U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29337638

Date: JAN. 30, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a real estate developer and 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). 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for the underlying visa classification or merits a discretionary waiver of the job offer requirement "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 an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business, under section 203(b)(2)(B)(i) 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]

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

We will then conduct a final merits determination to determine 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.

Once a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish eligibility for 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. ANALYSIS

The Petitioner's proposed endeavor is to use his U.S. based company, [redacted] formed in [redacted] 2018, to develop affordable real estate for low income Americans. His role as partner and general and operations manager will be to plan, execute, supervise, and coordinate construction projects in the affordable housing sector. He endeavors to use his professional experience in construction and home building to purchase lots (he provides evidence that [redacted] has purchased a lot in [redacted] Florida) and hire qualified professionals to build single-family homes aimed at meeting the needs of the United States' low-income population. He and his wife co-own [redacted] and they plan to grow their company and reinvest any profits in the first five years of operation. Initially, he describes that [redacted] will be located in a Florida HUBZone and will eventually expand into five counties in Florida and then into New York and California.

The Director determined the Petitioner met only two of the required three criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). On appeal, the Petitioner asserts he meets two additional eligibility criteria. Upon de novo review, for the following reasons, we conclude the record does not establish that the Petitioner meets any of the regulatory criteria.[4]

> *Evidence in the form of letter(s) from current or former employer(s) showing that the [noncitizen] has at least ten years of full-time experience in the occupation*

The Petitioner asserts that he has over 20 years of experience running his own real estate business since 2001. To support his assertion, the Petitioner initially provided several letters. One is an

[3] *See 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] Although we are withdrawing the Director's determination that he meets two criteria, a remand is not necessary because as the remainder of the decision indicates, the Petitioner has not established he meets any additional criterion. Therefore, he cannot meet the numerical threshold of three criteria to demonstrate he is an entrepreneur in the home real estate development business of exceptional ability. *See, e.g., Clifton v. Holder*, 598 F.3d 486, 494 (8th Cir. 2010) (*quoting Berte v. Ashcroft*, 396 F.3d 993, 997 (8th Cir. 2005)); *see also Lee v. Holder*, 765 F.3d 851, 855 (8th Cir. 2014); *Vargas v. Holder*, 567 F.3d 387, 391 (8th Cir. 2009) (generally standing for the proposition that remands are not needed if the issue is not likely to change the result).

unsigned letter on [redacted] letterhead purporting to be from [redacted], a certified public accountant (CPA), stating the Petitioner "has been working in the purchase and development of real estate since October 2001." It also states that he worked in "developments as a private individual until he became the partner of [his company]." Another is an August 2021 letter on [redacted] letterhead, from [redacted] which states the Petitioner is a partner and manager at [redacted] performing the role of "New Projects Director," and details his duties. In addition to these letters, the Petitioner included several documents related to his Brazilian-based company, [redacted] The first, titled "Particular Instrument for the Amendment of the Contract of a Limited Liability Company," is an agreement between himself, his wife, and two other partners, signed on December 19, 2020. The other, titled "Consolidation of the Articles of Incorporation of a Limited Liability Company" sets up the company. In addition to these documents, he included public records of real estate projects he carried out as an independent contractor since 2001.

Following the Director's request for additional evidence (RFE), the Petitioner provided two additional letters. One is on [redacted] letterhead, dated March 28, 2023 and signed by [redacted] The letter explains that in 2018, [redacted] became a partner of the Petitioner's Brazilian-based company [redacted] shortly after it was formed, and before that, since July 2012, [redacted] founding partners were investing in the Petitioner's construction projects, which he was carrying out as an independent contractor. The letter goes on to describe the eight projects that the Petitioner has developed from 2012 to 2018 as an individual builder and from 2018, as founding partner of his company, in which [redacted] and its partners were investors. The second letter, from [redacted] on the Petitioner's Brazil-based company's letterhead, states that he has been the Petitioner's partner since July 2018 and describes their roles as partners and four development projects undertaken by the company since 2019.

Although the Director determined that these letters were sufficient to establish this criterion, we will withdraw the Director's finding for the following reasons. While we do not doubt that the Petitioner has engaged in varying capacities in home building projects for some time, the evidence does not contain sufficient specificity to determine whether he meets the plain language of this criterion. For example, while a number of the letters reference the construction projects he worked on from 2001 to 2018, they do not provide such information as his title, duties, hours worked per week, or exact length of the projects. In addition, the record contains evidence that the Petitioner has been engaged in work as a pilot and/or aviation trainer,[5] but the letters do not address the time spent on that endeavor. Without more, we cannot conclude that the Petitioner has established at least ten years of full-time

[5] We note that in addition to several documents in the record referencing the Petitioner's occupation as a pilot, government records indicate that when he applied for a nonimmigrant visa in April 2013, the Petitioner described himself as a self-employed "Home Builder and Pilot."

experience in the occupation. As such, upon de novo review, we are withdrawing the Director's determination that he meets this criterion.

> *Evidence that the [noncitizen] has commanded a salary, or other renumeration for services, which demonstrates exceptional ability*

The Director determined that the Petitioner's initial evidence was sufficient to establish this criterion. The Petitioner provided a letter from his CPA listing his 2018, 2019, and 2020 earnings and information from Glassdoor showing the monthly salary for a general manager in Brazil in 2022.[6]

To meet this criterion, the Petitioner must establish that he has commanded a salary or other remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field. *See generally*, 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual. Here, the letter provides the Petitioner's total earnings without information regarding its source(s)[7] or any other relevant breakdown, whereas the information from Glassdoor addresses a monthly salary. Further, during the period from 2018 to 2020, the Petitioner has been the owner of his real estate development business and, as such, he has not established that salary information for a general manager would be a proper comparison.

As such, upon de novo review, we are withdrawing the Director's determination that he meets this criterion.

Evidence of membership in professional associations

As explained by the Director, the information submitted regarding the [redacted] did not establish that it is a professional association consistent with the regulation at 8 C.F.R. § 204.5(k)(2). More importantly, the evidence shows he joined the [redacted] Florida Chapter on Thursday February 23, 2023, after the Director issued a request for evidence (RFE) explaining that the Petitioner did not provide any evidence in support of this criterion. The Petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, the purpose of an RFE is to elicit information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), 103.2(b)(8), 103.2(b)(12). 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). As such, the Petitioner has not established that he meets this criterion.

[6] The Petitioner does not explain why he provided 2022 information from Glassdoor and income information from 2018-2020.

[7] We note, for example, evidence in the record indicates that the Petitioner may work as a pilot.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

On appeal, the Petitioner asserts the Director erred when she determined that his evidence was insufficient to demonstrate he meets this criterion. He highlights two letters he claims attest to his significant contributions and recognition for achievements from peers in his industry. The first, by the architect [redacted] explains that between March 2001 and April 2018, he worked with the Petitioner on 16 projects, and describes how the Petitioner's "performance as an entrepreneur and identifier of market opportunities has directly impacted the organic and rapid growth of his company." He also explains how the Petitioner's endeavor can be replicated in the United States, and will increase the U.S.'s competitiveness and improve public services. [redacted] provides information about the Petitioner's projects, including their locations, and state of completion, and distinguishes those projects completed by the Petitioner as an independent contractor before 2018 and those since he started his company in 2018. The second letter, by [redacted] explains that he has worked in the real estate and civil construction industry since 2008 and opines on "the importance of a professional like [the Petitioner] to the construction market [which] can be evidenced by the more than 20 projects implemented throughout his career, with a focus on low income areas." [redacted] also highlights the Petitioner's professional strengths including "identifying market niches, defining construction models, and the type of project to be developed" as the main skills needed by an entrepreneur in the construction industry, which he asserts is especially important in a country like Brazil, because of the great social and economic diversity combined with its complex tax burden, which directly impacts construction costs. [redacted] further opines on how the labor intensive civil construction industry can greatly contribute to job and income creation, as well as social development, in the United States.

Other letters also generally describe how the Petitioner's expertise in construction management resulted in profits and explain that his skills led the writers to repeatedly invest in his endeavors. For example, [redacted] a neuroradiologist who met the Petitioner during a private pilot course where the Petitioner was an "excellent flight instructor," explains how he invested in two of the Petitioner's projects, and that he carried out his work with excellence and made a nice profit. Similarly, [redacted], an air traffic controller who met the Petitioner in 1992 during a pilot course, describes investing in two of the Petitioner's projects, in 2012 and 2014, and making a profit from these endeavors. He also explains how he observed the Petitioner's "knowledge more closely" and that he "could see the impact in the neighborhoods in which he operates and in the surrounding areas."

The remaining letters also generally highlight the Petitioner's professional endeavors. For example, a letter from [redacted] the commercial director of his own landscape architecture business, explains that he founded his company in 1982, and as commercial director, he observed the Petitioner's expertise during his work on the [redacted] project. He describes the Petitioner's attentiveness and assertiveness and attests to his study of the U.S. civil construction market in order to invest in the United States.

The Petitioner also provides an expert opinion from [redacted], associate professor of innovation and entrepreneurship from the [redacted] states the Petitioner has "a record of consistent success in the construction and residential management industry." We note

that his opinion is based on the above-described letters and the Petitioner's resume, rather than personal knowledge of his work.

Finally, the Petitioner provided an article [redacted] published in the magazine, [redacted] The article generally describes his trajectory from airline pilot to the purchase of his first property to finally opening his construction company. The article also discusses the growth of his company and his approach to investing.

We agree with the Director that the evidence is insufficient to meet this criterion because, while complimentary, the letters do not sufficiently explain or document the Petitioner's recognition for *achievements and significant contributions to his industry or field* as required by the plain language of the regulation (emphasis added).

The Petitioner has not provided sufficient evidence to meet any of the criteria found at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). As the Petitioner has not established his qualification for the EB-2 classification as an individual of exceptional ability in the sciences, arts, or business, he is therefore ineligible for a national interest waiver. Although the Petitioner asserts on appeal that he meets all three of the prongs under the *Dhanasar* analytical framework, we reserve our opinion regarding 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"); *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).

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, and his appeal will be dismissed.

ORDER: The appeal is dismissed.