U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29277220

Date: JAN. 16, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneur, 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 qualified 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.

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 a degree of expertise significantly above that ordinarily encountered in the field.

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[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] U.S. Citizenship and Immigration Services (USCIS) has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

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 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.

Although we agree with the Director that the Petitioner has satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), for the reasons below, we disagree that he met the professional membership criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

In addition, the Petitioner claims for the first time on appeal that he meets the licensing and salary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(C) and (D). Although a petitioner may supplement previous eligibility assertions, it should not raise previously unclaimed eligibility issues on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). Further, the Petitioner does not identify the evidence he believes may be comparable to the licensing criterion (or how it would be comparable) or which evidence would satisfy the salary criterion.[4] As noted above, the Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-76. Therefore, the Petitioner has also not established his eligibility under the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(C) and (D). [5]

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

Although the Director determined the Petitioner met this criterion, we withdraw that conclusion. The Petitioner provided evidence to establish his membership in the [redacted], along with a printout of [redacted]' website describing its mission and [redacted] education, but he has not provided information regarding the qualifications for membership in this organization. "Profession" is defined as 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 into the occupation.[6] 8 C.F.R. § 204.5(k)(3). Here, the Petitioner has not offered sufficient evidence to establish the professional nature of the association of which he is a member. Accordingly, we cannot conclude the Petitioner meets this criterion.

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[3] *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).

[4] *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https: //www.uscis.gov/policy-manual.

[5] As the Petitioner does not claim, and the record does not reflect, that he meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), we will not address it here.

[6] 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.

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)

The Director determined that the Petitioner had not met this criterion and we agree. On appeal, the Petitioner claims that his "educational background, professional experience, and superb skills . . . enabled [him] to contribute to his field and will allow him to continue to do so in the future." However, the plain language of the regulation requires "recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations."

The record includes three letters of recommendation from the Petitioner's colleagues, along with four certificates for completing courses in Cinema 4D, a Certificate of Award from the [redacted], and Instagram account information. While the letters commend the Petitioner's work in the field of digital media, they do not provide any specific details that establish the Petitioner's recognition for achievements and significant contributions to the industry or field. For example, they do not explain with corroborative detail how working on client projects such as a wedding video and a commercial shoot for a beauty and personal care company would meet this criterion.

Similarly, although the certificates and Instagram information demonstrate his dedication to his profession and the Petitioner's silver medal at the [redacted] is admirable, without more, this evidence does not show he has received the required recognition for significant contributions to his field or industry as required by the plain language of this criterion. Therefore, we agree with the Director that the documentation does not satisfy this criterion.

Because the Petitioner has only met one of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii), he cannot fulfill the initial evidentiary requirement of three criteria. Thus, we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. In addition, we need not reach a decision on whether, as a matter of discretion, the Petitioner is eligible for or otherwise merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve these issues. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("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 alternate issues on appeal where an applicant is otherwise ineligible). The appeal is dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.