U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29531052

Date: APR. 2, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner is an industrial and quality engineer who seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and an individual of exceptional ability, as well as a national interest waiver (NIW) 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 Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding the Petitioner did not establish that he qualifies for the underlying visa classification or merits a discretionary waiver of the job offer requirement in the national interest. 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 dismiss the appeal.

I. LAW

To establish eligibility for an NIW, a petitioner must first demonstrate qualification 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.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree.

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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. We

will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field. USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual* B.2, https://www.uscis.gov/policy-manual.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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 NIW petitions. *Dhanasar* states that USCIS may, as matter of discretion, grant an NIW 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.

The purely discretionary determination of whether to grant or deny an NIW rests solely with USCIS. *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining four U.S. Circuit Courts of Appeals in concluding that USCIS' decision to grant or deny an NIW to be discretionary in nature).

II. EB-2 ELIGIBILITY

The Director determined that the Petitioner is not eligible for the EB-2 classification on either basis as an advanced degree professional or as an individual of exceptional ability. While we agree with the Director's determination relating to the Petitioner's advanced degree professional claims, we do not wholly agree with the analysis under his claims as a foreign national of exceptional ability.

A. Advanced Degree Professional

The Petitioner filed the petition in October of 2020. The Petitioner does not claim to possess a U.S. academic or professional degree (or a foreign equivalent degree) above that of a bachelor's degree. The Petitioner provided evidence he earned a foreign bachelor's degree in engineering in December of 2013. The Petitioner claimed work experience both before and after earning his bachelor's degree during various periods between 2002 and 2022.

For foreign nationals who have not attained a U.S. advanced degree (or a foreign equivalent degree), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires them to possess a U.S. bachelor's degree (or a foreign equivalent degree) and at least five years of progressive post-baccalaureate experience in the specialty. The Director partly denied the petition because the Petitioner had not met these requirements on the date he filed the petition in October of 2020. In the denial, the Director noted that some of the post-bachelor's experience letters did not contain the duties the Petitioner performed for the organizations. The regulation at 8 C.F.R. § 204.5(g) mandates that experience letters be from current or former employers while also including the name, address, and title of the author, and a specific description of the duties the foreign national performed. If a petitioner can demonstrate this

evidence is unavailable, USCIS will consider other documentation relating to their experience. Here, the Petitioner provided the letters from previous employers and did not assert that such evidence was unavailable.

As it relates to his qualifying post-bachelor's degree experience, the Petitioner's appeal brief replies to the Director's denial by identifying Exhibit 2 in his request for evidence (RFE) response, which was a business plan relating to his proposed endeavor in the United States. This business plan was prepared by an organization that, according to their website, specializes in creating business documents for various employment-based immigration classifications. This document recounted the Petitioner's professional experience, but it was not the form of required evidence relating to qualifying experience listed in the regulation at 8 C.F.R. § 204.5(g) as it did not include letters from current or former employers among other requirements. Here within the appeal, the Petitioner relies on a document from an organization that is not supported by probative and independent evidence in the record. Probative evidence is the type that "must tend to prove or disprove an issue that is material to the determination of the case." *Matter of E-F-N-*, 28 I&N Dec. 591, 593 (BIA 2022) (quoting *Matter of Ruzku*, 26 I&N Dec. 731, 733 (BIA 2016)); *see also* Evidence, *Black's Law Dictionary* (11th ed. 2019). Therefore, if some form of the Petitioner's evidence does not adequately prove their contention, then it is not considered to be probative and that's the case we have here.

As the Petitioner's final point on this issue within the appeal, he relies on the credentials evaluation he offered with the initial filing. A review of that evaluation from [redacted] reveals that he equated the Petitioner's education to a U.S. bachelor's degree in electrical engineering. He then discussed the foreign national's professional experience during different periods from 2002 through 2017. We note the Director favorably counted the Petitioner's work experience subsequent to his bachelor's degree and up to 2017 in their analysis, as it was evidence by the type of materials required by the regulation at 8 C.F.R. § 204.5(g). The credentials evaluation did not contain any discussion of post-bachelor's experience after 2017. [redacted] then stated:

> Considering that a Bachelor's Degree followed by five years of full-time work experience in the field of electrical engineering is equivalent to a Master of Electrical Engineering, it is my expert opinion that [the Petitioner], with a bachelor's degree and 5 years of experience, has no less than the equivalent of a Master of Electrical Engineering.

[redacted] language alluded to the Petitioner's experience as occurring after he earned his bachelor's degree, but he failed to explicitly state that or discuss any of his experience in detail. That the five years of progressive experience in the specialty occurs post-baccalaureate is a requirement for the advanced degree professionals immigrant classification. 8 C.F.R. § 204.5(k)(3)(i)(B). [redacted] also generally discussed the documents he reviewed to make his credentials determination but only indicated the evaluation "relies upon the copies of the original documents of the diplomas, transcripts, and resume provided by" the Petitioner, but not that [redacted] reviewed experience letters from current or former employers that included the name, address, and title of the author, and a specific description of the duties the foreign national performed.

Therefore, [redacted] relied on the Petitioner's self-produced resume to evaluate his work experience and not the type of evidence mandated by the regulation. For these reasons, we do not consider this

credentials evaluation to be probative nor does it assist the Petitioner in satisfying his burden of proof relating to his advanced degree professional claims.

Finally, the Petitioner vaguely references his work experience between the years 2020 and 2022, but we note he filed the petition in October of 2020. Therefore, any post-bachelor's work experience after October of 2020 cannot be factored into his claims for this petition. The Petitioner must have completed all substantive requirements of the degree or its equivalent on the date the NIW petition was filed in order to establish eligibility. *See Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017); *see also* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) (a visa petition may not be approved based on speculation of future eligibility or after an individual becomes eligible under a new set of facts); *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) (a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements).

In summary, we agree with the Director's overall determination that the Petitioner has not demonstrated eligibility for the advance degree professional immigrant classification based on the current record.

B. Exceptional Ability

The Director concluded that even though the Petitioner satisfied two of the criteria under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F), he did not meet a third criterion to warrant a final merits determination. That final determination would evaluate whether the evidence in its totality shows the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. While we agree with the Director regarding the two criteria they granted, we do not agree with their adverse determination relating to a license or certification to practice the profession at 8 C.F.R. § 204.5(k)(3)(ii)(C), as the Petitioner provided the licensing or certification to perform in the occupation with his initial petition filing. We therefore withdraw the Director's adverse determination on that regulatory criterion.

Normally we would remand the matter for the Director to perform a final merits analysis in the first instance. But, if a review of other dispositive issues addressed in the appeal reflect the Petitioner would remain ineligible even if we were to return the case to the Director, remanding would serve no purpose and would unnecessarily expend agency resources and the Petitioner's time in which he could decide future avenues that best serve his interests. Below we perform such a review of his NIW claims.

III. NATIONAL INTEREST WAIVER

The Petitioner initially indicated his proposed endeavor was to continue working as an industrial and quality engineer in the United States. In response to the Director's RFE, he clarified the issue indicating he would provide high level industrial and quality engineering services with a focus on manufacturing and production processes. The Petitioner further suggested he would bring innovative and highly effective industrial and quality engineering solutions that serve to drive the U.S. manufacturing sector, with a particular focus on the automotive industry. The Petitioner indicated he would pursue this endeavor while working for the same U.S. entity that employed him when he filed the petition.

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

The Director concluded the record established the Petitioner's proposed endeavor had substantial merit, but it did not show that it also has national importance. The Director evaluated and thoroughly discussed the Petitioner's claims relating to the first prong's national importance element. After reviewing the entire record, to include the arguments and evidence submitted on appeal, we agree with the Director's ultimate conclusion under this basis for NIW eligibility, with the added comments below. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Mendoza v. U.S. Atty. Gen.*, 327 F.3d 1283, 1289 (11th Cir. 2003) (joining eight U.S. Circuit Courts of Appeals in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

Our added comments relate to the portion of the Petitioner's appeal brief associated with his endeavor's national importance. Even if we did not adopt and affirm the Director's determination, we would conclude that the Petitioner has abandoned this issue on appeal when, in his appeal brief, he effectively reproduced the identical text he presented to the Director in response to the RFE. The only essential changes were cosmetic such as transitions introducing new paragraphs and a summarizing paragraph that failed to identify any error in law or fact attributable to the Director's adverse decision.

The reason for filing an appeal is to provide an affected party with the means to remedy what he or she perceives as an erroneous conclusion of law or statement of fact within a decision in a previous proceeding. *See* 8 C.F.R. § 103.3(a)(1)(v). Without such an error specifically identified within the appeal, the affected party has failed to identify the basis for the appeal. If the Petitioner does not explain the specific aspects of the decision that he considers to be incorrect, he has failed to meaningfully identify the reasons for taking an appeal. In order to review the appeal, it would therefore be necessary to search through the record and speculate on what possible errors the Petitioner claims. *Matter of Valencia*, 19 I&N Dec. 354, 355 (BIA 1986).

It is insufficient to merely assert that a filing party doesn't agree with a denial decision or that the preceding authority made an improper determination. Within an appeal, it should be clear whether the alleged impropriety in the decision lies with the interpretation of the facts or the application of legal standards. Where a question of law is presented, supporting authority should be included, and where the dispute is on the facts, there should be a discussion of the particular details contested. *Id.* Merely claiming the Director made an improper determination is the reason the regulation at 8 C.F.R. § 103.3(a)(1)(v) was promulgated; to allow us to promptly deal with appeals where the reasons given for the appeal are inadequate to inform it of the particular basis for the claim that the Director's decision before us is wrong. *Cf. Valencia*, 19 I&N Dec. at 355.

The Petitioner must identify all of the errors made by the Director as it relates to each of the claimed eligibility bases. Otherwise, we must speculate on what errors the Petitioner alleges. Failure to identify the error in law or error in fact for each basis contested on appeal, equates to an insufficient claim of eligibility within the appellate proceeding. Such a failure essentially amounts to the Petitioner's abandonment of the eligibility claim regarding this criterion.

The Eleventh Circuit Court of Appeals reasoned that it is not enough that a petitioner has merely contested an issue within its appeal. Whether an appellant has sufficiently addressed a claim relies on at least two aspects. First, they must raise the "core issue" before us within the appeal. *Montano Cisneros v. U.S. Att'y Gen.,* 514 F.3d 1224, 1228 n.3 (11th Cir. 2008). Second, the appellant must also set out any discrete arguments it relies on in support of that core issue claim. *Shkambi v. U.S. Att'y Gen.,* 584 F.3d 1041, 1048 n.4 (11th Cir. 2009). While there is no requirement for a petitioner to "use precise legal terminology" or provide abundantly-developed arguments to support their claim, an appellant is required to "provide information sufficient to enable [the appellate body] to review and correct any errors below." *Indrawati v. U.S. Att'y Gen.,* 779 F.3d 1284, 1297 (11th Cir. 2015) (quoting *Arsdi v. Holder,* 659 F.3d 925, 929 (9th Cir. 2011)).

When an appellant's brief does not challenge the denial by offering new arguments on the issues, or by describing the manner in which the Director erred, we consider those issues abandoned, waived, or forfeited. All the more so, when the filing party is not responsive to the Director's analysis and does not specify the actual error in the denial decision, which can be a basis for a summary dismissal. *Matter of Valencia*, 19 I&N Dec. 354, 355–56 (BIA 1986) (finding a summary dismissal of an appeal is appropriate when the filing party only asserts the underlying trier of fact came to the wrong conclusion or expresses general disagreement with the lower decision and "fails to specify the reasons for the appeal"). Likewise, offering the same analysis as presented within the RFE response, without describing the Director's error, is inadequate. Here, we conclude the Petitioner's actions on appeal result in his abandonment, waiver, or forfeiture of his first prong claims in this and any subsequent motion based on this petition.

As we explain above, *Dhanasar's* second and third prongs require the Petitioner to demonstrate he is eligible for an NIW meeting additional requirements. But because the Petitioner has not established that his proposed endeavor satisfies the first prong of the *Dhanasar* framework, he is not eligible for an NIW and further discussion of the second and third prongs would serve no meaningful purpose. Consequently, we will not address and we reserve the Petitioner's remaining appellate arguments. *Patel v. Garland*, 596 U.S. 328, 332 (2022) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25–26 (1976) (finding agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision)); *see also Matter of Chen*, 28 I&N Dec. 676, 677 n.1, 678 (BIA 2023) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.