U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28051751

Date: JUL. 30, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a heating, ventilation, and air conditioning (HVAC) entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as either a member of the professions holding an advanced degree or 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 Petitioner's Form I-140, Immigrant Petition for Alien Workers, concluding that the record did not establish that the Petitioner was a member of the professions holding an advanced degree or their equivalent, or was an individual of exceptional ability. The Director further concluded that the Petitioner did not merit a 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.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

Profession is defined as one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.[1] 8 C.F.R. § 204.5(k)(3).

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).[2] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[3] 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.

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,[4] 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

As noted above, the Director concluded, in part, that the Petitioner was not eligible for underlying EB-2 immigrant classification as he is not a member of the professions holding an advanced degree or their equivalent. The Petitioner does not contest this conclusion on appeal and therefore we consider the issue waived. *See, e.g.*, *Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

The Director also concluded that the Petitioner was not eligible for EB-2 immigrant classification as an individual of exceptional ability because he did not satisfy at least three of the six categories of

[1] 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.
[2] 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).
[3] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.
[4] *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).

evidence identified at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Specifically, the Director determined that the Petitioner only satisfied the regulatory criterion under 8 C.F.R. § 204.5(k)(3)(ii)(A) to provide an official academic record, but did not satisfy any of the remaining criteria as he did not provide evidence in the form of: letter(s) from current or former employer(s) showing that he has at least ten years of full-time experience in his occupation; a license to practice his profession or certification for a particular profession or occupation; that he has commanded a salary, or other renumeration for services, which demonstrates exceptional ability; membership in professional associations; or 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). On appeal, the Petitioner contends, in part, that he satisfied all six criteria identified in 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). After review, we conclude that the Petitioner has not established he satisfies at least three of six categories of evidence identified in 8 C.F.R. § 204.5(k)(3)(ii) for eligibility as an individual of exceptional ability.

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

To meet this criterion, the Petitioner submitted a membership card for "Clube de Engenharia" showing his status as a "contributor"; proof that he had been certified as a "Universal" technician by the [redacted] and corporate documents for the company he owns showing the company was registered with a state in Brazil and with the company [redacted] Additionally, while not necessarily submitted to satisfy this criterion, the Petitioner also submitted certificates of completion for various technical courses. In response to a request for evidence, the Petitioner stated that he "still [did] not have the '[l]icense' to act as an HVAC Technician...," but asserted the [redacted] certification demonstrated sufficient aptitude to handle and practice the profession. None of the certificates provided, however, reflect they are a license to practice in the HVAC field in which he claims exceptional ability, and as stated, he conceded that he did not have a license to practice as an HVAC technician. The Petitioner does not sufficiently describe or submit any evidence establishing the significance of membership as a contributor in Club de Engenharia or of a certification by the [redacted] as a "Universal" technician to show that the memberships and certificates are or were a certification for his occupation in the HVAC field. We therefore conclude that the Petitioner does not satisfy the criterion at 8 C.F.R § 204.5(k)(3)(ii)(C) requiring evidence of a license to practice his profession or certification for his particular profession or occupation.

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

In support of this criterion, the Petitioner submitted a letter from a person purporting to be an accountant for the Petitioner's company from 2007 to 2017 that lists revenue generated by the Petitioner's company and the Petitioner's salary for the same years. On appeal, the Petitioner submits the same letter and also provides a printout showing salaries associated with being a refrigeration technician in Brazil. He claims his income was twenty times the national average and notes he also received part of the company's profits due to being its owner. To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative

of their claimed exceptional ability relative to others working in the field.[5] We find that the evidence submitted, however, is insufficient to establish his salary or remuneration for services for the period described in the letter as the letter is unsupported by independent evidence such as payroll, employment, bank, or tax records to corroborate the amounts purported to have been earned by the company or Petitioner. Therefore, the Petitioner has not established he has commanded a salary or other remuneration for services that demonstrates exceptional ability.

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

For this criterion, the Petitioner submitted his membership card for Clube de Engenharia showing his status as a "contributor." As noted above, "profession" is defined as one of the occupations listed in section 101(a)(32) of the Act, which includes, but is not limited to, architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries, as well as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. The Petitioner has not provided evidence establishing the nature and purpose of Clube de Engenharia or its membership requirements to establish that it is a "professional" association. As such, despite his membership in this association, the Petitioner has not established his membership in a professional association.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations 8 C.F.R. § 204.5(k)(3)(ii)(F)

Finally, for this criterion, the Petitioner described his work experience installing, repairing, and maintaining certain HVAC projects and provided reference letters from colleagues and companies describing projects he completed and attesting to his overall competence and character. The Petitioner's statement and reference letters, while recognizing his contributions to individual projects, do not sufficiently detail how completion of any of the projects significantly contributed to the industry or field of HVAC beyond the scope of the individual project. Furthermore, the record is not supported by contemporaneous evidence that illustrates the significance of the projects to the HVAC industry or field. Accordingly, the Petitioner has not established he has received recognition for achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations.

Based on the above analysis, the Petitioner does not meet four out of the six initial evidentiary criteria listed in 8 C.F.R. § 204.5(k)(3)(ii) and therefore cannot satisfy at least three of the evidentiary criteria in that section as is required to be eligible for EB-2 immigrant classification.[6] Accordingly, he has

[5] *See* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

[6] The Director also found that the Petitioner did not satisfy the criterion under 8 C.F.R. § 204.5(k)(3)(ii)(B) that he provide letter(s) from current or former employer(s) showing that he has at least ten years of full-time experience in his occupation, and the Petitioner contests this conclusion on appeal. However, because we have determined the Petitioner does not otherwise meet four of the other evidentiary criteria, we need not address whether he satisfies this criterion. *See INS v. Bagamasbad*, 429 U.S. at 25-26; *see also Matter of L-A-C-*, 26 I&N at 526 n. 7. Similarly, we need not conduct a final merits determination to decide whether the evidence in its totality shows that the Petitioner is 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. *See id.*

not established he is an individual of exceptional ability in the sciences, arts, or business as is required for EB-2 immigrant classification.

III. CONCLUSION

As noted above, the Petitioner has not established that he is a member of the professions holding an advanced degree or their equivalent. Additionally, the Petitioner has not established that he meets the initial evidence requirements for classification as an individual of exceptional ability, as he has not met at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). He therefore has not demonstrated eligibility for the underlying EB-2 classification. Because this determination is dispositive of the Petitioner's appeal, we need not address his arguments on appeal regarding whether a discretionary waiver of the job offer requirement would be "in the national interest" and instead reserve this issue. *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).

ORDER: The appeal is dismissed.