U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32955388

Date: AUG. 26, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a management professional, 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 an individual of exceptional ability. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3. On appeal, the Petitioner requests that we review the evidence anew and reconsider his eligibility.

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.

II. ANALYSIS

The Petitioner, a citizen and national of Brazil residing in the United States, seeks to establish a management consultancy organization. The Director concluded that the Petitioner met the regulatory requirements for a person of exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), and (D)-(F) but did not demonstrate that he has expertise over and above that normally found in his field in the final merits determination and denied the petition on that basis.[3] On appeal, the Petitioner argues that his combination of community service and extensive work experience makes him an individual of exceptional ability. In addition, the Petitioner believes that since the Director found he meets five of the six regulatory criteria, he has clearly met the definition of a person of exceptional ability.

A. The Director Erred in Finding the Petitioner met Five of the Six Criterion for Exceptional Ability

For the reasons specified below we will withdraw the Director's determination that the Petitioner meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) and (F) and evaluate the evidence de novo.

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

The Petitioner provided evidence for his income in tax years 2019, 2020 and 2021. The Petitioner argued in his response to the Director's request for evidence (RFE) that his salary was sufficiently high to demonstrate that he is a person of exceptional ability. The Director agreed with the Petitioner, however, after reviewing the evidence provided below, the Petitioner has not sufficiently documented the prevailing wage for a person in his field to establish that his pay is significantly higher than others performing the same or similar jobs. The Petitioner provided a screen shot and citation to a job search website as evidence of the prevailing wage for an "operational manager". However, he did not provide evidence of how the website calculated the prevailing wage or that his current position would be the equivalent of an "operational manager" as defined by that website. Accordingly, the Petitioner has not established that he commands a salary which demonstrates exceptional ability.

> *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).

As evidence for this criterion, the Petitioner provided letters from individuals with whom he worked. While these letters demonstrate a degree of competence and the petitioner's value to the clients, organization, and managers with whom he worked, it does not demonstrate that he has made significant contributions to the field of product procurement and management as a whole. The record lacks evidence of awards or recognition by government entities or organizations relevant to the Petitioner's field of expertise. Accordingly, the Petitioner has not met this criterion.

[3] In a brief statement, the Director advised that the evidence in the record did not demonstrate that the Petitioner met the three prongs of *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) to establish eligibility for the national interest waiver but that a full analysis was unnecessary because the Petitioner was otherwise ineligible for EB-2 classification.

Even though we have withdrawn the Director's finding that the Petitioner met the two criteria above, he has still met three of the six criteria and we move to a final merits determination. s*ee, generally, 6 USCIS Policy Manual* F.5 (B)(2), https://www.uscis.gov/ policy-manual.

B. The Balance of the Evidence Does Not Demonstrate that the Petitioner has Exceptional Ability

Contrary to the Petitioner's argument, meeting three or more of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) is not sufficient to establish that an individual is a person of exceptional ability. The Petitioner must also demonstrate that he has the high level of expertise required for this classification. *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) *See also, generally, 6 USCIS Policy Manual* F.5 (B)(2), https://www.uscis.gov/ policy-manual. Where a petitioner meets the initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows the petitioner possesses exceptional ability. *See id*; *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). 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.

The Petitioner received a Titulo de Tecnologo (Technologist) from [redacted] and provided transcripts from [redacted] that showed additional management courses. While the Petitioner has shown he has some education related to his area of claimed expertise, the evidence provided does not support the conclusion that the Petitioner's education and academic credentials are substantially greater than those found in his field.

The Petitioner has also demonstrated that he began working in the field of product procurement as an assistant in 2001, eventually rising to a manager. The letters of support from colleagues and former employers demonstrate that he has achieved positive results for the organizations with which he has worked, including the completion of multiple large-scale projects. The expert opinion letter from V-L-[4], an associate professor of marketing at [redacted] states that the documentary evidence provided by the Petitioner demonstrates that he has a record of success in defining projects and that his services would be beneficial to U.S. companies. However, the Petitioner has not demonstrated significant contributions to the field of product procurement or management. He has also not demonstrated that he has been recognized for his work by government entities, trade journals, or other similar independent organizations. The Petitioner's contributions appear confined to the organizations in which he has worked, and the evidence does not demonstrate that the Petitioner has had a broader impact on his field that would demonstrate he is an individual of exceptional ability. We therefore conclude that he has not established that he has a degree of expertise significantly above that ordinarily encountered in the field of his proposed endeavor as the CEO of a management consulting company.

[4] We use initials to protect the privacy of individuals.

The Petitioner also established that he is a member of two professional organizations, the American Management Association and the Project Management Institute. According to the Petitioner, membership in these organizations is common for individuals in his field. He does not claim to be in a leadership position within these organizations or that the membership in such an organization is restricted to the top members of his profession. Therefore, he has not demonstrated that membership in these organizations is evidence of exceptional ability as an entrepreneur.

In addition to his education, work experience, and membership in organizations the Petitioner claims that his salary demonstrates that he is a person of exceptional ability because he makes significantly more than the average salary for a general or operational manager in Brazil. In support of this claim, the Petitioner referenced a public website that provided an average salary for operational managers in Brazil. As stated above, the website's findings were not broken down by industry or experience and did not provide a definition for what the website classifies as a manager. The information provided from a single website without evidence related to the methodology of how the findings were calculated is not sufficient to establish that the Petitioner receives remuneration indicative of exceptional ability. Therefore, he has not demonstrated that he makes a salary significantly higher than other individuals with similar experience in his industry or field.

The record, in its totality, does not establish the Petitioner's eligibility as an individual of exceptional ability. Although the Petitioner satisfied three of the initial criteria for consideration, the record does not demonstrate that the Petitioner has obtained a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). Additionally, to qualify for the exceptional ability classification, an individual must demonstrate they will substantially benefit the national economy, cultural or educational interests, or welfare of the United States because of their exceptional ability. *See* Section 203(b)(2)(A) of the Act. Here, while the Petitioner claims his volunteer activities demonstrate that he would have a positive impact on the United States, he has not directly linked his area of exceptional ability with his philanthropic endeavors. Moreover, the evidence in the record does not establish that the Petitioner would substantially benefit the national econom, cultural, or educational interests.

III. CONCLUSION

The record as a whole, including the evidence discussed above, does not establish the Petitioner's eligibility as an individual of exceptional ability. Although the Petitioner satisfied three of the initial categories of evidence, the record does not demonstrate that the Petitioner has obtained a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).[5] As such, we need not reach a decision on whether, as a matter of discretion, he is eligible for or otherwise merits a national interest waiver. Accordingly, we reserve this issue.[6] 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.

[5] *See also* 6 *USCIS Policy Manual*, *supra*, F.5(B)(2).

[6] *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).