In Re: 33387314 Date: AUGUST 14, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an information technology consultant and analyst, 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 qualified for EB-2 classification as an advanced degree professional or an individual of exceptional ability, and did not establish that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. 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.

II. 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). 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] If these criteria do not readily apply to a petitioner's occupation, the petitioner may submit comparable evidence. 8 C.F.R. § 204.5(k)(3)(iii). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] 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

[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).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

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.

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.

II. ANALYSIS

In his business plan, the Petitioner states he will establish a computer service company headquartered in [redacted] Florida that will develop and implement enterprise resource planning systems for small and medium-sized businesses that are centered on a business intelligence and analytics management approach. The Petitioner states he will serve as the chief executive officer (CEO) of the company.

A. Exceptional Ability

The Director determined the Petitioner met three of the regulatory criteria to establish exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F), but also concluded the Petitioner did not establish exceptional ability without conducting a final merits determination. On appeal, the Petitioner asserts the Director erred and he has established his eligibility. Although the Director erred in his assessment of exceptional ability, as discussed below, de novo review of the record shows the Petitioner does not meet at least three of the criteria.

1. Academic Record of Degree, Diploma, Certificate or Similar Award

This criterion requires 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). The Petitioner submitted a copy of his diploma and transcript from the [redacted] in Brazil granting him the professional title of electronics technician. The Petitioner also submitted an evaluation concluding that the Petitioner's diploma was equivalent to a United States vocational high school diploma in electronics. The Director determined the Petitioner meets this criterion. We agree.

2. Ten Years of Experience in the Occupation

This criterion requires 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." 8 C.F.R. § 204.5(k)(3)(ii)(B). The Director determined the Petitioner did not meet this criterion because "there was no evidence for which to base a waiver of or the exemption from the requirement of a labor offer and thus of a labor certification in the national interest of the United States." On appeal, the Petitioner correctly states that this criterion does not require such a showing and the Director's misstatement is hereby withdrawn.

De novo review shows the Petitioner does not meet this criterion because he did not submit the requisite letters from current or former employers. Instead, he submitted a copy of his labor and security card which states his employers and dates of his employment but does not indicate if the

employment was full-time. He also submitted a "term of internship commitment" stating the internship is "without any employment relationship;" a National Social Information Registry Social Security Statement listing his employers, dates of employment and remuneration, but not stating whether the employment was full-time; articles of incorporation for a company owned by the Petitioner and his wife; and a "declaration of service provision information technology consultancy" stating a company contracted the Petitioner's company, but not stating whether the work performed was on a full-time basis. In addition, none of the evidence indicates that the Petitioner was ever employed as a CEO, the occupation he seeks.

While this evidence reflects the Petitioner's employment, it is not in the requisite form of letters from employers showing he has at least ten years of full-time experience in the occupation sought. Consequently, the Petitioner does not meet this criterion.

3. License or Certification

This criterion requires evidence of 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 submitted evidence of his Brazil Professional Identity Card stating his title as Technologist in Industrial Automation Electronics Technician. The Director determined the Petitioner met this criterion.

The Petitioner did not provide information on how such identity cards are issued in Brazil. He also did not submit evidence that his title listed on his identity card is a profession, as that term is defined at 8 C.F.R. § 204.5(k)(2) as "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The Petitioner also did not submit evidence that his identity card constitutes a license to practice a profession or certification for his occupation. Consequently, the Petitioner does not meet this criterion and the Director's contrary determination is withdrawn.

4. Salary Demonstrating Exceptional Ability

This criterion requires evidence that an individual "has commanded a salary, or other remuneration for services, which demonstrates exceptional ability." 8 C.F.R. § 204.5(k)(3)(ii)(D). The Director determined the Petitioner met this criterion. We agree.

5. Membership in Professional Associations

This criterion requires evidence of "membership in professional associations." 8 C.F.R. § 204.5(k)(3)(ii)(E). The EB-2 regulations define "profession" 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). The Petitioner submitted a copy of his professional identity card issued by the *Conselho Federal de Engenharia e Agronomia* and CREA in Brazil and information about CREA. The Director did not address the Petitioner's eligibility under this criterion.

The information the Petitioner provided about CREA does not indicate that a baccalaureate degree is required for entry into the occupations CREA oversees. Consequently, he has not shown that CREA

is a professional association within the meaning of the regulations at 8 C.F.R. § 204.5(k)(2) and (3)(ii)(E). The Petitioner does not meet this criterion.

6. Recognition for Achievements and Significant Contributions to the Field

This criterion requires 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 Director determined the Petitioner did not meet this criterion because the evidence described the Petitioner's job duties but did not establish that he had made significant contributions to the field of IT. On appeal, the Petitioner does not specifically address this criterion.

The Petitioner submitted the "declaration of service provision information technology consultancy" showing he was contracted to provide IT services to another company, certificates of completion of IT courses, and a declaration of enrollment at the [redacted] for IT courses. These documents show his work and education in IT, but do not establish that he has been recognized for any significant contributions to the IT industry or field by peers, governmental entities, or professional or business organizations. Consequently, the Petitioner does not meet this criterion.

B. National Interest Waiver

The Petitioner has not met at least three of the regulatory criteria required to establish exceptional ability and he consequently does not qualify for EB-2 classification. As this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve determination of his eligibility for a waiver of the job offer requirement in the national interest. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating 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).

III. CONCLUSION

The Petitioner does not meet at least three of the regulatory criteria to establish exceptional ability and is consequently ineligible for EB-2 classification.

ORDER: The appeal is dismissed.