U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30354412

Date: APR. 19, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur for a toy sales and rental business, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business. 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 Texas Service Center denied the petition, concluding that 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 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. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three

of which must be satisfied, for an individual to establish exceptional ability:

> (A) An official academic record showing that the alien 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;
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> (B) 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;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; or
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> (F) 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).[1]

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] We then consider the totality of the material provided in a final merits determination and assess whether the record shows that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[3] 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). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." Matter of Chawathe, 25 I&N Dec. at 376.

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 eligibility for 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

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

[2] See generally 6 USCIS Policy Manual F.5(B)(2), https: //www.uscis.gov/policy-manual.

[3] 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, supra, at F.5(B)(2).

Dhanasar, 26 I&N Dec. 884 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. Dhanasar states that USCIS may, as matter of discretion,[4] 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. at 889.

II. ANALYSIS

The Petitioner proposes to establish a toy sales and rental business for which he would be its general and operations manager. With respect to the underlying EB-2 classification, the Petitioner submitted evidence to meet four of the six criteria of evidence for exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii). The Director concluded that the Petitioner met two criteria, ten years of full-time experience in the occupation at 8 C.F.R. § 204.5(k)(3)(ii)(B) and commanded a salary demonstrating exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(D). However, as discussed below, the record does not support the conclusion that the Petitioner meets either criterion.

In denying the petition, the Director found the Petitioner did not meet the criteria for membership in a professional association at 8 C.F.R. § 204.5(k)(3)(ii)(E) and recognition for achievements and significant contributions to the field at 8 C.F.R. § 204.5(k)(3)(ii)(F). The Director further found that the Petitioner did not merit a discretionary waiver of the job offer requirement "in the national interest."

On appeal, the Petitioner reasserts being an individual of exceptional ability by satisfying the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(E) and (F), and that he established by a preponderance of the evidence that he qualifies for the national interest waiver. After reviewing the evidence in the record, the Petitioner has not demonstrated satisfying at least three of the six initial evidentiary criteria and is not otherwise eligible for the requested benefit.[5]

> 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).

To meet this criterion, the Petitioner claims he has more than ten years of experience as an owner, director, and general manager of multiple businesses in Brazil. The Petitioner submitted multiple affidavits from an accountant; an amendment and consolidation of articles of organization for one business; and the articles of organization for another business. The Director sent a request for evidence (RFE) advising the Petitioner the initial evidence submitted was insufficient to meet the criterion, pointing out that the evidence did not detail the Petitioner's job duties or whether the Petitioner worked

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

[5] While we do not discuss each piece of evidence in the record individually, we have reviewed and considered each one.

full-time. In the Petitioner's RFE response, he indicated that he was submitting additional affidavits from the accountant listing his job responsibilities and that he worked full-time for each business. The Director's decision found the Petitioner met the criterion having considered multiple affidavits from the accountant and the corporate organizational documents. However, as discussed below, we withdraw that determination, because the Petitioner has not established that he meets the criterion.

Upon de novo review of the record, the Petitioner's RFE response only included the initially submitted affidavits from the accountant and does not include additional affidavits. Although the Petitioner's response provided quotes from the accountant's subsequent affidavits detailing his job responsibilities and that he worked full-time for multiple businesses, the record shows that the Petitioner's response only included the accountant's initially submitted affidavits, not new affidavits. The affidavits in the record do not indicate the Petitioner's job responsibilities for the businesses and whether the Petitioner worked full-time. The Petitioner's statements referencing the affidavits are not sufficient to demonstrate the criterion. The Petitioner must support his statements with relevant, probative, and credible evidence. See Matter of Chawathe, 25 I&N Dec. at 376.

We further note that had the record included the subsequent affidavits from the accountant, it is not clear that they would be sufficient to demonstrate he has ten years of full-time experience in his occupation. The Petitioner intends to work in the United States as the general and operations manager of his toy sales and rental business. To show his experience in his occupation, the Petitioner claims to have previously worked as the owner, director, partner, or general and operation manager of multiple businesses. However, the record shows that only one of the businesses related to toy sales and rental. The Petitioner claims that he was the owner and general and operations manager of a toy manufacturing, sales, and rental business in Brazil from September 2016 to April 2022. While, the Petitioner also claims to have gained experience with his other businesses, those businesses were a car wash and oil exchange business; a business for automobile repair and wholesale retail of motor vehicle parts and accessories; and a motor vehicle fuel station and convenience store. The Petitioner's work with these businesses is not related to his occupation of being the general and operations manager for a toy sales and rental business. Therefore, his experience with these businesses would not meet the requirements for the criterion.

Because the record does not demonstrate that he has at least ten years of full-time experience in his occupation, the Petitioner has not established that he meets the plain language of the criterion.

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

To meet this criterion, the Petitioner claims he has earned income from his toy manufacturing, sales, and rental business in Brazil which is above the average salary for a general manager in Brazil. The Petitioner submitted an income statement from an accounting firm relating to income he received as managing partner of the business. The statement indicates that as managing partner of the business, the Petitioner "received income from Profit Distribution and Pro Labore" as follows: R$400,000 in 2018; R$440,000 in 2019; R$400,000 in 2020; and R$450,000 in 2021. For comparison, the Petitioner's initial letter included a statement that "[a]ccording to the image below, taken from the Catho website . . ., the average gross monthly salary of a general manager in Brazil in 2022 was R$5,072.01, which is equivalent to R$60,854.12 per year." The Petitioner's letter included an image

from "Catho" indicating a general manager average wage is R$5.072,01. The Petitioner claimed this evidence shows his income exceeds the average salary for a general manager. Based on this evidence, the Director found that the Petitioner met the criterion.

However, the evidence submitted is not sufficient to show he meets the criterion. The comparison evidence is limited to the Petitioner's statements, which includes an extract of the "Catho" webpage. The webpage image does not indicate whether the general manager average salary is for Brazil, a region of Brazil, or some other area. The Petitioner's statements referencing the webpage are not sufficient to demonstrate the criterion. The Petitioner must support his statements with independent, relevant evidence. See Matter of Chawathe, 25 I&N Dec. at 376. Also, the accountant's statement indicates that the Petitioner received income for profits and for work. The evidence does not indicate what portion of his income is for his work and what portion is for profits. Without more, the Petitioner has not established the average salary for a general manager is a proper basis for comparison with the Petitioner's profit and work income as a managing partner of his business.

For these reasons, we withdraw the Director's determination for this criterion, as the Petitioner has not established that he commanded a salary indicative of his claimed exceptional ability relative to others working in the field.

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

To meet the criterion, the Petitioner submitted evidence of membership from two organizations, American Management Association (AMA) and Brazilian Association of Administration (BAA). For AMA, the Petitioner submitted a document entitled "Account Details" with details of an email address, a "My AMA ID: 3979048", the membership account number, the indicated job title of "Manager", and being a member since October 6, 2022. No other details are included on the document. Although the Petitioner indicates the document shows his membership with AMA, the document does not include the Petitioner's name. The record does not sufficiently show the "Account Details" document relates to the Petitioner or his membership with AMA. To show AMA is a professional association, the Petitioner's letter includes a short excerpt of the AMA bylaws, "Art. 5 – All individuals and companies that carry out management activities under the terms of Law n. 4,769, of September 9th, 1965, as well as individuals and companies or organization that carry out similar activities and that are in accordance with these bylaws." (emphasis omitted). However, we are unable to discern the meaning of the excerpt on its own without having the entire bylaws.

On appeal, the Petitioner argues that AMA is a professional association, "[AMA] is an international, non-profit, membership-based association that provides a wide range of educational and management development services to individuals and organizations. To this end, it offers online and on-site training courses for its associates." His appeal brief includes AMA's vision and mission statement indicating AMA is a respected association that has credibility with training companies and courses. He provides some information about an exam he intends to take stating that the exam "will further qualify me to be an entrepreneur with even more qualifications than I already have."

For the BAA, the record includes receipts of the Petitioner's request for membership and for his payment of his membership contribution annual fees for 2021, 2022, and 2023. While the documents show the Petitioner's membership to BAA, the record does not include evidence showing that BAA

is a professional association. On appeal, the Petitioner argues that BAA is a professional association based on its bylaws. In the Petitioner's appeal brief, he provides an excerpt from the BAA bylaws; however, it is the same excerpt previously provided by the Petitioner as the excerpt from AMA's bylaws. The record does not contain an excerpt from the BAA bylaws.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation having a minimum requirement of a U.S. bachelor's degree or foreign equivalent for entry into the occupation. The record does not show that either of AMA or BAA is a professional association as required under the criterion. The record does not show either of the entities requires that its membership body be comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association. Without more, the Petitioner has not established that AMA and BAA are professional associations such that his membership in them would be sufficient to meet this criterion.

As such, the Petitioner has not demonstrated his membership in a professional association under this 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).

To meet this criterion, the Petitioner submitted a news publication; an advertisement; letters of recommendation from his clients, his lawyer, and a service provider; letters of appreciation; and letters of interest in the Petitioner's proposed endeavor. The news publication and the advertisement both indicate that in 2005, the Petitioner's prior automobile repair businesses opened a new location. The Petitioner opening a new business location does not show recognition for achievements or significant contributions to his industry. The letters of recommendation and of appreciation from his clients and his lawyer attest to the Petitioner being a competent, reliable business professional who provided quality service and products. While the record shows the Petitioner's business clients and service providers confirm his management experience and knowledge in the products and services for his businesses, it does not demonstrate that the Petitioner has been recognized for achievements and significant contributions to the industry or field, as required under the criterion.

On appeal, the Petitioner summarizes the evidence submitted with the initial petition and requests that we review two letters of intent from prospective clients of his proposed endeavor. The Petitioner indicates that the letters of intent show that should he be granted a visa, he intends to expand his business in the United States which would generate U.S. employment and income. While the letters of intent express interest to invest in the Petitioner's business, they do not show that the Petitioner has been recognized for achievements and significant contributions to the industry or field, as required under the criterion. The Petitioner has not met the requirements for the criterion.

Because he Petitioner has not established that he meets at least three of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F), we need not conduct a final merits analysis to determine whether the evidence in its totality shows that he is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). Nevertheless, we advise that we have reviewed the record in the aggregate and conclude

that it does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability.

III. CONCLUSION

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) (noting that "courts and agencies are not required to make findings on issues the decision of which is 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).

The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.