U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30188182

Date: MAR. 20, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in the field of industrial electronics, seeks classification as an individual of exceptional ability in the sciences, arts or business. *See* 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, 8 U.S.C. § 1153(b)(2)(B)(i). 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 does not establish that the Petitioner qualifies 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.

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 a member of the professions holding an advanced degree or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2) of the Act. For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii) for an elaboration of these criteria. Meeting at least three criteria, however, does not,

in and of itself, establish eligibility for this classification.[1] We then conduct 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. *See* 8 C.F.R. § 204.5(k)(2).

In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides, "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."

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 USCIS may, as 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 determined that the Petitioner did not establish that he is an individual of exceptional ability, and as such did not establish that he qualifies for the underlying EB-2 classification.[3] The Director further determined that the Petitioner did not establish eligibility under the first and third prongs of the *Dhanasar* framework and therefore concluded that he is not eligible for a national interest waiver.

The Petitioner's proposed endeavor is to establish and operate an IT security consulting services company that will target small and medium-sized companies located in the United States. On appeal, the Petitioner submits a brief in which he asserts that he has established his eligibility for the underlying EB-2 classification as well as a national interest waiver.

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

[2] *See also 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 to be discretionary in nature).

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

A. Eligibility for EB-2 Classification

To determine whether the Petitioner established that he has a degree of expertise significantly above that ordinarily encountered in the field of information technology, the Director assessed the entirety of the record. The Director determined that although the Petitioner met at least three out of six criteria under 8 C.F.R. § 204.5(h)(3)(ii), the record lacked evidence that the Petitioner's professional achievements demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In a final merits determination, the Director acknowledged the Petitioner's education and experience, including his acquisition of licensure and training certifications in the field that prepared him to work in an executive capacity in the IT industry, but concluded that the Petitioner did not establish by a preponderance of the evidence that he has achieved a degree of expertise that is significantly above that ordinarily encountered in the sciences, arts, or business. *See* 8 C.F.R. § 204.5(k)(2). Specifically, the Director determined that his qualifications were typical for the average individual providing IT services and, therefore, the Petitioner had not demonstrated that his skill level qualified him as an individual of exceptional ability.

On appeal, the Petitioner first asserts that the Director "uses a standard of proof that is evidently higher than the one that should be applied by USCIS when adjudicating these petitions." The Petitioner, however, does not identify any unusual requirements imposed, nor does the Petitioner specify how the Director erred or what factors in the decision were erroneous.[4] The Petitioner also contends, without further explanation, that the Director applied a stricter standard of proof than that of preponderance of the evidence. Accordingly, we need not further address either of these assertions. *Cf. Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (declining to address a "passing reference" to an argument in a brief that did not provide legal support).

The Petitioner also asserts that by satisfying five of the six criteria that are required to demonstrate exceptional ability, he met the preponderance of the evidence standard and thus qualifies for the underlying EB-2 classification. He further argues that the Director's decision was insufficient due to its "lack of proper analysis of the totality of the evidence submitted." Moreover, he asserts that the Director's determination that he does not possess a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business, despite satisfying "80% of the initial criteria," constitutes an abuse of discretion. It appears, however, that the Petitioner relies on his ability to meet at least three of six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii) as the basis for claiming that he is an individual of exceptional ability. We disagree. As noted above, and as previously stated both in the Director's request for evidence and in the denial, meeting the minimum requirements by providing at least three types of initial evidence is not sufficient to establish that the Petitioner is an individual of exceptional ability, but instead is only the first step.[5] Here, the second step of the process is based on a comprehensive qualitative analysis of the evidence.

[4] An appeal must specifically identify any erroneous conclusion of law or statement of fact in the unfavorable decision. *See* 8 C.F.R. § 103.3(a)(1)(v).

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

We agree with the Director's determination that the Petitioner's academic credentials, experience, training certificates, and licensure in the field do not automatically render him an individual of exceptional ability because these types of qualifications are part of the normal course of employment and professional development in the IT industry. We acknowledge the Petitioner's submission of letters from colleagues and former employers who commended his expertise, training, and leadership skills in the field, and discuss how the Petitioner has competently performed his job and attest to his skillsets. However, these letters were not accompanied by corroborative evidence showing the impact of the Petitioner's work in the field, such as examples of the implementation of his methodologies or innovations or how the Petitioner's work has otherwise been recognized outside of organizations where he has been employed or associated. As noted by the Director, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. at 376.

Here, the Petitioner has not adequately explained the nature of his specific contributions to the field of information technology, supported by documentary evidence. Rather, he reiterates on appeal that he is an accomplished CEO of three companies in Brazil with many years of experience and references previously submitted evidence that demonstrates that he meets at least three of the six criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii). But he does not sufficiently address the final merits determination set forth under *Kazarian* or adequately explain how the Director erred in his analysis, and instead continues to focus primarily on the fact that the minimum evidentiary requirements were satisfied.

We adopt and affirm the Director's decision regarding its discussion of exceptional ability and the final merits. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday*, 113 F.3d at 234 (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

B. Eligibility for National Interest Waiver

The Director also addressed the Petitioner's eligibility for a national interest waiver, applying the three-prong framework set forth in *Dhanasar*, and concluded that although the Petitioner established that his endeavor has substantial merit and that he is well positioned to advance his endeavor, he had not established that his endeavor has national importance, or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Director explained how specific evidence within the record, such as the Petitioner's business plan, industry articles and reports, expert opinion letter, and letters of support did not establish that the Petitioner's proposed endeavor to continue his work as a chief executive in the IT industry has national importance or that it would be beneficial to the United States to waive the requirements of a job offer and, thus, of a labor certification.

Here, because the Petitioner has not demonstrated eligibility for the underlying EB-2 classification, we need not consider whether he merits a discretionary waiver of the job offer. We therefore decline to reach and hereby reserve the Petitioner's appellate arguments regarding his eligibility for a discretionary waiver under the *Dhanasar* analytical framework. *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 alternative issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.