U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26451548

Date: APR. 18, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an inventor and entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as an advanced degree professional or as an individual of exceptional ability. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Nebraska Service Center denied the petition in November 2022, concluding that the Petitioner did not submit a properly completed Application for Alien Employment Certification (Form ETA-750B) or Application for Permanent Employment Certification (ETA Form 9089), Parts J, K, and L. The Petitioner later filed a Form I-290B, Notice of Appeal or Motion in January 2023. The Director then issued a service motion to reopen and a request for evidence (RFE) in May 2023 to which the Petitioner responded in August 2023. The Director issued another denial decision in September 2023 further determining the Petitioner did not establish that he qualified for the EB-2 classification as an individual of exceptional ability. The Director also determined that the Petitioner did not merit a national interest waiver as a matter of discretion. 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 establish eligibility for a national interest waiver, 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. 8 C.F.R. § 204.5(k)(2).

"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. 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 a degree of expertise significantly above that ordinarily encountered in the field.

If a petitioner demonstrates eligibility for the underlying EB-2 classification, 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,[1] 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.

See Dhanasar, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

A. Permanent Employment Certification

Prior to the issuance of a service motion to reopen and the subsequent RFE issued by the Director, the petition was denied because the Petitioner submitted an incomplete Application for Permanent Employment Certification (ETA Form 9089). Specifically, the ETA Form 9089 initially submitted was not properly completed, signed, or dated by the Petitioner. On appeal, the Petitioner submitted a properly completed ETA Form 9089. As such, we have incorporated it into the record.

However, as we will discuss below, the properly completed ETA Form 9089 does not establish the Petitioner's eligibility for a national interest waiver based on his qualification as either an advanced degree professional or as an individual of exceptional ability.

B. EB-2 Classification

[1] *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 to be discretionary in nature).

1. Advanced Degree

In the most recent denial decision, the Director determined the Petitioner did not establish that he qualified as an advanced degree professional. The Petitioner claims his qualifications as an individual of exceptional ability based on the evidence of record and additional documentation submitted with the appeal and RFE response. We note that neither the Petitioner's appeal nor his RFE response address his qualification as an advanced degree professional or the Director's determination with respect to this issue. We therefore consider the issue of whether the Petitioner qualifies as an advanced degree professional to be 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-,* I&N Dec. 657, 658 n.2 (BIA 2012)).

2. Exceptional ability

As noted above, to demonstrate eligibility as an individual of exceptional ability, a petitioner must initially submit documentation that satisfies at least three of the six categories of evidence at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). The record initially included a business plan outlining the Petitioner's intention to improve public transit access for certain individuals in the United States. The record also included documentation demonstrating his registered businesses in Egypt and the United States, patent applications in Egypt and the United States, and material related to awards and acknowledgment of his participation in competitions and trade shows. The Director concluded that the evidence of record did not satisfy any of the exceptional ability criteria.

On appeal, the Petitioner submits documentation previously included in the record, as well as evidence showing the active status of his company registered in the United States. We observe that the Petitioner's appeal brief and initial statement concerning his endeavor generally advocate for his qualification as an individual of exceptional ability based on patent applications and competition wins, including those for "startup" proposals and "hackathons." The Petitioner also asserts the merit and purported national importance of his proposed endeavor based on its potential to improve public transit systems in the United States. However, the Petitioner does not specifically identify his qualifications under any evidentiary category at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F), nor does he contend that any of the Director's determinations were erroneous. An appeal must specifically identify any erroneous conclusion of law or statement of fact in the unfavorable decision. *See* 8 C.F.R. § 103.3(a)(1)(v). On this basis alone, the appeal must be dismissed. Nevertheless, we will review the Petitioner's qualifications under each category based on the evidence of record.

> *An official academic record showing that the individual has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(A).*

The appeal brief discusses the Petitioner's introduction to the field of engineering through a graduate program from which he states he later withdrew. The Petitioner did not submit supporting documentation to show that he has a degree, diploma, certificate, or similar award from any institution of learning related to his claimed area of expertise as an entrepreneur in the public transit industry, an inventor in the field of engineering, or any other asserted area of expertise. Therefore, the record does not satisfy this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the individual 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 record includes registration documentation reflecting that the Petitioner started a business in Egypt in the area of "Hotel Supplies and Public Import and Export" beginning in 2000. The Petitioner also provided a Certificate of Good Standing showing that his business in the United States was active as of 2023. These documents alone, however, do not demonstrate that the Petitioner had at least ten years of full-time experience as of the date the petition was filed in the field of his intended occupation as either an inventor, an owner of a company, or in the field of engineering. The Petitioner did not submit sufficient evidence demonstrating the activities of these companies or of his full-time employment with them. The Petitioner also did not provide documentation depicting his specific duties at these companies or how his employment roles related to his area of claimed exceptional ability. The Petitioner must support his assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

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

The Petitioner does not claim to meet this criterion, and the record does not include any licenses or certifications related to his proposed occupation. Therefore, we deem this issue to be waived, and we will not address this criterion further. *See, e.g., Matter of O-R-E-,* 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-,* I&N Dec. 657, 658 n.2 (BIA 2012)).

Evidence that the individual has commanded a salary, or other renumeration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

The Petitioner also does not assert he meets this criterion, and he did not submit documentation related to his salary or renumeration for his services. Therefore, we deem this issue to be waived, and we will not address this criterion further. *See, e.g., Matter of O-R-E-,* 28 I&N Dec. at 330, 336 n.5.

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

The Petitioner does not claim to meet this criterion, and he did not provide evidence of his membership in an association. Therefore, we deem this issue to be waived, and we will not address this criterion further. *See, e.g., Matter of O-R-E-,* 28 I&N Dec. at 330, 336 n.5.

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).

On appeal—as well as in his original statement of endeavor and business plan—the Petitioner asserts the importance of his awards and placement in several competitions related to his inventions, business startup proposals, and computing. The record includes documentation from a competition in Canada referencing his bronze medal award and a letter from a competition in Kuwait suggesting he was awarded another bronze medal. This documentation, however, is not supplemented with information

about the competitions or their sponsors to demonstrate their orientation or importance within the industry and the significance, if any, of the awards they confer. Further, the documentation is not supported by explanations of how the awards demonstrate that the Petitioner is recognized for achievements and significant contributions to the industry by peers, governmental entities, or professional or business organizations.

The Petitioner also submitted a list of several competitions in which he purportedly participated or won; this list, however, is of unclear origin and is not accompanied with corroborative documentation to demonstrate his placement within these competitions. In addition, while the Petitioner provided patent applications and references to his inventions in the award letters and documents he authored, the record does not include independent documentation detailing or even summarizing the functionality of his inventions. For example, the Petitioner provides the following broad description of his pending patent for [redacted] (quoted as written):

> [U]sing a wearable technology to help the people with disability get the help needed before ,at & after riding the mass transit units ,help the public transportation operators to communicate with people with disability & offer the best service possible and comply with guidance and regulations of the American Disability Act –(ADA).

While the Petitioner emphasizes that his "passion for problem-solving and creativity" led him "to make significant contributions to the field of innovations & Entrepreneurship," the record does not support these claims. The Petitioner did not submit sufficient evidence to demonstrate his recognition for achievements and significant contributions within the field of engineering or to the public transit industry. Again, the Petitioner must support his assertions with relevant, probative, and credible evidence and he has not done so here. *See Chawathe* at 376. Therefore, the Petitioner did not demonstrate eligibility under this criterion.

Because the Petitioner has not established that he meets three of the six evidentiary criteria under 8 C.F.R. 204.5(k)(3)(ii), he has not met the initial requirement to demonstrate his eligibility as an individual of exceptional ability. Therefore, we need not conduct a final merits determination of whether he is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. Nevertheless, we have reviewed the totality of the evidence and conclude that he does not meet the elevated standard for this classification. While the Petitioner may have experience in the field of engineering, the record does not show that his level of expertise is unusual or stands out in the field.

In sum, the Petitioner has not established eligibility for the EB-2 classification as an individual of exceptional ability. On appeal, the Petitioner does not assert nor does the record establish that he is eligible for the EB-2 classification as a professional holding an advanced degree. Therefore, he is ineligible for a national interest waiver. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the *Dhanasar* 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

The Petitioner has not established that he meets the requirements of EB-2 classification. The petition will remain denied.

ORDER: The appeal is dismissed.