U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26925907

Date: JUL. 25, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a martial artist 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 Texas Service Center denied the petition, concluding that the Petitioner did not establish eligibility for the national interest waiver. The matter is now before us on appeal pursuant to 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 the underlying EB-2 visa classification, a petitioner must establish they are an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) 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] 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 the requisite degree of expertise and will substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

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

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate 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.

Id.

II. ANALYSIS

At the time of filing, the Petitioner claimed that he meets the initial evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F) and that he otherwise qualifies for classification as an individual of exceptional ability in the sciences, arts, or business. The Petitioner intends to operate a martial arts sports entertainment business in the United States and submitted a business plan for a Florida company he established in 2020, noting that his organization held mixed martial arts tournaments and he is developing a program to teach mixed martial arts to children and adults with low incomes in various areas of the world.

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

[3] *See 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).

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

The Director determined that the record established the Petitioner met two of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii)(E) and (F) and issued a request for evidence (RFE) for additional documentation to demonstrate he met the additional criteria. In the RFE response, the Petitioner claimed to satisfy all four of the remaining exceptional ability criteria, relating to academic degrees, experience, license or certification, and salary.

In the denial notice, the Director addressed all six criteria and concluded that the Petitioner submitted evidence to satisfy three of the criteria, relating to experience, memberships, and recognition. The Director indicated that based on a review of the record, the Petitioner has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. We note the Director also stated that the Petitioner was not found to be an individual of exceptional ability. The Director further concluded that the Petitioner did not establish eligibility under the first and third prong of the *Dhanasar* analytical framework. Specifically, the denial indicated that the evidence did not demonstrate the national importance of the proposed endeavor or that on balance, waiving the job offer requirement would benefit the United States.

On appeal, the Petitioner asserts the Director made erroneous conclusions of law and fact and provides further arguments related to the potential national importance of the proposed endeavor and to the third *Dhanasar* prong. We note the Petitioner states that the Director found he qualifies for EB-2 classification as an individual holding an advanced degree. The record does not support this statement; the Petitioner indicated in his RFE response that he does not have an advanced degree and he seeks qualification as a professional of exceptional ability.

After de novo review of the evidence, we conclude that the Petitioner did not establish that he meets the requirements of at least three of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii). Accordingly, for the reasons provided below, we will withdraw the Director's determination that the Petitioner established his eligibility as an individual of exceptional ability.

> *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 asserted in his RFE response that his martial arts certificates satisfy this criteria because the documents demonstrate that he reached the highest levels of mastery through practice and continuous examinations. We agree with the Director's determination that the Petitioner did not establish that these certificates were earned from a college, university, school, or other institution of learning relating to the area of exceptional ability.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the individual 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 Petitioner filed his national interest waiver petition in September 2020. The Petitioner's resume submitted with the initial filing lists his professional history beginning in June 2014. Accordingly, the Director requested additional documentation in the RFE to show that the Petitioner possesses ten years of full-time experience in the occupation he seeks. The RFE response included employment verification letters that discussed the Petitioner's work experience as the chief executive officer (CEO) of a martial arts store from June 2014 to June 2016, the CEO of a mixed martial arts company in Brazil beginning in March 2016, and the owner and manager of a sports academy franchising business since July 2016.

The submitted evidence reflects the Petitioner's work experience began in June 2014, only six years prior to the petition's filing date in September 2020. Accordingly, the Petitioner has not provided evidence from current or former employers that documents his ten years of full-time experience in the occupation in which he intends to work in the United States, as required by the plain language of this criterion. We will withdraw the Director's determination regarding this criterion.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C)

The Petitioner asserted in his RFE response that an occupational license is not required in order to practice his proposed endeavor, there is no governmental licensing agency in charge of professional mixed martial arts fighters or entrepreneurs, and holding certifications is not a requirement for being an entrepreneur. We agree with the Director's determination that the Petitioner did not meet this criterion because the record does not demonstrate a license or certification is required for his profession or occupation.

> *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 Petitioner's RFE response included his accountant's statement that between 2016 and 2022 he earned between R$ (Brazilian Real) 50,000 and R$112,000 annually. To satisfy this criterion, the Petitioner referred to the previously submitted undated document that reflects entrepreneur salaries in Brazil range from R$2,410 for a trainee at a small company to R$15,487 for a master at a large company. It is unclear whether the entrepreneur salaries document refers to monthly or annual salaries. The record lacks sufficient information to show that the Petitioner commanded a salary, or other remuneration for services, which demonstrates exceptional ability, and we agree with the Director's determination that the Petitioner did not meet 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 Mixed Martial Arts Gaucha Association. The Director concluded, without further discussion, that the Petitioner meets the regulatory requirements for this criterion. We disagree with the Director's conclusion.

The Petitioner submitted no information or evidence about this association other than the certificates, and therefore the Petitioner has not established that it 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). 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).

The evidence that the Petitioner identified as addressing this criterion consists of letters and articles discussing the Petitioner's achievements and his company's success in the mixed martial arts field. We agree with the Director's conclusion that the Petitioner meets the regulatory requirements for this criterion.

The Petitioner has not established eligibility as an individual of exceptional ability because he has submitted documentation that only meets one of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). 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. The petition cannot be approved without an underlying determination that the Petitioner qualifies for EB-2 classification. Therefore, we will reserve discussion of the Petitioner's national interest waiver claim under the *Dhanasar* framework.[4]

ORDER: The appeal is dismissed.

[4] *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).