U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30315618

Date: APR. 01, 2025

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as an alien 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner merits a national interest waiver. 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 alien 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. *See generally* 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual. 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 substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

[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 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*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (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 alien 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

The Petitioner proposes to act as the founder and owner of a freight transportation (trucking) business, [redacted] In his decision, the Director stated that the Petitioner qualifies as an alien of exceptional ability, but did not provide an analysis of the evidence submitted under the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii) or conduct a final merits determination.[3] As discussed in detail below, our review of the record indicates that the Petitioner did not meet the requirements of at least three of those criteria, and we therefore withdraw the Director's conclusion in that regard.[4]

A. Official Academic Record

The evidentiary criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) calls for evidence in the form of an official academic record which shows that the alien has a degree, diploma, certificate or similar award relating to the area of exceptional ability. That document must have been issued by a college, university, school, or other institution of learning.

Here, the Petitioner submitted a diploma and supplement from the [redacted] in [redacted] Georgia showing that he was awarded a Bachelor of Laws degree. While this evidence qualifies as an official academic record of a degree, the Petitioner has not established that it relates to his area of exceptional ability. When responding to the Director's request for evidence (RFE), which sought additional evidence in support of all six of the evidentiary criteria, the Petitioner asserted that the degree was relevant to his proposed endeavor as it gave him "skills and knowledge that will be instrumental in implementing the proposed endeavor." But the Petitioner did not identify any specific skills or knowledge that he gained in the course of his studies that relate to his operation of a trucking company, stating only that he "studied various business-related disciplines during my formative years and beyond and attained sufficient knowledge to establish and operate a business." This assertion is

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

[3] The Director's concluding sentence in his discussion of the Petitioner's eligibility as an alien of exceptional ability ends with "to deny this Form I-140 Petition," which is at odds with the rest of the sentence stating that the Petitioner qualifies for the underlying EB-2 classification. Because the Director did not provide an analysis regarding a potential ground for denial on this basis, we will consider this to be a typographical error.

[4] The Petitioner did not submit evidence in support of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) and (F).

insufficient to establish that his law degree earned in Georgia relates to his claimed area of exceptional ability as an entrepreneur in the United States. Accordingly, he does not meet this criterion.

B. License to Practice the Profession

The evidentiary criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) requires evidence of a license to practice the profession or certification for a particular profession or occupation. The Petitioner initially submitted a copy of his state commercial learner's permit. In responding to the Director's RFE, the Petitioner submitted his commercial driver's license, issued approximately one month after his petition was filed, as evidence under this criterion.[5] We first note that the Petitioner's proposed endeavor is to start and operate his business as an entrepreneur, not a truck driver, and he has not explained how a commercial driver license allows him to practice as an entrepreneur.

Second, even if we were to consider that this license is related to his endeavor of owning and operating a trucking company, he has not provided evidence that the occupation of truck driver, which is the occupation that this license allows one to pursue, is a profession. The term "profession" is defined at 8 C.F.R § 204.5(k)(2) as an occupation listed in the Act and any occupation requiring at a minimum a United States baccalaureate degree or its foreign equivalent. The record does not include evidence showing that the occupation of truck driver is either listed in the relevant section of the Act or requires a bachelor's degree. The Petitioner has therefore not established that his commercial driver license meets the requirements of this criterion.

C. Salary or Other Remuneration Demonstrating Exceptional Ability

The evidentiary criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) calls for evidence that the alien has commanded a salary or other remuneration which demonstrates exceptional ability. In support of this criterion, the Petitioner submitted the 2022 IRS Form 1120 income tax return for [redacted], the business he founded. This return indicates that the company did not pay any salaries or wages in that year, and had taxable income of $9,635. While the return indicates that the petitioner is the sole shareholder of this company, it does not show the salary or other remuneration received by him through his ownership of the company. As the record does not include evidence of the Petitioner's salary, he has not established that he has commanded a salary or remuneration which demonstrates exceptional ability.

D. Membership in Professional Associations

The evidentiary criterion at 8 C.F.R § 204.5(k)(3)(ii)(E) requires evidence of the alien's membership in professional associations. Here, the Petitioner submitted evidence of his membership in the [redacted], including a letter from the association stating that it is "the only national organization representing the interests of professional truckers!" Despite [redacted] description of its members as "professionals," the Petitioner has not established that it is a professional association. Notably, the regulation at 8 C.F.R. § 204.5(l)(2) defines "professional" as an alien who holds at least a bachelor's degree and who is a member of the professions. The record

[5] Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998).

lacks evidence that [redacted] requires its members to hold at least a bachelor's degree or be a member of a profession as defined at 8 C.F.R § 204.5(k)(2). Accordingly, the Petitioner has not demonstrated that [redacted] is a professional association, and he therefore does not meet this criterion.

E. Final Merits Determination

The Petitioner has not established that he meets at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii), so we need not conduct a final merits determination to ascertain whether he possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. Nevertheless, we have reviewed the entire record and conclude that it does not establish that the Petitioner has the expertise required for the classification sought. While the Petitioner claims that he has successfully run his business since establishing it in 2018, he has submitted little documentation of his success in business as an entrepreneur. The evidence in the record shows that he has obtained the necessary business and occupational registrations and licenses, but the aforementioned tax return does not suggest that his company has enjoyed notable commercial success or growth. Because the Petitioner has not met at least three of the evidentiary criteria and established that he has the requisite level of expertise, we withdraw the Director's conclusion that the Petitioner qualifies for the EB-2 classification as an alien of exceptional ability.[6]

III. NATIONAL INTEREST WAIVER

The Petitioner has not established his eligibility for the EB-2 classification, so he is not eligible for a national interest waiver. Nevertheless, because the Director based his denial solely on the merits of the Petitioner's request for a national interest waiver, we will address the Petitioner's claims on appeal below.

A. Substantial Merit and National Importance

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual proposes to undertake. *Matter of Dhanasar*, 26 I&N Dec. at 889. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. *Id.* In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Id.*

In his decision, the Director determined that the Petitioner had established that his proposed endeavor was of substantial merit. Based upon the references included in the Petitioner's business plan for [redacted] regarding the economic importance of the trucking industry, and specifically the vehicle transportation segment, we agree that the Petitioner has established the substantial merit of his proposed endeavor in business.

Regarding the national importance of the proposed endeavor, the Director stated that while the evidence supported the positive economic effects of the trucking industry in general, the Petitioner

[6] As the Petitioner did not claim eligibility for the underlying classification as a member of the professions holding an advanced degree, we will not provide an analysis of his eligibility under those separate requirements. Nevertheless, the record does not establish that he qualifies as a member of the professions holding an advanced degree.

had not established that his specific endeavor would have economic effects at that level. The Director also noted that the Petitioner had not shown that his proposed endeavor had significant potential to employ U.S. workers, or that it would otherwise have broader implications within the trucking industry.

On appeal, the Petitioner asserts through his representative that [redacted] operation in the vehicle shipping segment means that it will have national importance, as the segment "generates substantial revenue, employs thousands of individuals, and plays a crucial role in the transportation and logistics network of the United States." However, as stated by the Director in his decision, counsel's unsubstantiated assertions do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). Here the Petitioner's representative does not refer to evidence in the record to support these statements. More importantly, when determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on "the specific endeavor that the foreign national proposes to undertake." *Matter of Dhanasar*, 26 I&N Dec. at 889. Thus, even if these assertions were supported by evidence in the record, they would not tend to support the national importance of the Petitioner's ownership and operation of a single business in the sector.

The Petitioner also asserts on appeal that the proposed endeavor will create jobs, as [redacted] expects to hire employees. While the brief does not go into detail on this point, the Petitioner submitted a business plan for the company which states that it already employs 3 drivers and plans to hire 5 additional drivers within 5 years. But the record does not include evidence of the company's current staffing levels, and the business plan does not provide a basis for these employment projections. These unsupported assertions do not show that the proposed endeavor would have a significant potential to employ U.S. workers. *Id. at* 890. Also, the Petitioner has not demonstrated that the creation of these positions would potentially have broader implications within the trucking industry or the vehicle transportation segment. While an endeavor that has significant potential to employ U.S. workers or would have other substantial positive economic effects may be found to be of national importance, the Petitioner's assertions on appeal are insufficient to show that [redacted] potential job creation and revenue production would reach those levels and thus be of national importance.

Further, the Petitioner stresses in his brief that his "expertise in freight transportation and logistics" and "extensive experience and skills" will be of national importance in that they will "contribute to the growth of the U.S. economy, job creation, and the improvement of societal welfare." Aside from the minimal evidence of the Petitioner's claimed expertise and experience as an entrepreneur, these assertions are misplaced within the analysis under the first prong of the *Dhanasar* framework. As stated above, the focus when considering the substantial merit and national importance of the proposed endeavor is the specific endeavor. Factors concerning a petitioner's ability to advance that endeavor, such as education and experience, are considered under the second prong.

For the reasons discussed above, we conclude that Petitioner has not established the national importance of his proposed endeavor, and he therefore does not meet the requirements of the first prong of the *Dhanasar* framework.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the individual. *Id.* at 890. To determine whether they are well positioned to advance the proposed endeavor, we consider factors including, but not limited to: their education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals. *Id.*

The Director concluded, based in part on the vagueness of the Petitioner's business plan for [redacted] and on the lack of evidence of interest from potential customers, investors, and other individuals, that the Petitioner is not well positioned to advance his proposed endeavor. In his appeal brief, the Petitioner does not specifically address these noted deficiencies, but instead focuses on his education, experience, and skills. For example, he asserts that he is "exceptionally qualified" to advance his endeavor as an entrepreneur based upon his experiences as a window installer and as a driver for ridesharing companies. He also asserts that his bachelor of laws degree "demonstrates his dedication to learning." But in neither case does he explain the relation between any knowledge or skills he may have acquired from this education and experience and his ability to advance his proposed endeavor as an entrepreneur.

In addition, while he claims in his personal statement (and in his appeal brief) to have operated [redacted] since July 2018 as a car shipping service, there is scant evidence of the company's activities prior to 2022, and his claims regarding this experience are inconsistent both within this petition and between this petition and others he has previously filed with USCIS. For example, on Form ETA 750 Part B, which he signed and attested to the accuracy of its contents, the Petitioner indicated that he worked two full-time jobs for more than three years between April 2018 and September 2021. These included his role as the owner of [redacted] and as a professional dancer for [redacted] But the Petitioner makes no mention of his work for [redacted] in his personal statement, nor does he explain how he was able to work two full-time jobs for more than three years.

Further, the Petitioner's assertion that he operated his company as a car shipping service since July 2018 is at odds with his business plan for [redacted] in which he claims to have worked as a rideshare driver during this period, as well as the 2022 federal tax returns which indicate in Schedule K that the company's business activity is "local passenger transport service," not car shipping. Also, we note that [redacted] did not receive its certificate from the U.S. Department of Transportation to operate as a common carrier of property until November 2021, and the Petitioner's own commercial driver license was issued on December 23, 2022.

Additionally, we note that much of the evidence and statements concerning the Petitioner's employment history in the record conflict with the terms of the Petitioner's previous P-3 nonimmigrant status, which was initially approved in 2015 and continued with short interruptions through March 2022. USCIS records indicate that the Petitioner first entered the United States to work as an artist in a culturally unique program for [redacted] in January 2016, and subsequently received several renewals of that status through [redacted] However, the Petitioner indicates on Form ETA 750B that from December 2015 through April 2018 he was self-employed, and that he worked for [redacted] as a professional dancer from April 2018 through September 2021. Also, in the

business plan he submitted for [redacted], he indicates that he worked as a window installer from October 2017 through July 2018, and thereafter was employed as a rideshare driver. These statements directly conflict with the Petitioner's approved employment as a dancer in a culturally unique program in P-3 nonimmigrant status, which grants authorization to work only as an artist or entertainer in a culturally unique program.[7]

It is the Petitioner's burden to resolve these many inconsistencies 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). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.; see also Matter of O-M-O-*, 28 I&N Dec. 191, 197 (BIA 2021) ("by submitting fabricated evidence, the appellant compromised the integrity of his entire claim") (cleaned up). Here, these unresolved inconsistencies significantly undermine the Petitioner's claim of experience and expertise as an entrepreneur in the second prong of the *Dhanasar* analytical framework.

For all of the reasons given above, we conclude that the Petitioner has not established that he is well-positioned to advance his proposed endeavor.

A petitioner must meet all three prongs of the *Dhanasar* analytical framework in order to establish their eligibility for a national interest waiver. Here, the Petitioner has not established that his proposed endeavor is of national importance, and has thus not met the first prong of the framework. As discussed above, he also has not met the second prong of the analytical framework by showing that he is well positioned to advance his proposed endeavor. Since the identified bases for denial are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the third prong of the framework. *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 an applicant is otherwise ineligible).

III. CONCLUSION

As the Petitioner has not established that he meets at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii), he is not eligible as an alien of exceptional ability and we withdraw the Director's conclusion in that regard. In addition, the Petitioner has not established that he is eligible for a national interest waiver, as he has not shown that his proposed endeavor would be of national importance or that he is well positioned to advance that endeavor.

ORDER: The appeal is dismissed.

[7] In addition, the Petitioner appears to have violated the terms of his P-3 nonimmigrant status and worked without authorization, which may impact any future applications for immigration benefits where admissibility is an issue.