U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33691588

Date: SEP. 10, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, an entrepreneur and business administrator, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that he qualifies for the underlying EB-2 classification or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. 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

To qualify for a national interest waiver, a petitioner must first show eligibility for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. USCIS will then conduct a final merits determination to decide whether the evidence as a whole shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

If a petitioner demonstrates EB-2 eligibility, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that USCIS may, as matter of discretion,[2] grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

Id.

II. EXCEPTIONAL ABILITY

To establish eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii), summarized below:

(A) An academic degree relating to the area of claimed exceptional ability;
(B) Ten years of full-time experience in the occupation;
(C) A license or certification for the profession or occupation;
(D) A salary or other remuneration that demonstrates exceptional ability;
(E) Membership in professional associations; and
(F) Recognition for achievements and significant contributions to the industry or field.

If an individual meets at least three of the regulatory criteria, we then consider the totality of the material provided in a final merits determination and assess whether the record shows a degree of expertise significantly above that ordinarily encountered in the individual's field. *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, generally,* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

In the denial, the Director determined that the Petitioner did not satisfy any of the four criteria to demonstrate eligibility as an individual of exceptional ability. On appeal, the Petitioner maintains that the evidence submitted satisfies the criteria relating to: (1) experience; (2) license to practice profession; (3) membership in professional associations; and (4) recognition. The Petitioner relies upon the documents previously submitted in response to the Notice of Intent to Deny (NOID) to argue that the Director applied an incorrect standard of proof. However, the record on appeal lacks additional probative evidence detailing precisely how the Director erred and instead resubmits many of the same documents and assertions provided in the NOID.

[2] *See also Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts, and Third in an unpublished decision, in concluding that USCIS' decision to grant or deny a national interest waiver is discretionary in nature).

The Petitioner intends to own and operate three small businesses, [redacted] As explained below, we conclude that the Petitioner has not satisfied the regulatory requirements for any of the claimed criteria.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

The Director concluded that the expert opinion letters contain discrepancies regarding the dates of employment for the Petitioner. Moreover, the decision noted that two of the letter writers were not employed by the company about which they were writing. Elsewhere in the record, such as on his curriculum vitae, the Petitioner offered a brief description of his duties at each of the businesses he owned, but the record lacks sufficient evidence to corroborate his assertions, and, the Petitioner therefore, has not met his burden of proof.

On appeal, the Petitioner submits an updated employment verification letter from his accountant. This letter contains dates of employment that are inconsistent with the letter submitted previously. Regarding [redacted] in the recent 2024 letter, the accountant states that the Petitioner "served as the owner and Entrepreneur of the company from October 2003 until June 2012". The accountant's 2022 letter notes that the Petitioner owned this company beginning in 2004, not 2003 as indicated in the most recent letter. She also refers to the Petitioner's "establishment of both companies in 2003," however the record lacks documentation regarding two companies founded in 2003 by the Petitioner. Further, in the 2024 letter, the accountant explains that the Petitioner operated as the principal of [redacted] until his relocation to the United States around 2017 and that he managed the company on-site. In the 2022 letter, the accountant explains that the Petitioner served as full time owner and director of this company from August 2013 until the present day, without explaining any change in his duties that occurred after he relocated to the United States. The evidence submitted on appeal does not overcome the Director's determination that the discrepancies concerning the dates of the Petitioner's self-employment raise questions about his work history. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner has not met his burden of proof to satisfy the requirements of this criterion.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

In support of this criterion, the Petitioner submitted an expired license from the Florida Department of Highway Safety and Motor Vehicles for [redacted] one of the Petitioner's businesses, not for himself. The Petitioner has not submitted additional evidence on appeal demonstrating the validity of this license and resubmits the expired license. The Petitioner's eligibility must be established at the time of filing and continue through adjudication. *See* 8 C.F.R. § 103.2(b). The Petitioner also submitted evidence of membership in Auction ACCESS and the National Federation of Independent Businesses (NFIB). As explained by the Director, these documents do not establish the Petitioner is licensed to practice a profession as required by 8 C.F.R. § 204.5(k)(3)(ii)(C). The Petitioner has not established he meets this criterion.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

On appeal the Petitioner reasserts that his memberships in Auction ACCESS and (NFIB) establish membership in professional associations. However, the Director determined, and we agree, that membership in these organizations does not constitute a license to practice a profession as defined in Section 101(a)(32) of the Act, or any occupation for which a U.S. baccalaureate degree or the foreign equivalent is the minimum entry in the occupation. *See* 8 C.F.R § 204.5(k)(2). We conclude that the Petitioner has not met his burden of proof to show that he meets the requirements of this regulatory criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F).

The plain language of the regulation calls for "evidence of recognition for achievements *and* significant contributions to the industry or field." As such, materials that identify an individual's achievements but not significant contributions to the industry or field cannot suffice to satisfy the regulatory requirements. *See Matter of Echeverria*, 25 I&N Dec. 512, 518 (BIA 2011) (holding that the use of the conjunction "and" in a series of regulatory requirements "is a clear indication" that one "must satisfy each of the [listed] requirements"). After reviewing the letters from individuals discussing the Petitioner's background and achievements, the Director concluded that the Petitioner has not established that he received recognition for contributions to the industry or field. On appeal, the Petitioner reiterates the arguments made in the NOID and the record on appeal lacks evidence to support that a determination that his businesses made a significant contribution to the industry. The Petitioner has not met his burden of proof to meet the regulatory requirements of this criterion.

Because the Petitioner has not met his burden of proof to satisfy at least three of the initial criteria at 8 C.F.R. § 204.5(k)(3)(ii), we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Further, because the petition cannot be approved without an underlying determination that the Petitioner qualifies for EB-2 visa classification, we will reserve discussion of the Petitioner's national interest waiver claim under the *Dhanasar* framework.[3]

III. CONCLUSION

The Petitioner has not established that he qualifies as an individual of exceptional ability. Therefore, the Petitioner has not shown eligibility for EB-2 classification. Without such a showing, the Petitioner cannot qualify for the national interest waiver. We will dismiss the appeal for these reasons.

ORDER: The appeal is dismissed.

[3] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).