U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32631861

Date: AUG. 01, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in janitorial services, 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 did not establish that the Petitioner is eligible as an individual of exceptional ability. 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). When assessing exceptional ability, USCIS uses a two-step analysis. *See generally 6 USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual. First, a petitioner must submit at least three of the following types of evidence:

- An official academic record showing the noncitizen's possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- Letters from current or former employers showing that the noncitizen has at least 10 years of full-time experience in the proposed occupation;
- A license to practice the profession or certification for the profession or occupation;

- Evidence of the noncitizen's receipt of a salary or other remuneration demonstrating exceptional ability;
- Proof of membership in professional associations; or
- 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). If these types of evidence do not "readily apply" to a beneficiary's occupation, a petitioner may establish eligibility by submitting "comparable evidence." 8 C.F.R. § 204.5(k)(3)(iii).

Meeting at least three criteria does not, in and of itself, establish eligibility for this classification.[1] If a petitioner does so, we will then conduct a final merits determination. Wherein, USCIS evaluates all evidence, considering the petition in its entirety. *See generally 6 USCIS Policy Manual*, *supra,* at F.5(B)(2). The Agency must determine whether a petitioner, by a preponderance of evidence, has demonstrated a beneficiary's possession of a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

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.

II. ANALYSIS

A. Individual of Exceptional Ability

The first issue to be addressed is whether the Petitioner established his eligibility for the EB-2 classification. The Petitioner asserts on appeal that he is an "Entrepreneur in the field of Janitorial Services of Exceptional Ability."[2]

As a preliminary matter, the Petitioner avers on appeal that the Director applied a stricter standard of proof to the petition than the required preponderance standard. 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). However, counsel does not explain or identify any specific instance, as required, in which the Director engaged in this impermissible weighing of the evidence.

The Director determined that the Petitioner met the requirements to show that he had 10 years of experience in the occupation but concluded that he had not demonstrated any of the other five categories of evidence required to demonstrate exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii). Upon de novo review, contrary to the Director's decision, we disagree that the record establishes that he has 10 years of experience. *Id.* In regard to the other categories of evidence, we agree with the Director

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. *See generally 6 USCIS Policy Manual*, *supra,* at F.5(B)(2).
[2] The Petitioner has not asserted that he is an advanced degree professional.

that the Petitioner did not provide sufficient evidence for any of the other categories. *Id.* Therefore, the Petitioner cannot satisfy any of the six categories of evidence.

The Petitioner did not submit evidence or argue that he has a license to practice the profession or commanded a salary or other remuneration demonstrating exceptional ability under 8 C.F.R. §§ 204.5(k)(3)(ii)(C) and (D). As such, we will not address the issues further as they are not in contention. We will address the remaining criteria in contention under 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B), (E), and (F) below.

1. 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. 8 C.F.R. § 204.5(k)(3)(ii)(A).

To establish this criterion the Petitioner submitted his "Electro-Electronic Technician" certificate from the [redacted] According to the academic record submitted, an electro-electronic technician is "qualified to plan, execute and evaluate the implementation of projects and maintenance of electronic systems to operate electric machines," and related tasks. The appeal brief states that the Petitioner is an "Entrepreneur in the field of Janitorial Services." Neither the briefs, nor the rest of the evidence in the record explains how the electro-electronic field relates to entrepreneurship in janitorial services. Thus, the Petitioner has not demonstrated that he satisfies the criterion that he has a degree, diploma, certificate, or similar award relating to the area of exceptional ability.

2. Letters from current or former employers showing that the noncitizen has at least 10 years of full-time experience in the proposed occupation. 8 C.F.R. § 204.5(k)(3)(ii)(B).

To establish this criterion the Petitioner submitted several letters from his partners in some of the businesses he has owned and operated. The record as presented does not demonstrate the Petitioner had any experience in the occupation of an "Entrepreneur in the field of Janitorial Services" until he incorporated his current venture [redacted] on [redacted] 2022, roughly two months prior to the filing of this petition. Although the Petitioner had several different endeavors prior to this, including restaurants, parking lots, and a travel agency, nothing in the record shows that he operated a janitorial services company prior to late 2022. Thus, the record does not establish that he has 10 years of experience as an entrepreneur in janitorial services. Moreover, the letters submitted are deficient as they do not specify if the Petitioner's work with each business was full-time or part-time, as required.[3] Without this information, the Petitioner cannot establish if his work with these companies equated to 10 years of full-time employment.

Based on the above, the Petitioner has not established that he meets the requirements of this criterion to show at least 10 years of full-time employment in the offered occupation.

[3] We note that several of time periods specified in the letters overlap with others. The Petitioner should clarify the allotment of hours he worked at each business in any subsequent petitions.

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

To meet the requirements of this criteria, a petitioner must show membership in a "professional association." 8 C.F.R. § 204.5(k)(3)(ii)(E). The regulations define "profession" to include "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries" or "as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. § 204.5(k)(2) (incorporating by reference Section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32)).

In response to the request for evidence (RFE), the Petitioner submitted a copy of his membership certificate for the International Facility Management Association (IFMA) and a page from organization's website.[4] The webpage states that the organization is "the world's largest and most widely recognized association for facility management professionals," but contains no information about the requirements for membership. The Petitioner provided no further information on this association.

The Petitioner's appeal brief contends that Petitioner's membership "should be considered as fulfilling the criterion." The brief makes various declarations about the IFMA, asserting that it has a "reputation for setting industry standards," its "membership often involves active participation," and that it offers various membership levels that "require fulfilling specific criteria, such as education." However, contentions require support to underpin them, as assertions themselves 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"). As noted above, the record does not establish that the IFMA is an association of professionals as defined in the regulations as one of the occupations listed above or as an occupation requiring a U.S. baccalaureate degree or its foreign equivalent. 8 C.F.R. § 204.5(k)(2). Therefore, the Petitioner has not demonstrated that his membership in this group satisfies the regulatory requirement.

4. 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).

The Petitioner's evidence for this criterion consisted of letters of recommendation from business partners and associates attesting to his work history and successful projects. The Director found this evidence insufficient to meet the criterion. On appeal, the Petitioner contends that the letters are "clear evidence of recognition and endorsement from peers, professionals, and business entities." The record also contains some informational articles on some of the Petitioner's restaurants and clubs and copies of local awards his restaurants received.

Upon de novo review, we find the record does not establish eligibility for this criterion. Although the letters and other evidence show the Petitioner's success with these respective ventures, it does not

[4] We observe that nothing in the record indicates when the Petitioner joined this association, and it was not submitted in the initial petition. A petitioner must meet all of the eligibility requirements of the petition at the time of filing. 8 C.F.R. §§ 103.2(b)(l), (12).

point to the Petitioner's recognition for achievements or significant contributions to the industry of entrepreneurial janitorial services as a whole.[5]

Based on the above, the Petitioner has established none of the six criteria. Therefore, as the Petitioner does not meet the minimum three required criterion, we need not provide the type of final merits determination referenced in *Kazarian v. USCIS,* 596 F.3d 1115, 1119-20 (9th Cir. 2010). Subsequently, we determine that the Petitioner has not established that he is an individual of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii).

As the Petitioner has not shown that he is as an individual of exceptional ability, and he has not asserted that he is an advanced degree professional, the documentation in the record does not establish eligibility for the underlying EB-2 classification.

B. National Interest Waiver

As the Petitioner has not established eligibility for the EB-2 visa classification, 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 qualifies as an individual of exceptional ability, or that he is otherwise eligible for the underlying EB-2 immigrant visa classification. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.

[5] We also note that the record lacks any independent information as to the requirements associated with these awards, only descriptions from the Petitioner explaining the respective awards.