U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20612235

Date: SEP. 14, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, a performer, 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 Director of the Nebraska Service Center denied the petition, concluding that although the Petitioner had established that he met the initial evidence requirements for the classification by meeting the requisite three evidentiary criteria under 8 C.F.R. § 204.5(h)(3), the record did not establish that he had the necessary level of acclaim and expertise to qualify as an individual of extraordinary ability.

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 *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability if:

(i) the alien has 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,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's 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).

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).

II. ANALYSIS

The Petitioner is currently employed in the United States as a performer for the [redacted] He was a member of the Russian national [redacted] team for many years, and earned a silver team medal in the 2009 [redacted] Championships on the [redacted] The record includes contracts for his continued employment as a performer with [redacted]

A. Evidentiary Criteria

As noted above, the Director concluded that the Petitioner met the requirements of the following criteria under 8 C.F.R. § 204.5(h)(3):

- (i) Lesser nationally or internationally recognized awards for excellence in the field
- (iv) Participation as a judge of the work of others in the same or an allied field
- (vii) Display of his work in the field at artistic exhibitions or showcases

Upon review of the evidence, we agree with the Director that the record establishes that the Petitioner meets these three evidentiary criteria, and therefore has met the initial evidence requirement for this classification.

On appeal, the Petitioner challenges the Director's determination that his team silver medal in [redacted] at the 2009 [redacted] Championships does not qualify as a one-time achievement (that is, a major, internationally-recognized award), as well as his conclusion regarding five of the ten evidentiary criteria. However, once a petitioner shows, through either evidence of a one-time achievement or meeting at least three of the evidentiary criteria, that they met the initial evidence requirement, we move on to consider the totality of the evidence in the second part of the adjudication, the final merits determination. We will therefore not consider the Petitioner's arguments on appeal as

they relate to these criteria, but will instead review them in the context of the final merits determination.

B. Final Merits Determination

In a final merits determination, we examine and weigh the totality of the evidence to determine whether the Petitioner has sustained national or international acclaim and is one of the small percentage at the very top of the field of endeavor, and that his achievements have been recognized in the field through extensive documentation. Here, the Petitioner has not offered sufficient evidence that he meets that standard as an artistic performer.

We first note that while much of the evidence relates to the Petitioner's career as an athlete, he intends to continue to be employed as a performer in the United States. Guidance from the *USCIS Policy Manual* relates to this point:

> Some of the most problematic cases are those in which the beneficiary's sustained national or international acclaim is based on his or her abilities as an athlete, but the beneficiary's intent is to come to the United States and be employed as an athletic coach or manager. Competitive athletics and coaching rely on different sets of skills and in general are not in the same area of expertise. However, many extraordinary athletes have gone on to be extraordinary coaches.
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> Therefore, in general, if a beneficiary has clearly achieved recent national or international acclaim as an athlete and has sustained that acclaim in the field of coaching or managing at a national level, officers can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability such that USCIS can conclude that coaching is within the beneficiary's area of expertise.[1]

Although the above refers only to the situation in which an athlete has transitioned to a coaching career, the record indicates that while a performer relies on different sets of skills than a gymnast, many extraordinary gymnasts have gone on to careers as performers with [redacted].[2] We will therefore apply the same analysis in the Petitioner's case.

The record shows that as an athlete, the Petitioner was a member of the Russian national [redacted] team [redacted] from 2003 to 2016, although in several of those years he was a member of the junior team or the reserve team. His membership is confirmed by a letter from the head coach of the team, as well as copies of the team rosters for each of those years. This evidence also demonstrates that admission to the national [redacted] team is highly competitive and is achieved by advancing through three rounds of competition and a final selection process, and that the Russian team enjoyed success while the Petitioner was a member.

[1] 6 USCIS Policy Manual F.2(A)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2.
[2] Several articles indicate that [redacted] performers are former athletes, including some who have competed in and medaled at the Olympics.

In addition, during his membership on the Russian national team, the evidence shows that the Petitioner successfully competed in continental and top-level international competitions, most notably between 2008 and 2010. Although he competed in several events as a member of the team, he won medals in international competition only on , which is not included in Olympic competitions. Specifically, he received his most prestigious award at the 2009 Championships as a member of the team awarded a silver medal, but also received individual and team medals in the Championships in 2008 and 2010. While he continued to successfully compete in national competitions from 2011 to 2013, he did not medal again in a major international competition until 2014, when he was a member of the team that took the gold medal at the Championships. The record shows that while he continued to successfully compete in national and international competitions from 2014 to 2017, he did not participate in major competitions again in his career.

The evidence summarized above is sufficient to establish that the Petitioner achieved sustained national or international acclaim from 2008 through 2014 as an athlete, and was one of the few at the top of his field for at least a portion of that period. He then began his career as a performer in 2017, approximately three years before filing the instant petition, which shows the recency of this acclaim as an athlete per the USCIS Policy Manual. As he now intends to continue working in the U.S. as a performer, we must evaluate whether he has sustained his acclaim in that field. Upon review of the record, we conclude that he has not done so.

In support of his acclaim as a performer with the Petitioner relies on two sets of evidence: his role in the show and his salary. Regarding the former, he submitted a letter regarding his role in from Senior Artistic Director at While he describes the role played by the Petitioner as a leading one, he does not explain this statement other than to complement his acrobatic skills on the . Further, while stating that the Petitioner's work contributes to the artistic and commercial success of does not indicate that the Petitioner's addition to the show had a direct impact on that success.

Another letter from employee was submitted by , Senior Advisor in the talent department. He confirms that the Petitioner was recruited to as part of a revamp of the show in 2018, specifically for the acts, and also states that his abilities as a allowed for the inclusion of new tricks. also states that the Petitioner plays a variety of roles in the show, including the act and which he states is a leading character in the show. However, we note that neither own press release, or any of the reviews of included in the record, mention the Petitioner or the role.[3] While all of this evidence shows that the Petitioner is one of many talented performers making up the cast of the show, it does not indicate that he is singled out as a star performer for the show or for or has otherwise received sustained national or international acclaim based on this role.

Regarding his salary, the Petitioner submitted evidence that in 2020 and 2021 he was compensated at the rate of $154.00 per show. However, he then presented two different calculations of his hourly rate.

[3] One article from the website www.danceinforma.com dated August 8, 2011 includes a photo captioned but this photo shows three characters, and the article makes no further mention of

He initially stated that from the time he is required to report to work each night through the end of the second show is five and one-half hours, making his wages $56 per hour. However, on appeal he states that since each show lasts 90 minutes, his hourly wage should be considered to be $108.00 per hour. Since he initially indicated that his employer requires him to be on duty for two and one-half hours before the shows begin, we will consider the lower figure as representative of his actual wages.

For purposes of comparison, the Petitioner previously submitted evidence showing the mean hourly wage for the occupation "Miscellaneous Entertainers and Performers, Sports and Related Workers" from the website of the U.S. Bureau of Labor Statistics (BLS), which in the [redacted] area was $49.84 per hour. On appeal, he submits additional evidence from the U.S. Department of Labor's ONet website which shows that in 2021, the highest 10% of workers in this occupation earned in excess of $100.00 per hour. We note that while the Petitioner's hourly age of $56 per hour is above the mean wage, it is well below that of top earners, and therefore does not reflect acclaim.

In addition, even if we were to consider the higher hourly wage that the Petitioner claims on appeal, which would place him among the top 10% earners in this occupational grouping, the SOC code 27-2090 assigned to this occupation group is a catch-all which includes a wide variety of occupations not included under other, more specific SOC codes such as those for actors, athletes and dancers. This can be seen in the BLS's listing of industries which have the highest levels of employment in this occupation group, which includes motion picture and video; independent artists, writers and performers; drinking places; and performing arts companies. The data presented therefore does not provide a sufficient or accurate basis for the comparison of the Petitioner's wages to those of other artistic or circus performers.

Further, the record indicates that the Petitioner's employer "is the number one [redacted] company in the world," employing 1300 performers like him.[4] But the record lacks evidence showing that his earnings place him amongst the small percentage of [redacted] performers at the top of the field. [redacted] writes that the Petitioner earns "annual remuneration of $72,996," a figure based upon the Petitioner's performance in all 474 scheduled shows of [redacted] and that this is "substantially above the industry average for a trampolinist." But the record does not include evidence to support this statement, and [redacted] does not indicate how the Petitioner's earnings compare to that of other [redacted] performers. Also, the record contains a 2016 article posted on the CNBC website which includes a quote from a circus industry expert that "An award-winning artist... might earn in the low six-figures with benefits." After consideration of all of the evidence relating to the Petitioner's earnings, we find that it does not show that they place him amongst the very few at the top of his field, or otherwise indicate that he has enjoyed national or international acclaim as an artistic performer.

The record shows that the Petitioner was a world-class [redacted] athlete with sustained international acclaim, and competed successfully at the international level relatively recently. However, because he intends to continue working in the United States as an artistic performer, he must show that he has continued that level of acclaim in this related field. As explained above, although he is a talented performer and an important part of [redacted] show, the record lacks extensive

[4] From the article [redacted] from the website www.mentalfloss.com dated [redacted], 2019.

documentation showing that this work has garnered him acclaim at the national or international level, or that he is one of the few artistic performers among the small percentage at the top of that field.

III. CONCLUSION

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 Petitioner has not shown that the significance of his work is indicative of the required sustained national or international acclaim or that it is consistent with 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 has garnered national or international acclaim in the field, and that he 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).

For the reasons discussed above, the Petitioner has not demonstrated his eligibility as an individual of extraordinary ability. 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.