U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29424907

Date: JAN. 31, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a film and television producer, seeks classification as an individual of exceptional ability. 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 is an individual of exceptional ability or that a waiver of the job offer requirement is 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 immigrant 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.

"Exceptional ability" means a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(k)(2). An individual 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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[1] If a petitioner does demonstrate meeting at least three criteria, USCIS then conducts a final merits 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.

[1] 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.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, the petitioner 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 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 a 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 found that the Petitioner did not establish that he is an individual of exceptional ability, and as such did not demonstrate that he qualifies for the EB-2 classification.[3] The Director further found that the Petitioner did not demonstrate eligibility under any of the three required prongs of the *Dhanasar* framework and therefore concluded that he is not eligible for a national interest waiver. The Petitioner proposes to work as a television and film producer. On appeal, the Petitioner submits a brief in which he asserts that he is an individual of exceptional ability and is eligible for a national interest waiver.

A. Qualification for the EB-2 Classification

As stated above, the Petitioner claims to qualify as an individual of exceptional ability. 8 C.F.R. § 204.5(k)(2). The Director concluded that the Petitioner established only the initial criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) (possessing at least ten years of full-time experience in the occupation) and 8 C.F.R. § 204.5(k)(3)(ii)(E) (relating to membership in a professional association). On appeal, the Petitioner asserts that the evidence also establishes the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D) and 8 C.F.R. § 204.5(k)(3)(ii)(F).[4] We examine each criterion in turn.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D).

The Director determined that the personal financial documents and work experience documents that the Petitioner submitted were not sufficient to establish that the Petitioner has commanded a salary or other remuneration which demonstrates exceptional ability.

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[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).

[3] The Petitioner does not claim to qualify for the EB-2 classification as an advanced degree professional.

[4] The Petitioner states that he does not meet the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to a degree, diploma, or other certificate relating to the area of exceptional ability). The Petitioner also states that his occupation does not require a license to practice, and therefore the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) (a license to practice or certification for the profession or occupation) does not apply to his occupation.

On appeal, the Petitioner asserts that the evidence submitted does establish this requirement and claims that the wages he received for his work as an audiovisual producer for television and film significantly exceed the minimum wage in Colombia.

However, the Petitioner does not explain why the minimum wage in Colombia is a useful comparison point to establish that the wages he has earned demonstrate his exceptional ability. Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(k)(2). Without an explanation as to the relevance of this standard, we conclude that the Petitioner's claim that his wages have exceeded the minimum legal requirement for wages, even if true, does not sufficiently demonstrate exceptional ability.

Similarly, in response to the request for evidence (RFE), the Petitioner claimed that he has earned "significantly higher salaries than the average in Colombia" and well above average for that of a film and television producer in Colombia. We acknowledge that the salaries of other film and television producers in Colombia would be a better comparison point than the minimum wage in Colombia. However, in support of the assertion that his wages have exceeded those of other film and television producers, the Petitioner only provided URLs to websites that are in Spanish. The Petitioner did not provide any documentary evidence related to this claim and did not provide a translation of the information contained in the websites.[5] We conclude that this is insufficient for the Petitioner to meet his burden of proof to demonstrate this claim. *See Matter of Chawathe*, 25 I&N Dec. at 375-76.

Additionally, we note that the evidence the Petitioner submitted to demonstrate his own wage history is not sufficiently clear. The Petitioner submitted work experience letters, along with English translations, which state the wages he was paid for various projects. The Petitioner also included a chart in response to the RFE and a chart on appeal to compile this wage information. However, there are discrepancies between the wage amounts stated on the original letters, the English translations, and the charts. To use one production as an example, the chart submitted in the RFE response states that, for the [redacted] production in 2009, the Petitioner earned $12,664.78 USD. However, the English translation of the letter from this production company states that the Petitioner received $214 USD per week, and a total of $6,853 USD for his work on this production. Meanwhile, in the original letter in Spanish, the corresponding sums are stated as 1,000.00 and 32,000.00. These discrepancies appear to be due to the Petitioner attempting to both adjust for inflation and convert from Colombian pesos to U.S. dollars. While the Petitioner may have made these changes in an attempt to provide context, we conclude that the changes create confusion and a lack of clarity as to the actual wages earned by the Petitioner.

Finally, we note that the letters themselves do not describe the Petitioner's salary as being due to his exceptional ability. The letters submitted from prior employers provide the wages paid and state that the Petitioner "very satisfactorily fulfilled" his duties, and that the Petitioner's services "were provided with autonomy and technical and administrative independence." However, they do not support the claim that the Petitioner's wages were determined based upon his exceptional ability.

[5] Any document containing a foreign language submitted to USCIS must be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3).

As such, the Petitioner has not established this 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).

The Director concluded that this criterion was not met. The Director concluded that the letters of recommendation submitted in support of this criterion, while not without weight, did not identify any specific recognition the has Petitioner received for his achievements and significant contributions to the industry and that they were insufficient on their own to establish this claim.

On appeal, the Petitioner reiterates the assertion that the letters submitted do establish this criterion. Upon review of the record, we acknowledge that the writers of the letters appear to be from trade and professional organizations related to the Petitioner's industry. However, we agree with the Director that the letters lack sufficient detail as to specific recognition that the Petitioner has received for his achievements or contributions. Although the letter writers praise the Petitioner and his work, they do so only in general terms, for example asserting that the Petitioner's "career in the film and television industry has left a significant mark;" that the Petitioner's work has "consistently raised the standard of excellence in technical achievement and artistic merit;" that his "leadership and management skills have been fundamental to the success of multiple productions;" and that the Petitioner has "exceptional talent for producing high-quality television programs and films." We conclude, however, that the writers do not provide sufficient details regarding specific achievements or contributions, nor do they describe specific recognition that the Petitioner has received for those achievements.

The Petitioner also submits on appeal a certificate of recognition from the [redacted] which states that it is "for his extensive career and contribution to the film and television industry," along with a new letter of support from this organization. The certificate and letter are both dated July 4, 2023, after the Director's denial of the petition.[6] Generally, we will not consider events that arose after the initial filing of a petition. A petitioner must establish eligibility at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved when a beneficiary, initially ineligible at the time of filing, becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Additionally, the Petitioner does not explain the context in which he received this certificate. The letter of support, which is dated the same day as the certificate, appears to have been written specifically in support of the Petitioner's national interest waiver petition. Without further context, the record is not clear as to whether the certificate similarly was created and issued specifically for the purposes of this petition. As such, we conclude that the certificate is not sufficiently probative evidence of the Petitioner's recognition for contributions to his field.

Finally, the Petitioner submitted on appeal a list of the film and television projects in which he has participated and awards which those projects have received or for which they have been nominated. However, the record does not establish that these nominations and awards were the result of the Petitioner's work nor whether he significantly contributed to the work that received recognition. For example, the categories of awards and nominations include best director, best lead actress in a series,

[6] The Petitioner's Form I-140, Immigrant Petition for Alien Workers, was filed on July 13, 2022.

best screenplay, best theme song, and best supporting actor. The Petitioner has not established that his work as an audiovisual or field producer in these productions significantly contributed to the recognition these projects received. Upon de novo review, with agree with the Director that this criterion has not been met.

As such, the Petitioner has not established this criterion.

Therefore, the Petitioner has established that he satisfies only two of the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Because the Petitioner does not satisfy at least three of the criteria, we need not conduct a final merits determination to evaluate whether he has achieved the degree of expertise required for exceptional ability classification. As such, the Petitioner does not qualify as an individual of exceptional ability. Having determined that the Petitioner does not qualify as an individual of exceptional ability, we conclude that the Petitioner has not demonstrated eligibility for the underlying EB-2 classification.

B. Eligibility for a National Interest Waiver

The next issue is whether the Petitioner has established that a waiver of the classification's job offer requirement is in the national interest. Because the Petitioner has not established that he meets the threshold requirement of eligibility for the underlying EB-2 classification, we need not address whether he is eligible for, and merits as a matter of discretion, a waiver of that classification's job offer requirement. *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 alternate issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as an individual of exceptional ability, and therefore does not qualify for the EB-2 immigrant classification. 8 C.F.R. § 204.5(k)(3). Because the Petitioner has not demonstrated eligibility for the underlying EB-2 classification, we conclude that the Petitioner has not demonstrated eligibility for a national interest waiver. We reserve our opinion regarding whether the Petitioner has satisfied any of the three prongs of the *Dhanasar* analytical framework.

ORDER: The appeal is dismissed.