U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24443220

Date: SEPT. 16, 2024

Appeal of Texas Service Center Decision

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

The Petitioner has a varied history in the performing arts and associated occupations and he seeks classification as an alien 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 Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding that although the record established that the Petitioner met at least three of theten regulatory criteria, he did not warrant an approval considering the totality of the evidence. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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

To qualify under this immigrant classification, the statute requires the filing party demonstrate:

- The foreign national enjoys extraordinary ability in the sciences, arts, education, business, or athletics;
- They seek to enter the country to continue working in the area of extraordinary ability; and
- The foreign national's entry into the United States will substantially benefit the country in the future.

Section 203(b)(1)(A)(i)–(iii) 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-step analysis. In the first step, 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 material if he or she is 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 these initial evidence requirements, we then move to the second step to 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, 1121 (9th Cir. 2010) (discussing a two-step 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 Amin v. Mayorkas*, 24 F.4th 383, 394 (5th Cir. 2022).

II. ANALYSIS

Before the Director, the Petitioner claimed he met eight of the regulatory criteria. The Director decided that the Petitioner satisfied four of the criteria relating to published material, judging, display of the Petitioner's work, and performing in a leading or critical role. But the Director concluded he did not satisfy the criteria associated with prizes or awards, original contributions, high salary or remuneration, or commercial success. Within the final merits determination, the Director decided the Petitioner's claims and evidence did not show that he is one of that small percentage who have risen to the top of the field of endeavor, nor did it reflect his achievements set him significantly above almost all others in the field at a national or international level and does not establish sustained acclaim.

The Petitioner presents four procedural errors in the Director's decision for this appeal. Those relate to: (1) the Director's application of the sustained acclaim requirement; (2) the totality of the evidence method; (3) by improperly dismissing individual criteria under step one (8 C.F.R. § 204.5(h)(3)(i)–(x)) the Director failed to properly conduct a final merits analysis based on the totality of the evidence, and the failure to explain why the evidence did not meet the requisite level of acclaim resulting in an abuse of discretion.

A. Petitioner's Proposed Sustained National or International Acclaim Method is Incorrect

Relating to the Petitioner's first argument that the Director did not properly approach the sustained acclaim evaluation, he posits there are two methods for demonstrating sustained national or international acclaim. Those consists of showing one is the recipient of a one-time achievement, or alternatively that satisfy at least three of the ten regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). But we do not fully agree with that opinion. First the USCIS Policy Manual speaks to this issue:

> When filing a petition for a person with extraordinary ability, the petitioner must submit evidence that the person has sustained national or international acclaim and that the person's achievements have been recognized in the field of expertise.[] In determining

> whether the beneficiary has enjoyed "sustained" national or international acclaim, the officer should consider that such acclaim must be maintained.[] However, the term sustained does not imply an age limit on the beneficiary. A beneficiary may be very young or early in his or her career and still be able to show sustained acclaim. There is also no definitive time frame on what constitutes sustained.
>
> If a person was recognized for a particular achievement, the officer should determine whether the person continues to maintain a comparable level of acclaim in the field of expertise since the person was originally afforded that recognition. A person may, for example, have achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter.

See generally 6 *USCIS Policy Manual* F.2(A)(1), https://www.uscis.gov/policymanual.

We are not persuaded by the Petitioner's appellate arguments regarding what constitutes sustained acclaim, and he does not address the guidance within the USCIS Policy Manual. We will say that within this segment of the brief, the Petitioner's reading of the regulation does not take into account that the one-time achievement and the ten regulatory criteria are intended as the first step (e.g., the means) paving one's way to get to the end—or step two—being the final merits determination. The *Kazarian* decision supports this interpretation when it found evaluating sustained acclaim under the ten regulatory criteria rested on an improper understanding of the regulatory requirements. *Kazarian v. USCIS*, 596 F.3d at 1121.

Sustained national or international acclaim played a role in two of the regulatory areas the Director discussed in their final merits determination. First when discussing the display of the Petitioner's work, then for his performance in a leading or critical role for organizations or establishments.

Regarding the display of the Petitioner's work, the Director discussed the display of his film in 2010 and determined that did not demonstrate his work has "been consistently displayed at the top exhibit and showcase venues throughout the national or international communities for the field." Here, the Director did not simply list the 2010 display as any event, but instead they evaluated the level associated with the display (e.g., top exhibitions and showcase venues). On appeal, the Petitioner notes 15 subsequent instances where his work was on display without addressing the level at which the display occurred. On remand, the Director should consider whether any of those instances in 2019 resulted in acclaim on a national or international level, and whether all of the instances lead the Director to decide they are commensurate with those who are part of the small fraction of individuals at the very top of the Petitioner's field of endeavor.

Turning to the Petitioner's leading or critical role and whether that reflected his sustained national or international acclaim in this area, the Director noted the Petitioner's roles dated back to 2011 and 2014 and decided this was insufficient to demonstrate sustained acclaim considering the seven-year gap from 2014 to the petition filing year. Within the Petitioner's appeal he only offers a discussion relating to the definition of sustained acclaim that we addressed above and determined his interpretation of that regulatory requirement to be incorrect. In other words, although the Petitioner contests the Director's conclusion in this regulatory area in the final merits determination, he does not offer any additional

instances in which he performed in a leading or critical role that should be factored into any future final merits analysis in this regulatory topical area.

B. The Director's Totality of the Evidence Method was Proper

Next, the Petitioner's second argument in the appeal is that the Director erred in their totality of the evidence analysis, which we also do not find to be persuasive. The Petitioner proposes that demonstrating one has received a one-time achievement, or meeting three of the criteria is all that is required to demonstrate: (1) a level of expertise indicating the individual is one of that small percentage who has risen to the very top of the field of endeavor; (2) sustained national or international acclaim; and (3) there is extensive documentation regarding their achievements. The Petitioner's proposed methodology is directly refuted by both the *Kazarian* decision and USCIS Policy Manual, and the Petitioner doesn't argue why those authorities should be set aside in favor of the method he proposes in this appeal.

We do not agree with the Petitioner's assertions in the appeal brief that USCIS is restrained in the method it utilizes to perform a final merits determination. The adjudicating officer is free to address a petitioner's achievements in each of the regulatory areas (e.g., prizes or awards, membership, published material, etc.) to evaluate the level of the petitioner's national or international acclaim and the extent to which their achievements have been recognized in the field to determine whether they have established:

a) The foreign national has sustained national or international acclaim;
b) His or her achievements have been recognized in the field of expertise through extensive documentation; and
c) The beneficiary has attained a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.

And that is the method the Director utilized here. The Petitioner claims there is no basis in the plain language of the regulation to support the method the Director used. The *Kazarian* decision described the appropriate two-part adjudicative approach to evaluating evidence and in 2010 USCIS amended its policy based on that approach. *See generally* 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* 3 (Dec. 22, 2010).

Although the Petitioner does discuss the *Kazarian* decision, it appears he misunderstands its findings. In fact the *Kazarian* court stated: "While other authors' citations (or a lack thereof) *might be relevant to the final merits determination of whether a petitioner is at the very top of his or her field of endeavor*, they are not relevant to the antecedent procedural question of whether the petitioner has provided at least three types of evidence." *Kazarian*, 596 F.3d at 1121 (emphasis added). This serves as the *Kazarian* court's acknowledgement that it is within the final merits determination that USCIS is to evaluate the qualitative statutory and regulatory requirements.

In the Petitioner's final point under his second procedural argument, he points to an unpublished 2017 decision from this office that performed a final merits determination. But that decision related to a different classification altogether and the Petitioner has not shown why that is relevant to the restrictive immigrant classification he seeks in this petition. The unpublished decision relates to a foreign national applying for O-1 status, a classification reserved for nonimmigrants of extraordinary ability. We note

that nonimmigrant classification is based on a different standard—statute, regulations, case law, and agency policy. Considering the Petitioner has not argued how these two distinctly different classifications are handled procedurally in the same manner, we will not offer any additional analysis for the Petitioner's final point here.

C. Petitioner's Claims that Dismissing Regulatory Criteria Adversely Affects the Final Merits Analysis is Incorrect

That brings us to the Petitioner's third appellate argument, and the appeal brief begins that section with the following:

> As a result of the adjudication errors described above, the Service deprived the Petitioner of a proper Final-Merits Analysis of the big-picture totality of the evidence, by improperly dismissing criterion one-by-one using an incorrect definition of 'sustained,' by erroneously applying standards intended for the totality of the evidence to evidence for individual criteria which produces circular logic, and by abusing its discretion by ignoring evidence and by failing to explain why other evidence was dismissed as insufficient.

Petitioner's counsel does not offer clear arguments here. Counsel's complex sentence structure diminishes their argument's clarity, making it difficult to follow and obscuring their key points. It appears counsel is attempting to argue one of two points, but we cannot be sure so we will address both. The first possibility we could glean is counsel is alleging that by dismissing individual regulatory requirements under step one—improperly dismissing them according to the Petitioner—this negatively affects the final merits determination analysis.

The second possibility could be that counsel alleges that because the Director organized their final merits discussion of the evidence in a sequential order—similar to the way they reviewed the evidence to evaluate whether the Petitioner met the plain language of the criteria under step one—that they erred by essentially isolating evidence into each particular section or area. And by doing so, the Director did not collectively consider the evidence in the final merits when they determined he did not meet the regulatory requirements for extraordinary ability at 8 C.F.R. § 204.5(h)(2) (the definition of extraordinary ability) and (h)(3) (relating to sustained acclaim and that his achievements have been recognized in the field of expertise).

To address what we consider counsel's first possible argument, in theory, this is not accurate because even if USCIS determines a filing party's claims and evidence do not fit squarely within the regulatory requirements in step one (8 C.F.R. § 204.5(h)(3)(i)–(x)), the officer is still required to consider all of the claims and evidence in the final merits determination regardless of whether it was directly applicable to any of the criteria. The USCIS Policy Manual lays out this guidance:

> At this step, officers consider any potentially relevant evidence in the record, even if such evidence does not fit one of the above regulatory criteria or was not presented as comparable evidence. The officers consider all evidence in the totality. Some evidence may weigh more favorably on its own, while other evidence is more persuasive when viewed with other evidence.

See generally 6 *USCIS Policy Manual*, *supra*, F.2(B)(2). That is to say—in theory—if USCIS declines to grant an individual criterion we will still fully address the level of acclaim and whether that places a foreign national among those at the top of the field in a final merits analysis. But "in practice" in this case, we depart from the "in theory" situation because the Director did not discuss and consider all of the regulatory areas in their final merits determination. In the final merits, the Director did not evaluate the acclaim associated with the Petitioner's prizes or awards, contributions, or high salary or significantly high remuneration and as the USCIS Policy Manual reflects, this is required. The Director should offer a more thorough final merits determination on remand.

Moving to counsel's second possible argument within the blocked quote immediately above, we view the methodology the Director utilized to conduct the final merits determination to be one acceptable approach. And the Petitioner does not identify any source or authority that might establish the Director's method was incorrect. We therefore, will not address this issue further.

D. The Final Merits' Topical Areas Did Not Include Sufficient Analysis

Here, we close out the Petitioner's procedural allegation of error. The Petitioner claims that the final merits determination involves articulating a reason rationale to explain why the evidence presented in step one was not sufficiently persuasive to determine that the foreign national has sustained national or international acclaim and was among those at the very top of their field of endeavor. The Petitioner alleges the Director summarily dismissed evidence with only a conclusory statement that the record does not demonstrate that he has risen to the very top of the field or that he has sustained a claim that is sufficient level. The Petitioner advances this methodology is arbitrary and capricious, it is an abuse of discretion, and it deprives him of due process by not providing an explanation for how USCIS reached its conclusion.

Because some of the regulatory areas in the final merits determination contain more salient analysis than others, we will discuss each area in the denial to consider the Petitioner's allegations. We first reiterate that the decision's final merits determination did not include any discussion regarding prizes or awards, contributions, or high salary or significantly high remuneration and that was an error on the Director's part. Next, in reviewing the Director's discussion of the Petitioner's achievements in the areas of published material about him, his judging experience, and the display of his work, the Director discussed some of his accolades, but it is not apparent that they fully considered all of the evidence under each area.

Then, for the final topical area, leading or critical role, we first revisit the basis for the Director's adverse determination for this subject. The Director acknowledged two of the Petitioner's claims but decided that his performance from 2011 to 2014 did not demonstrate the requisite level of sustained acclaim. On appeal, the Petitioner begins claiming the Director did not use a proper concept of sustained and offers his own definition. Above we explained why the Petitioner's concept of this term is not controlling here. Additionally, the USCIS Policy Manual not only offers a definition of that term, but more importantly the agency has explained how its officers are to apply it. The USCIS Policy Manual states:

> In determining whether the beneficiary has enjoyed "sustained" national or international acclaim, the officer should consider that such acclaim must be maintained.[] . . . .
>
> If a person was recognized for a particular achievement, the officer should determine whether the person continues to maintain a comparable level of acclaim in the field of expertise since the person was originally afforded that recognition. A person may, for example, have achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter.

Id. at F.2(A)(1). It appears the Director followed the policy guidance when they determined the hiatus between 2014 and 2021 was a situation in which he "achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter."

Second, the Petitioner claims that his exile from his home country should factor into the final merits analysis, but does not address why he was unable to serve in a similar role for other organizations or establishments outside of his country considering some of his other accolades (display of his work) also occurred in multiple countries.

And we address the Petitioner's final argument, the abuse of discretion allegation. Petitioner's counsel makes this contention without a citation to any authority as a basis for the claim. And it does not appear this allegation is even within our jurisdiction or authority to decide, which is established through DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003) (delegating appellate authority over those case types listed at 8 C.F.R. § 103.1(f)(3)(iii) (2003)). As we state above, the standard of review we use in these administrative proceedings is de novo and we generally do not rule on an abuse of discretion standard.[1]

Abuse of discretion is a standard of review appellate courts use to review lower court decisions and is not applicable in these proceedings. Relating to administrative law, 5 U.S. Code § 706(2)(a) governs the abuse of discretion concept. That statute states that when a federal court is reviewing an administrative agency's decision, the court will set it aside when the decision was either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." But as one can see, this too relates to how federal courts review an administrative agency's decision and falls outside of this office's authority. Based on a lack of jurisdiction on this topic, we will not consider these claims any further.

III. CONCLUSION

As we discuss above, the denial decision did not include all of the required types of analysis and we will remand the matter for a new decision. On remand, the Director should determine whether the Petitioner has sustained national or international acclaim and received recognition for achievements in his field, identifying him as one of that small percentage who has risen to the very top of the field. The Director should also consider any potentially relevant evidence in the record, even if it does not

[1] This is not to say that within our de novo review, we avoid any evaluating a denial decision's discretionary elements. We review questions of law, policy, fact, and discretion on a de novo basis. *Christo's Inc.*, 26 I&N Dec. at 537 n.2; *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 542 n.1 (AAO 2015).

fit one of the initial evidentiary criteria or was not presented as comparable evidence. *Id.* at F.2(B)(2). The petition's approval or denial depends on the evidence's type and quality. *Id.*

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