U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33380391

Date: SEPT. 10, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an aviation maintenance specialist, 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 record neither establishes that the Petitioner qualifies as an individual of exceptional ability, nor does it establish that the Petitioner is eligible for a national interest waiver as a matter of discretion. The matter is now before us on appeal pursuant to 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 the underlying EB-2 visa classification, a petitioner must establish they are an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) 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.[2] If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having the requisite degree of expertise and will

[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).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, provides the framework for adjudicating national interest waiver petitions. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016). *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[3] 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.

Dhanasar, 26 I&N Dec. at 889.

II. ANALYSIS

The Petitioner asserts that he is eligible for EB-2 classification as an individual of exceptional ability. The Director concluded that the Petitioner met two of the six criteria; that he has a degree in the area of exceptional ability and ten years of full-time experience in the occupation. 8 C.F.R. § 204.5(k)(3)(ii)(A),(B). The Director stated that the Petitioner did not establish he commanded a salary which demonstrates exceptional ability and that the recommendation letters do not establish recognition for achievements and significant contributions to the industry or field. 8 C.F.R. § 204.5(k)(3)(ii)(D), (F). On appeal, the Petitioner contends that the Director did not properly analyze the evidence and information in the record regarding these two criteria at § 204.5(k)(3)(ii)(D), (F). However, he does not address any other criteria on appeal such as subparts (C) and (E) of 8 C.F.R. § 204.5(k)(3)(ii). An issue not raised on appeal is waived. *See, e.g.*, *Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). Therefore, our analysis will only address the issues raised on appeal. After de novo review of the evidence, we conclude that the Petitioner does not meet at least three of the six required criteria, nor has he established that he possesses a degree of expertise significantly above that ordinarily encountered in his field.

The Director stated that the Petitioner did not establish he commands a salary which demonstrates exceptional ability under 8 C.F.R.§ 204.5(k)(3)(ii)(D). The Director noted that the submitted tax return was from 2021 but the salary survey in the record was from 2023; therefore, the evidence is not comparable. On appeal, the Petitioner contends that the evidence is comparable as salaries rise each year, but the Petitioner's 2021 salary is higher than the 2023 salary survey, and this shows his exceptional ability relative to others working in the field. However, in addition to offering data from different time periods to compare, another problem with the submitted salary evidence is that the record does not establish the Petitioner's employment and source of income in 2021. The tax return reports his gross income in 2021, however, the record only establishes his employment up to 2019. Therefore, we cannot determine if the Petitioner's 2021 salary was earned as the "Average Aviation

[3] *See 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).

Technician Salary in Colombia for 2023." As we cannot confirm what his job title was and where he was working in 2021, we cannot conclude that this is comparable evidence. In addition, the record also contains the Petitioner's 2020 tax return in which this same line item for gross income states "0." It appears that in 2020 he may have had no income at all, which raises more questions about how he earned his income in 2021. Since the record does not contain sufficient information about the Petitioner's salary and the wage data in the same period, the record does not establish that he has commanded a salary which demonstrates exceptional ability.

In addition, the Director concluded that the recommendation letters the Petitioner submitted describe the Petitioner's "ability experience, and positive personal characteristics," but they do not specify how he has been recognized for achievements and significant contributions to the industry or field. 8 C.F.R.§ 204.5(k)(3)(ii)(F).

On appeal, the Petitioner asserts that the letters do show his recognition and contribution. He highlights a few of the letters, which we have reviewed. The first letter he highlights is one which speaks to the Petitioner receiving a medal for his "distinguished services to Naval Aviation" and his knowledge and training as a military instructor. The Petitioner contends that, "[t]raining military personnel in aviation is a contribution of major significance to the field because through this training [the Petitioner] directly contributed to the safety and success of military operations, which is a matter of high stakes." This letter does confirm that the Petitioner earned an award for his "[q]ualities as a leader and experience as an aeronautical maintenance non-commissioned officer" and that he indeed served as a military instructor, but it does not discuss any "significant contributions to the industry" that are attributable to the Petitioner. Although this letter speaks to the Petitioner's contribution to his employer and that he contributed to the safety and success of the military operations he assisted in, it does not describe any significant contributions to the industry of aviation or aviation maintenance.

The next letter discusses the Petitioner earning two medals and being selected to "carry out courses abroad." The last letter speaks of promoting the Petitioner for new positions and medals "for his excellent professionalism and military virtues," and the courses he taught. These letters of recommendation all describe how the Petitioner has been recognized by his peers for contributions to his direct employer and his experience in the field, but they do not speak to broader contributions to the field of aviation or aviation maintenance. We recognize the Petitioner is very experienced in his field; however, the record does not establish he made significant contributions to the industry and therefore this criterion has not been met.

For the reasons given above, the evidence does not establish that the Petitioner meets the eligibility requirements as an individual of exceptional ability and therefore does not meet the requirements for EB-2 classification. Because the Petitioner has not established that he meets the minimum required criteria under 8 C.F.R. § 204.5(k)(3)(ii), we need not conduct a final merits determination. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established that he possesses a degree of expertise significantly above that ordinarily encountered in his field.

While we do not discuss each piece of evidence individually, we have reviewed and considered the record in its entirety. The Petitioner has not established his qualification for the EB-2 classification as an individual of exceptional ability in the sciences, arts, or business, and is therefore ineligible for

a national interest waiver. While the Petitioner asserts on appeal that he meets all three of the prongs under the *Dhanasar* analytical framework, we reserve our opinion regarding these issues. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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 the applicant did not otherwise meet their burden of proof).

III. CONCLUSION

We conclude by a preponderance of the evidence that the Petitioner has not established that he qualifies as an individual of exceptional ability, or that he is otherwise eligible for the underlying EB-2 immigrant visa classification and therefore is not eligible for a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.