U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29769653

Date: FEB. 21, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a restaurant manager, seeks classification as a member of the professions holding an advanced degree and as an individual of exceptional ability in the sciences, arts or business. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for either of the two EB-2 classifications. The Director also concluded that the Petitioner had not established eligibility for the 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.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States 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 of the occupations listed in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32),[1] as well 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).

[1] The listed occupations are architects, engineers, lawyers, physicians, surgeons, and teachers at certain institutions.

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. USCIS will then conduct a final merits determination to decide whether the evidence as a whole shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

Once a petitioner demonstrates EB-2 eligibility, 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 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.

II. ADVANCED DEGREE PROFESSIONAL

In his native Turkey, the Petitioner earned a bachelor's degree in physical education in 1990, and he states that he then worked in sales, marketing, and management for various companies until 2002. From 2004 to 2011, the Petitioner owned a convenience store in Turkey. Since 2012, the Petitioner has spent most of his time in Florida as the spouse of an E-1 nonimmigrant treaty trader, working in food service management. The Petitioner was a shift manager at a Mediterranean restaurant from 2012 to 2013, a supervisor for a company with several retail restaurants from 2013 to 2019, and general manager of a pizza franchise from 2019 to 2020. At the time he filed the petition in April 2021, the Petitioner was the general manager of a hamburger franchise.

When he filed the petition, the Petitioner claimed eligibility as a member of the professions holding an advanced degree. The Petitioner did not claim to have earned an advanced degree academically, but he asserted that his post-baccalaureate work experience is 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 the alien has a United States baccalaureate degree or a foreign equivalent degree, and letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty. 8 C.F.R. § 204.5(k)(3)(i)(B).

The Director did not address the question of whether the Petitioner's intended occupation meets the regulatory definition of a profession. The Petitioner earned a bachelor's degree in a "Physical

[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] *See also 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).

Education and Sports Teaching Program" in Turkey in 1990. Because the Petitioner's intended employment in the United States does not relate to physical education and sports teaching, the Director determined that the Petitioner had not established that he holds the equivalent of an advanced degree in his intended field. On appeal, the Petitioner does not dispute this determination. Instead, the Petitioner erroneously states that the Director "agreed that the Appellant qualifies as a member of a profession holding an Advanced Degree."[4] The record does not support this statement; the Director stated the reasons for a determination that the Petitioner had not established eligibility as a member of the professions holding an advanced degree.

Because the Petitioner does not address the grounds cited by the Director related to the advance degree issue, we consider the Petitioner to have waived appeal on this issue.[5] The Petitioner has not addressed, and has not overcome, the stated grounds for the Director's determination.

III. EXCEPTIONAL ABILITY

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;
(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.

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[4] This and other erroneous references in the appellate brief prepared for the Petitioner suggest that the brief is derived, at least in part, from an earlier brief prepared on behalf of a different petitioner.

[5] *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived); *see also Sepulveda v. US. Att'y Gen.*, 401 F .3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, 9 (E.D.N.Y. Sept. 30, 2011) (finding the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO); *Desravines v. US. Att'y Gen.*, 343 F. App'x 433, 435 (11th Cir. 2009) (indicating that a passing reference in the arguments section of a brief without substantive arguments is insufficient to raise that ground on appeal). When an appellant fails to properly challenge one or more of the grounds upon which the Director based their conclusion, the filing party has abandoned any challenge of that ground or grounds, and it follows that the adverse determination will be affirmed. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014); *United States v. Cooper*, No. 17- 11548, 2019 WL 2414405, at *3 (11th Cir. June 10, 2019).

When he initially filed the petition, the Petitioner did not claim exceptional ability in business. The Petitioner first raised the issue after the Director issued a request for evidence (RFE). In the RFE response, the Petitioner claimed to satisfy four exceptional ability criteria, relating to: (1) academic degrees; (2) experience; (3) membership in professional associations; and (4) recognition.

In the denial notice, the Director addressed all six criteria, although the Petitioner had claimed to meet only four. The Director concluded that the Petitioner submitted evidence to satisfy two of the criteria, relating to experience and memberships. On appeal, the Petitioner asserts that his evidence satisfies the criteria relating to degrees and recognition.

As explained below, we conclude that the Petitioner has not satisfied the regulatory requirements for any of the claimed 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).

The Petitioner cited his bachelor's degree in physical education and sports teaching. We agree with the Director's determination that the Petitioner did not establish that, or explain how, this degree relates to his area of claimed exceptional ability in business.

On appeal, the Petitioner asserts that his degree "helped him to develop the necessary skills of business organization and efficiency." This general and unsupported assertion does not overcome the Director's determination. Statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998). The academic transcript in the record does not reflect business-related coursework.

The Petitioner's response to the RFE also included letters showing that he took courses with such titles as "Sales and Sales Technique," "Time Management," and "Effective Leadership and Management Skills." These courses, however, were offered by the Petitioner's employers, rather than institutions of learning as the regulations require. The Petitioner did not submit official academic records for the courses, as required, nor did he establish that these courses were comparable to education in an academic setting. On appeal, the Petitioner does not repeat his earlier argument that this employer-led training is comparable to an academic degree.

The Petitioner has not met his burden of proof to satisfy the requirements of this criterion.

> *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 concluded that letters from several employers satisfy the requirements of this criterion. But employers' letters documenting required employment experience must include a specific description of the duties performed by the individual. 8 C.F.R. § 204.5(g)(1). The Petitioner submitted several letters attributed to current and former employers, but only three of those letters include the

required specific description of duties performed. Those three letters account for less than three and a half years of employment experience.

The other letters provide few details apart from the dates of employment and the Petitioner's job title at each position. Also, only three of the letters, accounting for six years and eight months of employment, specify that the experience was full-time. One letter, from the Petitioner's accountant, attests to the Petitioner's ownership of a convenience store from April 2004 to June 2011, but does not describe his duties there or even specifically indicate that the Petitioner actually worked at the shop. Elsewhere in the record, such as on his résumé, the Petitioner offered his own description of his duties at the convenience store, but he submitted no evidence to corroborate his assertions, and, therefore, has not met his burden of proof.

Furthermore, the Petitioner claims only about seven years of experience as an entrepreneur, running his own business as opposed to holding a managerial or supervisory position at a business owned by others.

The Petitioner has not met his burden of proof to satisfy the requirements of this criterion.

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

Copies of certificates indicate that the Petitioner is a member of the [redacted]. The Director concluded, without further discussion, that the Petitioner meets the regulatory requirements for this criterion. We disagree with the Director's conclusion.[6]

The Petitioner submitted no information or evidence about the [redacted] other than the certificates, and therefore the Petitioner has not established that the [redacted] is a professional association. The Petitioner did not show that the association's members are professionals as defined at 8 C.F.R. § 204.5(k)(2). Furthermore, the Petitioner claims exceptional ability as a general and operations manager and entrepreneur, rather than in the related but distinct field of marketing.

Also, the certificates indicate that the Petitioner joined the [redacted] in March 2019, at a time when the Petitioner acknowledges that he was unemployed; employers' letters and his own résumé show a gap between January and October of that year. Therefore, his admission to the [redacted] does not appear to have been contingent on employment at all, let alone employment in a profession relating to marketing.

For the above reasons, we conclude that the Petitioner has not met his burden of proof to show that he meets the requirements of this regulatory criterion.

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).

[6] We note that, on appeal, the Petitioner erroneously states that the Director concluded that "this criterion has not been met," but the Petitioner does not allege that the Director erred by reaching that conclusion.

The language of the regulation calls for "evidence of recognition for achievements *and* significant contributions to the industry or field." As such, materials that identify an individual's achievements but not significant contributions to the industry or field cannot suffice to satisfy the regulatory requirements. *See Matter of Echeverria*, 25 I&N Dec. 512, 518 (BIA 2011) (holding that the use of the conjunction "and" in a series of regulatory requirements "is a clear indication" that one "must satisfy each of the [listed] requirements").

The evidence that the Petitioner identified as addressing this criterion consists of three letters. The first letter is from the president of the homeowners association (HOA) in the Petitioner's neighborhood. This individual asserts that prior to an HOA election, the Petitioner "showed a presentation [in] addition to his resume [stating] how he would be useful to the community. As a result, he received the highest number of votes . . . and became the director of [the] HOA." Although the Petitioner described his business experience when he campaigned for the position of HOA manager, the Petitioner has not established that his election constitutes recognition for achievements and significant contributions to the industry or field. Also, the Petitioner did not show that the voting members of the HOA are peers, governmental entities, or professional or business organizations as the regulation requires. Materials in the record indicate that the author of the letter is, or was, a member of the local City Council, but she did not claim to be writing on behalf of the City Council or in her capacity as a member. The letter is therefore not recognition from a governmental entity.

The second letter is from a manager at the hamburger franchise where the Petitioner began working in January 2021. The manager indicated that the Petitioner "developed a brand new inventory system" that enabled the business "to stabilize the inventory control." The manager did not claim that, or explain how, this inventory system is a significant contribution to the industry or field. The record does not show that the system has been implemented anywhere outside of this one franchise location.

The third letter is from the owner of the same hamburger franchise. The owner stated that sales and profitability increased after the Petitioner began working at the restaurant as a manager, but the owner did not identify any significant contributions to the industry or field.

The Director concluded that "the letters fail to describe the petitioner's specific achievements and significant contributions to the industry or field of restaurant service or similar entrepreneurial endeavors."

On appeal, the Petitioner states that he meets the criterion because "he has cultivated excellent relationships, enhanced his communication skills, and maintained professional management standards throughout different geographic environments and multinational teams within the information technology field." The Petitioner does not work in "the information technology field," and he does not explain how his personal success and career performance amount to significant contributions to either information technology or the field of restaurant management.

The Petitioner has not met his burden of proof to meet the regulatory requirements of this criterion.

Because the Petitioner has not met his burden of proof to satisfy at least three of the initial criteria at 8 C.F.R. § 204.5(k)(3)(ii), we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Nevertheless, the record in the aggregate does not support a

conclusion that the Petitioner has established exceptional ability in business as a general and operations manager and entrepreneur as claimed. The submitted evidence indicates that the Petitioner has experience both as a restaurant manager and, separately, as an entrepreneur, but the record contains few specific details about that experience. The Petitioner has also not established a sufficient baseline against which to compare his expertise in the field. Without sufficient evidence regarding the Petitioner's own work and that of others, the record does not establish that the Petitioner possesses a degree of expertise significantly above that ordinarily encountered among either entrepreneurs or general and operations managers in the food service industry.

Because the 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.[7]

IV. 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. We will dismiss the appeal for these reasons.

ORDER: The appeal is dismissed.

[7] *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).