U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31032073

Date: AUG. 19, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a senior software maintenance engineer, 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 Petitioner's Form I-140, Immigrant Petition for Alien Workers, concluding that the record did not establish the Petitioner's eligibility for underlying EB-2 classification as an individual of exceptional ability or that he merited a national interest waiver. 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 qualify for a national interest waiver, a petitioner must first show eligibility 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.

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] 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

[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 aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

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 U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[3] 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.

II. ANALYSIS

The Petitioner is a senior software maintenance engineer who wishes to continue working in the information technology field for an organization in support of that organization's business objectives. The Petitioner earned the foreign equivalent of an associate's degree in data processing in Brazil.

The Director concluded that the Petitioner did not establish eligibility for underlying EB-2 classification as an individual of exceptional ability.[4] In doing so, the Director initially found that the Petitioner satisfied, as required, at least three of the six exceptional ability evidentiary criteria identified in 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F) after providing an official academic record; letters from current or former employers showing the Petitioner had at least 10 years of full-time experience in the occupation he sought; and evidence of membership in professional associations. However, the Director concluded, after conducting a final merits determination, that the Petitioner did not establish a degree of expertise significantly above that ordinarily encountered in his field and therefore did not establish he was an individual of exceptional ability and eligible for underlying EB-2 classification. Additionally, the Director concluded that the Petitioner did not merit a discretionary waiver of the job offer requirement "in the national interest" because, while his proposed endeavor had substantial merit, he did not establish its national importance. Finally, the Director found that the Petitioner was neither well positioned to advance his proposed endeavor, nor that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification, and therefore did not satisfy the second and third prongs of the *Dhanasar* analytical framework.

On appeal, the Petitioner contends that he satisfied five out of the six evidentiary criteria identified in 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F) for establishing exceptional ability, rather than only the three the Director concluded were satisfied. He further claims the record demonstrates that he possesses a

[3] *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 is discretionary in nature).

[4] The Petitioner did not assert before the Director, nor does he assert on appeal, that he is an "advanced degree professional."

degree of skill and expertise significantly above that ordinarily encountered in the field. He asserts that the record is therefore sufficient to establish he is a person of exceptional ability and that he is thus eligible for EB-2 visa classification. Finally, he claims that he also merits a national interest waiver because his proposed endeavor is nationally important, that he is well positioned to advance the proposed endeavor, and that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus a labor certification. After review, we disagree with the Director's conclusions regarding the initial evidentiary criteria and conclude that the Petitioner has not established he meets at least three of the six initial evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii) as is required to establish eligibility as an individual of exceptional ability.

The record includes an official academic record showing that the Petitioner 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. The evidence also includes letters from current or former employers showing that the Petitioner has at least ten years of full-time experience in the occupation for which he is being sought. We therefore agree with the Director that the Petitioner has satisfied the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (B).

However, the Petitioner has not satisfied any of the remaining four criteria. The Petitioner submitted numerous certifications dating from 2006 through 2018 showing he had completed various training courses related to the information technology field and therefore claimed to satisfy the criterion at 8 C.F.R § 204.5(k)(3)(ii)(C), which specifies evidence in the form of a license to practice the profession or certification for a particular profession or occupation. Additionally, while not specifically submitted to satisfy this criterion, the Petitioner also submitted over 40 additional certificates of completion and achievement dated from 2001 to 2014 for courses he completed related to the information technology field. The Petitioner claimed that the certificates he submitted constituted licenses and certifications that allow him to practice his profession. However, none of the certificates provided are formally characterized as a license to practice a profession in the field of information technology, and he has not shown that a license or certification is required to practice his profession in Brazil as he claims. Additionally, although the Petitioner claims the certificates are licenses and certifications that allow him to practice his profession, the certificates were issued after the Petitioner began his career in the information technology field in 1999 and he has not shown that the certificates were required to obtain or maintain any of his subsequent positions in the information technology field. The Petitioner also does not sufficiently describe or submit evidence showing that any of the certificates are certifications for his occupation, rather than simply documentation that he completed certain trainings.[5] We therefore conclude that the Petitioner did not submit a license to practice his profession or certification for his particular profession or occupation to satisfy the criterion at 8 C.F.R § 204.5(k)(3)(ii)(C).

[5] For instance, the Petitioner provided a certificate reflecting he had successfully completed all the program requirements to be certified as a System Administrator in Red Hat OpenStack in 2017. Publicly available information shows that this type of certificate is earned by passing an exam administered by Red Hat and is used to prove "what you know and can do and validate your knowledge to the market or an employer." Red Hat, https://www.redhat.com/en/services/training-and-certification/faq (last visited Aug. 19, 2024). The same information provides that "[o]rganizations hiring employees, contractors, and consultants can look to Red Hat certifications as an input into hiring, assignment, promotion, and other management decisions," and continues by explaining that, "individuals who earn these certifications benefit and see value by having official, impartial, and proven validation of their skills and knowledge." *Id.* These descriptions do not, however, reflect that this type of certification is for a specific profession or occupation.

The Director also concluded that the Petitioner did not submit evidence relating to the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) as he did not submit evidence that he has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. The Petitioner did not claim he commanded a salary, or other remuneration for services, that demonstrated exceptional ability when he submitted his Form I-140, and our review of the record similarly reflects that it contains insufficient evidence to establish the Petitioner satisfied this criterion. We therefore conclude that the Petitioner has not satisfied this criterion.

The Director concluded that the Petitioner satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E), specifically evidence of membership in professional associations. "Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation." 8 C.F.R. § 204.5(k)(2). The Petitioner did not claim he was a member of any professional associations when he submitted his Form I-140, nor did he submit evidence of such memberships. Further, our review of the record does not reflect that the Petitioner is a member of any professional associations. We therefore withdraw the Director's conclusion that the Petitioner submitted evidence to establish that he met the criterion at 8 C.F.R § 204.5(k)(3)(ii)(E).

Finally, the Petitioner claimed to satisfy the criterion at 8 C.F.R § 204.5(k)(3)(ii)(F), because he submitted evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. In support of his claim, the Petitioner submitted letters of recommendation from coworkers, a certificate from a state government in Brazil recognizing his contribution to a project making possible the digitization and electronic processing of judicial processes in Brazilian courts, and an annual award from a software company. While this evidence describes the Petitioner's employment history, contributions made in support of his and his employers' businesses, and the length of his service in the information technology field, the evidence does not show or address how the above achievements and contributions have significantly contributed to the information technology industry or field. For instance, while the Petitioner's contributions to Brazilian courts may have modernized their systems, the Petitioner has not established that the project accomplishing this significantly contributed to the information technology industry or field beyond the benefit to the court's operations. Similarly, the annual award the Petitioner received from a software company (Red Hat) recognizes certain professionals who have completed that company's trainings and who "demonstrate ingenuity, hard work, and expertise" using that company's products, and does not necessarily recognize significant contributions to the information technology industry or field.[6] Accordingly, while the Petitioner has submitted evidence of claimed recognition from peers, governmental entities, or professional or business organizations, we conclude the evidence does not recognize achievements and significant contributions to the information technology industry or field. Accordingly, the Petitioner has not satisfied the criterion at 8 C.F.R § 204.5(k)(3)(ii)(F).

[6] *See* Red Hat, https://www.redhat.com/en/services/certification/rhcp/rhcp-of-the-year (last visited Aug. 19, 2024) (describing that a submission for the annual award should include examples of how a nominee used the company's certified skills to succeed in their current job, enhance their company's or customers' information technology environments, improve their company's or customers' system performance, increase their company's or customers' system security, or generally deliver results to an organization).

Per the above analysis, the Petitioner has not established that he meets the initial evidentiary requirements by satisfying at least three of the six exceptional ability evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii), and we withdraw the Director's determination to the contrary. Therefore, the Petitioner is ineligible for EB-2 classification on this basis alone.

Nevertheless, we have reviewed the record in the aggregate and agree with the Director that it does not support a finding that the Petitioner has established a degree of expertise significantly above that ordinarily encountered in the field in order to establish he is an individual of exceptional ability. Although the record contains evidence such as a diploma for the Petitioner's associate's degree in data processing and certificates showing he completed various courses, the mere possession of a degree, diploma, certificates, or similar award from an institution of learning is not by itself considered sufficient to establish exceptional ability. Here, the Petitioner has not sufficiently addressed or provided comparative information to establish that his education, work experience, training, and the numerous certificates for courses he completed differentiate him from other information technology professionals or that they, either independently or collectively, constitute a degree of expertise significantly above that ordinarily encountered in the field. Similarly, as noted above, the letters from current or former employers and recommendation letters, the recognition from a state government for his contribution to the Brazilian courts project, and the annual award in the record are insufficient to establish that he is above others in the field. The employer letters and letters of recommendation generally praise the Petitioner's character and ability, while an expert opinion letter in the record addresses the first and second prongs of the *Dhanasar* analytical framework as it relates to his proposed endeavor; however, the letters do not address how the Petitioner compares to other information technology professionals and the expert opinion letter notably makes no conclusion as to whether the Petitioner possesses a degree of expertise significantly above that ordinarily encountered in the field. Finally, while we acknowledge the Petitioner's recognition for his contribution to the Brazilian courts from a state government and his receipt of an annual award from Red Hat, the state government award only generally praises his "dedication, expertise, and efficiency," and, as noted above, the annual award is limited to those who complete that company's trainings and may, at a minimum, be given to someone who demonstrates "hard work" and "generally deliver[s] results to an organization." Therefore, they do not sufficiently provide a comparative benchmark against others in the information technology field. Accordingly, while the Petitioner has thus far had a successful career in information technology, he has not established he possesses a degree of expertise *significantly* above that ordinarily encountered in his field.

III. CONCLUSION

The Petitioner has not established that he meets the regulatory evidentiary criteria for classification as an individual of exceptional ability, as he has not met at least three of the criteria under 8 C.F.R. § 204.5(k)(3)(ii) as required. Additionally, the Petitioner has not overcome the Director's determination that he has not shown he has a degree of expertise significantly above that ordinarily encountered in the field to establish exceptional ability. He is therefore ineligible for underlying EB-2 immigrant classification as an individual of exceptional ability. As our determination on this issue is dispositive of this appeal, we need not address the Petitioner's additional arguments with respect to the Director's determination that he did not establish that he merits a national interest waiver and reserve the issue. *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal

agencies are not generally required to make findings and decisions unnecessary to the results they reach).

ORDER: The appeal is dismissed.