in 2023. The Petitioner intends to pursue her career in the fashion design field through her work with D-.

As a preliminary matter, we acknowledge that the Petitioner has been the beneficiary of an approved O-1 petition. Although USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the Petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different statute, regulations, and case law. The nonimmigrant and immigrant categories have different criteria, definitions and standards for persons working in the arts. "Extraordinary ability in the field of arts" in the nonimmigrant O-1 category means distinction. 8 C.F.R. § 214.2(o)(3)(ii). But in the immigrant context, "extraordinary ability" reflects that the individual is among the small percentage at the very top of the field. 8 C.F.R. § 204.5(h)(2).

Because the Petitioner has not indicated or shown that she received a major, internationally recognized award, she must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). The Director determined that the Petitioner met two of the regulatory criteria by providing sufficient evidence (1) that material had been published about her in major trade publications or major media, and (2) of her leading or critical role with a distinguished organization. *See*

[1] The Petitioner indicated in the petition that she intends to be employed within the "Fashion Designers" occupation should this petition be approved. DOL's Occupational Information Network (O*NET) summary report for "Fashion Designers," may be viewed at https://www.onetonline.org /link/summary/27-1022.00.

8 C.F.R. § 204.5(h)(3)(iii) and (viii). On appeal, the Petitioner asserts that she also meets several other criteria, including the artistic display criterion at 8 C.F.R. § 204.5(h)(3)(vii). She asserts that the Director erred in determining that she did not meet the plain language of these initial regulatory requirements.

As more fully discussed below, we conclude that the Petitioner has met the criterion at 8 C.F.R. § 204.5(h)(3)(vii). Because the Petitioner has shown that she satisfies at least three criteria, we will remand the matter to the Director to evaluate the totality of the evidence in the context of a final merits determination to determine whether the Petitioner has demonstrated her sustained national or international acclaim, her status as one of the small percentage at the very top of her field of endeavor, and that her achievements have been recognized in the field through extensive documentation.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii)

The plain language of this criterion requires evidence (1) of a petitioner's work in the field, and (2) that their work in the field has been displayed in an artistic exhibition or showcase. The petitioner must satisfy both elements to meet the plain language requirements of this criterion.

The Petitioner submitted evidence that her artistic works were showcased at fashion related exhibitions. We note that the Director analyzed the evidence under this criterion and concluded that the display of D-'s fashion designs at the [redacted] (C-) and [redacted] (T-) exhibitions did not constitute the display of the Petitioner's own work, and as such the Petitioner did not meet the first element of the plain language requirements for this criterion. Based on our de novo review, we conclude that the evidence of record suggests otherwise. For instance, according to the testimonial letters and the webpages submitted about the exhibition at C-, the Petitioner attended the exhibition and assisted in the creation of collaborative digital fashions for the personal avatars of other participants at the event. Likewise, for T-'s exhibition the Petitioner created and presented a digital dress in the artwork to adorn the avatars of other artists involved with this artistic display.

The testimonial letters and documentary evidence about D-'s business in the record indicates that the Petitioner co-founded this company and since its inception has performed in a variety of creative roles therein that extend beyond administrative oversight, to include integrating various technologies and providing creative direction to create the patented and trademarked software used in the design of the digital attire and accessories that form the basis for D-'s online products. We therefore agree with the Petitioner that, more likely than not, she meets the plain language requirements for this criterion, and the Director erred in concluding otherwise.

For the reasons discussed above, we withdraw this aspect of the Director's decision and remand the matter for further review and entry of a new decision. Because the Petitioner has established her qualifications under criteria at 8 C.F.R. § 204.5(h)(3)(iii), (vii), and (viii), on remand, the Director should conduct a final merits review of the evidence of record.

As extraordinary ability is an elite level of accomplishment whose recognition necessarily entails a judgement call, it cannot be established through meeting at least three of the evidentiary criteria alone.

The final merits determination is the ultimate statutory inquiry of whether the applicant has extraordinary ability as demonstrated by sustained national or international acclaim. *Amin v. Mayorkas*, 24 F.4th 383, at 395 (2022). The Petitioner seeks a highly restrictive visa classification, intended for the handful of individuals at the top of their respective fields. 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). As contemplated by Congress, the Petitioner must demonstrate the required sustained national or international acclaim, consistent with a "career of acclaimed work in the field." H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act.

The new decision should include an analysis of the totality of the evidence, evaluating whether the Petitioner has demonstrated, by a preponderance of the evidence, her sustained national or international acclaim, her status as one of the small percentage at the very top of her field of endeavor, and that her achievements have been recognized in the field through extensive documentation. *See* section 203(b)(1)(A)(i) of the Act; 8 C.F.R. § 204.5(h)(2), (3); *see also Kazarian*, 596 F.3d at 1119-20. We express no opinion regarding the ultimate resolution of this case on remand.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.