U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30413669

Date: AUG. 23, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, who has studied industrial management and plans to own and operate a trucking company, 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for EB-2 immigrant classification 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). 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 in its totality shows that they are recognized as having the requisite degree of expertise and will

[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.

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. 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

A. Exceptional Ability

The Petitioner's proposed endeavor is to own and operate a long-distance trucking company. His business plan indicates he will work as the senior manager of the company.

In reviewing the Petitioner's eligibility for the underlying EB-2 visa classification, the Director concluded that the evidence did not establish that he met the requisite three of the six evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii) to demonstrate his eligibility as an individual of exceptional ability. Specifically, the Director stated that the Petitioner met the criteria related to a degree or diploma relating to the area of exceptional ability criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) and membership in a professional association under 8 C.F.R. § 204.5(k)(3)(ii)(E). However, the Director concluded that the Petitioner did not meet the requirements of two other criteria for which he submitted evidence.

On appeal, the Petitioner maintains that he also meets the license to practice a profession or occupation criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) and the salary criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D). After reviewing the evidence, we agree with the Director that the record does not support a finding that the Petitioner satisfies the requirements of at least three criteria.

> *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).

[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).

As support for this criterion, the Petitioner submitted a diploma and accompanying transcript that he earned a Bachelor of Science in Industrial Management degree from [redacted] Additionally, he completed a summer session in marketing management at [redacted] Accordingly, we agree with the Director that this criterion has been met.

> *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 a copy of his temporary Florida state commercial driver's license (CDL), valid from September 2020 to July 2021, in support of this criterion. However, the Director concluded that the Petitioner did not demonstrate that a license to drive a commercial-sized vehicle permits him to practice a profession or occupation, and that entrepreneurship does not require a license. The Director therefore determined that this criterion was not met. On appeal, the Petitioner argues that the CDL is "a specialized license demonstrating his competency and expertise in the operation of commercial vehicles. This CDL is a crucial qualification for [his] intended profession in the trucking industry . . . ."

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) requires "[a] license to practice the profession or certification for a particular profession or occupation." Although we take administrative notice that a CDL is required to operate certain vehicles, the record does not establish how a CDL is required to work as the owner and operator of a trucking company, as the Petitioner proposes to do. The Petitioner's business plan indicates that he will be the president of the business, working as "senior management," and will hire truck drivers as staff. The evidence the Petitioner has submitted does not state that he will work as a truck driver and will therefore require a CDL to practice his profession or occupation as the owner and senior manager of a trucking company. Additionally, the Petitioner proposes to operate his trucking company in the state of New York and does not address how a temporary Florida CDL is required for an occupation in another state. Therefore, the record does not establish how the Petitioner's CDL satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) in this case.

> *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 satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of their claimed exceptional ability relative to others working in the field. In a request for evidence (RFE), the Director indicated that the Petitioner did not initially submit evidence in support of this criterion. In response, the Petitioner claimed that "based on the documentation previously submitted and/or attached hereto," the criterion had been met. In support of his RFE response he provided copies of his 2021 income tax return showing he reported a gross income of $88,877. On appeal, he again states that "based on the documentation in the record, the Beneficiary clearly established that this criterion has been met, and USCIS erred in finding otherwise." Although the Petitioner previously submitted copies of his income tax return, he has not offered documentation showing that his earnings are indicative of exceptional ability relative to others in the field. Based on the foregoing, we agree with the Director that the Petitioner has not demonstrated he meets this regulatory criterion.

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

The Petitioner has provided evidence that he paid for a "TVC Pro-Driver" membership with TVC Marketing Associates, Inc. In response to the Director's RFE, he stated he is also a member of the Owner-Operator Independent Drivers Association (OOIDA). He provided information about OOIDA and a photocopy of a credit card transaction receipt showing the Petitioner made a membership payment to the organization. The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "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." The evidence presented is not sufficient to demonstrate that either TVC Marketing Associates, Inc. or OOIDA has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that either organization otherwise constitutes a professional association pursuant to the definition at 8 C.F.R. § 204.5(k)(2). Accordingly, we withdraw the Director's determination that the Petitioner has satisfied this criterion.

For the reasons set forth above, the evidence does not establish that the Petitioner satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification.

C. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. As previously outlined, in order to qualify for a national interest waiver, the Petitioner must first show that he qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. The Petitioner has not submitted sufficient evidence to support his claim that he has satisfied the regulatory criteria and achieved the level of expertise required for exceptional ability classification. Accordingly, the Petitioner has not established eligibility for the underlying EB-2 immigrant classification. Because this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding his eligibility for a national interest waiver under the *Dhanasar* analytical framework. *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).

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as an individual of exceptional ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.