U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34508680

Date: DEC. 04, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an attorney, seeks employment-based second preference (EB-2) immigrant classification as either a member of the professions holding an advanced degree or 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 the underlying EB-2 classification and therefore did not show that a waiver of the required job offer 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.

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.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. Profession is defined as one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.[1] 8 C.F.R. § 204.5(k)(2).

[1] Profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) 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).[2] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[3] 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 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,[4] 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

As noted above, to qualify for the requested national interest waiver, the Petitioner must demonstrate eligibility for the underlying EB-2 classification. He may do so as either a member of the professions holding an advanced degree or as an individual of exceptional ability. We find that the record for the instant petition, including as supplemented on appeal, does not demonstrate that the Petitioner has established eligibility for EB-2 classification by a preponderance of the evidence.

On the Form I-140, Immigrant Petition for Alien Workers (I-140), the Petitioner stated that his occupation was global tax consultant/military instructor. In a statement accompanying the I-140, the Petitioner asserted that he was a tax, labor, and corporate law attorney and also claimed that he had recognized expertise in the field of military science as an instructor and former military member. In response to a request for additional evidence (RFE) from the Director, the Petitioner submitted a business plan, among other documents, detailing his intention to establish a legal consulting company in the United States dealing with these topics as his proposed endeavor. On appeal, the Petitioner submits a brief and contends that he has established eligibility for the national interest waiver. He

[2] 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).

[3] 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.

[4] *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).

renews claims that he has ten years of professional experience "in the field of business and tax law" and asserts that he has the equivalent of a Master of Law degree in the United States.

A. Advanced Degree Professional

When he filed the petition, the Petitioner claimed eligibility as a member of the professions holding an advanced degree under 8 C.F.R. § 204.5(k)(2). The Petitioner did not claim to have earned an advanced degree academically, but he asserted that his post-baccalaureate work experience was equivalent to a master's degree under 8 C.F.R. § 204.5(k)(2).

To establish this equivalency, the Petitioner must submit an official academic record showing that he has a United States baccalaureate degree or a foreign equivalent degree, along with letters from current or former employer(s) showing at least five years of progressive post-baccalaureate experience in the specialty. 8 C.F.R. § 204.5(k)(3)(i)(B). Regarding this requirement, in his RFE response, the Petitioner submitted an expert letter from [redacted] an associate professor of management and law at the Department of Finance and Business Management at the [redacted] The letter asserted that the Petitioner had a four-year degree and more than ten years of professional experience, which should be considered the equivalent to a master's degree in law.

In denying the petition, the Director found that the Petitioner had earned a bachelor of law degree, but he had not met the requirement at 8 C.F.R. § 204.5(k)(3)(i)(B) to submit at least five years of letters from employers demonstrating progressive post-baccalaureate experience in the specialty. On appeal, the Petitioner renews claims that he is an advanced degree professional and refers to the letter from [redacted] However, he does not address the specific deficiency noted by the Director in conforming with the regulatory requirement for this eligibility criterion.[5] He has not, for example, claimed that he previously submitted the requisite letters from employers documenting his five years of progressive post-baccalaureate experience in the specialty. Our review of the record for the instant petition does not disclose such documentation. Therefore, we find no error in the Director's finding that the Petitioner has not shown that he is an advanced degree professional.

B. Exceptional Ability

When he filed the petition, the Petitioner did not claim to be an individual of exceptional ability. The Petitioner first raised the issue after the Director issued a request for evidence (RFE) and made such an assertion in a personal statement. In the RFE response, the Petitioner appeared to claim to satisfy five exceptional ability criteria by submitting an excerpt from the USCIS Policy Manual with these criteria highlighted.

To establish eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii), summarized below:

(A) An academic degree relating to the area of claimed exceptional ability;

[5] He also does not claim that the bachelor's degree he earned is equivalent to a master's degree in the United States.

(B) Ten years of full-time experience in the occupation;
(C) A license or certification for the profession or occupation;
(D) A salary or other remuneration that demonstrates exceptional ability;
(E) Membership in professional associations; and
(F) Recognition for achievements and significant contributions to the industry or field.

If an individual meets at least three of the regulatory criteria, we then consider the totality of the material provided in a final merits determination and assess whether the record shows a degree of expertise significantly above that ordinarily encountered in the individual's field. *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.

The Director concluded, without elaborating, that the Petitioner did not satisfy qualify as an individual of exceptional ability. On appeal, the Petitioner asserts that his previously-submitted evidence satisfies four criteria; (1) an academic degree, (2) a license to practice his profession, (3) membership in a professional association, and (4) recognition for achievements and significant contributions to the field of tax and business law.[6]

1. Regulatory Criteria

As explained below, we agree that the Petitioner has satisfied the regulatory requirements for the requisite three of the six claimed criteria for individuals of exceptional ability.

> *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 cited his bachelor's degree in law completed in 2006 and his bachelor's degree in military sciences completed in 2000. The record contains diplomas for both of the noted degrees. Accordingly, the Petitioner has demonstrated that he possesses a degree relating to the area of claimed exceptional ability.

> *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 indicated that he intended to work as an attorney in the United States. With the initial petition, he submitted a document from the Director Secretary General of the Order of Lawyers of

[6] Before the Director, the Petitioner appeared to additionally claim to be eligible for the criterion related to ten years of full-time experience in the occupation under 8 C.F.R. § 204.5(k)(3)(ii)(B). However, as the Petitioner did not claim this on appeal, we consider the issue waived. Additionally, the appeal submission only refers to the Petitioner's professional experience in the field of business and tax law. Therefore, we consider his claims below of an occupation as a military instructor waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (an issue not raised on appeal is waived).

Brazil, Section of Minas Gerais, stating that the Petitioner was a registered lawyer in good standing. We therefore find that the Petitioner possesses the requisite license to practice his particular profession.

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

The record includes a certificate of approval from the Brazilian BAR Association, Regional Council of Minas Gerais, attesting that the Petitioner "was approved" and able to apply for registration in the board of attorneys of the Brazilian BAR Association. The Petitioner has provided sufficient evidence to satisfy this requirement.

We also note the evidence submitted in support of the Petitioner's claim that has been recognized for achievements and significant contributions to his field in support of this criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). However, as we find that he has established that he meets the initial evidentiary requirement, we need not consider whether he also meets additional criteria. Rather, we will consider this evidence together with the balance of the record to determine whether the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field, and is therefore eligible for the requested classification.

2. Final Merits Determination

In reviewing the totality of the evidence in a final merits determination, we consider the quality of the evidence.[7] Upon de novo review of the record for the instant petition, we find that the Petitioner has not shown that he has exceptional ability in the legal field, or in the field of tax law. He has not demonstrated that he has a degree of expertise significantly above that ordinarily encountered in the field.

As an initial matter, the evidence of the Petitioner's educational credentials, attorney license, and bar association membership document showed that he possesses the minimum qualifications to perform in his field. However, this documentation did not demonstrate that the organizations have any membership requirements above those commonly found in attorneys working in the field.

Additionally, the testimonial evidence in the record did not establish that the Petitioner is recognized by others in his field for significant expertise not ordinarily encountered. Although most of the letters attested that the Petitioner is knowledgeable about tax law and is an excellent lawyer, they largely repeated the Petitioner's claims of his own contributions to the field without further probative detail. The Petitioner must support his assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. Some letters were from professional associates who attest that the Petitioner's skills helped their businesses or clients, but do not discuss how his expertise compares to others in the field. A letter from an American law professor claimed that the Petitioner was well-positioned to advance the national interest "more than other individuals with similar credentials," but similarly did not support this claim with specific facts.

The Petitioner also submitted industry reports and articles. However, these focused on the complexity of tax law in Brazil and Latin America and did not discuss any particular achievements or contributions

[7] 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

by the Petitioner or otherwise establish that the Petitioner has a degree of expertise significantly above that ordinarily encountered in his field.

Finally, on appeal the Petitioner does not identify any erroneous conclusion of law or statement of fact regarding the Director's finding that he did not demonstrate that he is an individual of exceptional ability, aside from generally stating that he has submitted sufficient evidence of his eligibility. *See* 8 C.F.R. § 103.3(a)(1)(v). While the Petitioner argues that he has demonstrated exceptional ability, he does not elaborate this claim with details about specific facts or pieces of evidence that support this claim. Commensurate with the Petitioner's burden of proof is the responsibility for explaining the significance of proffered evidence. *Repaka v. Beers*, 993 F. Supp. 2d 1214, 1219 (S.D. Cal. 2014); *see also Adler v. Duval Cnty. Sch. Bd.,* 112 F.3d 1475, 1481 n. 12 (11th Cir. 1997) (noting in a civil case that, absent plain error, it is not the place of an appellate body to grant appellants relief "based on facts they did not relate").

III. CONCLUSION

The Petitioner has not established that he qualifies as a member of the professions holding an advanced degree or as an individual of exceptional ability in business. Therefore, the Petitioner has not shown eligibility for EB-2 classification. Without such a showing, the Petitioner cannot qualify for the national interest waiver. Because this petition cannot be approved without an underlying determination that the Petitioner qualifies for EB-2 classification, we will reserve discussion of the Petitioner's national interest waiver claim under the *Dhanasar* framework.[8] We will dismiss the appeal for these reasons.

ORDER: The appeal is dismissed.

[8] *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); *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).