U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29243227

Date: JAN. 16, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks classification 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, 8 U.S.C. § 1153(b)(2)(B)(i). 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 does not establish the Petitioner qualifies for classification as an individual of exceptional ability. The Director further concluded that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. 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 establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either a member of the professions holding an advanced degree or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2) of the Act. For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii) for an elaboration of these criteria. Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[1] We then conduct a final merits

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of

determination to decide whether the evidence in its totality shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. *See* 8 C.F.R. § 204.5(k)(2).

In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides, "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."

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 USCIS may, as matter of discretion,[2] 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. ANALYSIS

The Director concluded that the record does not satisfy at least three of the six exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii). More specifically, although the Petitioner asserted that he satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (C)-(F), the Director found that the record satisfies only the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). On appeal, the Petitioner reasserts that he satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(C)-(F), in addition to the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner does not assert on appeal that the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation, as contemplated by 8 C.F.R. § 204.5(k)(3)(iii).

A. A License to Practice the Profession or Certification for a Particular Profession or Occupation

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." The Director acknowledged that the Petitioner submitted a copy of a temporary commercial driver's license (CDL) issued to the Petitioner by the State of Florida; however, the Director noted that the CDL is dated November 2022, after the date the Petitioner filed the Form I-140, Immigrant Petition for Alien Workers. The Director concluded that

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

[2] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

the CDL dated after the Form I-140 filing date cannot establish eligibility, citing *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971); 8 C.F.R. § 103.2(b)(1), (12). On appeal, the Petitioner reasserts that he holds a CDL, that the CDL "is an integral part of his occupation," and that the CDL satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. at 49. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The Petitioner filed the Form I-140 in August 2021. The Petitioner described the proposed endeavor, at the time of filing, as a plan to "seek employment as an independent business owner in the field of cargo transportation & logistics." The record contains a copy of a temporary CDL, issued to the Petitioner by the State of Florida, in November 2022, after the petition filing date. Although we take administrative notice that a CDL is required to operate certain vehicles, the record does not establish how a CDL, temporary or otherwise, is required to work "as an independent business owner in the field of cargo transportation & logistics," which is distinguishable from working as the operator of a vehicle that requires a CDL. Therefore, the record does not establish how a CDL—even if it were valid at the time of filing—could satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). However, even to the extent that a CDL could satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C), in this case the CDL dated November 2022 could not establish eligibility because it is dated after the Form I-140 filing date. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. In summation, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

B. Salary or Other Remuneration for Services, Which Demonstrates Exceptional Ability

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires "[e]vidence that the [noncitizen] has commanded a salary, or other renumeration [sic] for services, which demonstrates exceptional ability." The Director acknowledged that the record contains copies of IRS Form 1120, U.S. Corporation Income Tax Return, for the Petitioner's company, dated March 2023, New York State Department of Taxation and Finance Form CT-3, General Business Corporation Franchise Tax Return, for the Petitioner's company, also dated March 14, 2023, and related documents. The documents relate to income and other business activities during the 2022 calendar year. However, the Director again noted that the documents are dated after the Form I-140 filing date and, thus, cannot establish eligibility, again citing *Matter of Katigbak*, 14 I&N Dec. at 49; 8 C.F.R. § 103.2(b)(1), (12). On appeal, the Petitioner generally reasserts, "Based on the documentation in the record, the Beneficiary clearly established that this criterion has been met, and USCIS erred in finding otherwise."

The Petitioner does not identify on appeal any particular documentation in the record of a fact that existed at the time of the Form I-140 filing date that may establish the Petitioner's salary or other remuneration for services, demonstrating any particular level of ability. As the Director explained, the financial documents dated 2023, for income and other business activities during the 2022 calendar year, cannot establish eligibility at the time of the Form I-140 filing date. *See id*; *see also Matter of*

Izummi, 22 I&N Dec. at 176. We have reviewed the record in its entirety; however, it does not establish how the Petitioner may have had a salary or other remuneration for services that demonstrates exceptional ability at the time he filed the Form I-140; therefore, it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

C. Membership in Professional Associations

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations." The Director acknowledged that the record contains a copy of a receipt for a "free trial membership to the [redacted] [dated] February 11, 2023," which is after the Form I-140 filing date. The Director again concluded that the Petitioner's free trial membership to the [redacted], dated February 2023, cannot establish eligibility because it is not evidence of a fact that existed at the time the Petitioner filed the Form I-140 in 2021, again citing *Matter of Katigbak*, 14 I&N Dec. at 49; 8 C.F.R. § 103.2(b)(1), (12). On appeal, the Petitioner reiterates that he "is a member of the [redacted]" and that, "[b]ased on the documentation in the record, the [Petitioner] clearly established that this criterion has been met, and USCIS erred in finding otherwise."

The Petitioner does not identify on appeal any particular documentation in the record of a fact that existed at the time of the Form I-140 filing date that may establish he was a member of a professional association at the time he filed the Form I-140. As the Director explained, evidence of the Petitioner's free trial membership in the [redacted] dated February 2023, cannot establish eligibility at the time of the Form I-140 filing date. *See id*; *see also Matter of Izummi*, 22 I&N Dec. at 176. We have reviewed the record in its entirety; however, it does not establish that the Petitioner was a member of a professional association at the time he filed the Form I-140; therefore, it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

D. Achievements and Significant Contributions to the Industry or Field by Peers, Governmental Entities, or Professional or Business Organizations

Because the record would not establish that the Petitioner satisfied at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) even if it satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), we need not address it in detail. Therefore, we reserve our opinion regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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). Furthermore, we reserve our opinion regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). *See id.*

In summation, the Petitioner has not established that the record satisfies at least three of the exceptional ability criteria. The record also does not establish, in the alternative, that the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation and that comparable evidence establishes exceptional ability. Therefore, we need not determine whether the record establishes the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. *See* 8 C.F.R. § 204.5(k)(2). We note, however, that if we were to conduct a final merits determination of the record, it would not support the conclusion that the Petitioner has a degree of expertise

significantly above that ordinarily encountered in the field. *See id.* Furthermore, because the record does not establish that the Petitioner satisfies at least three of the exceptional ability criteria, it does not establish that he qualifies for second-preference classification as an individual of exceptional ability. *See* section 203(b)(2)(A) of the Act. Because that issue is dispositive, we reserve our opinion regarding whether the record satisfies the *Dhanasar* criteria for national interest waiver eligibility. *See INS v. Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7; *Matter of Dhanasar*, 26 I&N Dec. at 889-90.

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an individual of exceptional ability; therefore, we conclude that the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.