U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29848907

Date: MAR. 27, 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 online instruction, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business 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 record did not establish that the Petitioner qualifies for EB-2 classification as an alien of exceptional ability or that the Petitioner was eligible for the requested national interest waiver. 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. Section 203(b)(2)(B)(i) of the Act. An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States 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).

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

[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).

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 a degree of expertise significantly above that ordinarily encountered in the field.[3]

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 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.

II. ANALYSIS

The Petitioner has not claimed he is a member of the professions holding an advanced degree, nor does the record contain evidence that the Petitioner previously earned a U.S. baccalaureate degree or its foreign equivalent. Therefore, to qualify for EB-2 immigrant classification, the Petitioner must establish he is an individual with exceptional ability in the sciences, arts, or business.

A. Individual of Exceptional Ability

The Petitioner states he is a chief executive officer with "exceptional ability and a degree of expertise significantly above that ordinarily encountered in the business field." As such, we will review the regulatory criteria as to whether it establishes the Petitioner's exceptional ability in the field of business. The Director concluded that the Petitioner only satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B). Upon de novo review of the record, we agree with the Director's ultimate conclusion that the Petitioner has not established that he is an individual of exceptional ability for the reasons explained herein. While we do not discuss each piece of evidence contained in the record individually, we have reviewed and considered each one.[5]

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[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.

[3] *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); *see generally* 6 USCIS Policy Manual, supra, at F.5(B)(2).

[4] *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).

[5] *Osuchukwu v. INS*, 744 F.2d 1136, 1142-43 (5th Cir. 1984) ("[The Board of Immigration Appeals] has no duty to write an exegesis on every contention"). *See also Ren v. USCIS*, 60 F.4th 89, 97 (4th Cir. 2023) ("[S]o long as [USCIS] has given reasoned consideration to the petition, and made adequate findings, we will not require that it address specifically each claim the petitioner made or each piece of evidence the petitioner presented." (cleaned up)).

An official academic record showing that the beneficiary 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 submitted the following documents for consideration under the first criterion:

- An academic transcript from [redacted] showing the Petitioner completed 52 of 217 credits required for a bachelor of informatics;
- Certificate of Graduation from [redacted] confirming the Petitioner graduated from its English language program, reaching the level of Applied English;
- Letter from [redacted] confirming the Petitioner's participation in its Intensive English Program, along with his official continuing education transcript;
- Certificates of completion in multiple courses from LinkedIn learning;
- Certificates of completion for courses from Google; and
- Petitioner's high school diploma.

The Director determined that the evidence did not satisfy the criterion as the certificates do not appear to relate to the area of exceptional ability, as required. And the Director noted that the transcript from [redacted] does not establish that the Petitioner earned a "degree, diploma, certificate, or similar award" from the university because he did not complete the required credits for the bachelor of informatics. On appeal, rather than explain how the evidence relates to his area of exceptional ability, the Petitioner simply reiterates that the evidence on record does meet the criterion.[6] Without more, we cannot conclude that the Petitioner has met the plain language of this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien 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 Director concluded the Petitioner met this criterion based on the letters regarding his employment with [redacted] from August 21, 2011 through October 22, 2017, and [redacted] from April 13, 2004 to July 15, 2011. We disagree and withdraw the Director's conclusion to the contrary.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires "[e]vidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought." Neither letter specifies whether the Petitioner was employed in a full-time capacity. Further, the record contains inconsistent information relating to the Petitioner's employment with both companies. For example, we note that, although the Petitioner's curriculum vitae (CV) indicates his employment with [redacted] ended in 2011 and his employment with [redacted] ended in 2017, the business plan, which contains a separate copy of his CV, states that both positions are

[6] *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).

ongoing. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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

As acknowledged by the Petitioner, he did not provide evidence in support of this criterion with either the initial filing or in response to the Director's request for evidence (RFE). For the first time on appeal, the Petitioner submits three Adobe Systems Incorporation certificates stating that the Petitioner is an Adobe Certified Instructor in Dreamweaver CC, Contribute CS5, Dreamweaver CS5, and Dreamweaver CS6. We note that the certificates were issued in 2013, nearly a decade before the filing of this Petition. Because the Petitioner was put on notice and given a reasonable opportunity to provide this evidence, we will not consider it for the first time on appeal. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial").

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

The Petitioner submitted a letter from [redacted] identifying the amount of revenue the Petitioner generated through his online courses from January to November 2018, as well as an excerpt from Glassdoor.com reporting online professor salaries in Brazil. The Director concluded this evidence did not satisfy the regulatory criterion as the letter from [redacted] appeared to only indicate the revenue generated by the Petitioner and did not clearly indicate the salary the Petitioner received.

On appeal, the Petitioner asserts that the revenue identified in the letter from [redacted] represented the Petitioner's individual earnings and not the revenue he generated for the company, but does not provide evidence such as tax records or paystubs to support this claim. Instead, the Petitioner now submits reports that purportedly identify his monthly earnings from [redacted] between September 2017 and July 2020, indicating that his net earnings totaled $805,508.70. However, the Petitioner has not provided evidence to establish the source of these reports.[7]

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*.[8] The only comparison data presented by the Petitioner is the Glassdoor.com salary survey which is comprised of six anonymous submissions and does not include any description of the job duties it covers. Further, it reflects salaries in Brazil whereas the Petitioner appears to have been living and working for [redacted] in the United States since 2018.[9] The Petitioner has also not explained how salary information for online professors in Brazil compares to his remuneration, as he has not claimed to earn a salary from [redacted] but rather appears to receive money from them based

[7] It is not clear from the record, for example, whether this is something accessible from the Petitioner's [redacted] account or if it's a self-generated chart.

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

[9] We note that although the document from Glassdoor.com indicates that it was "updated March 25, 2023," it does not state the time period covered.

upon a variety of income streams.[10] For all these reasons, we agree with the Director that the Petitioner has not satisfied his evidentiary burden to establish that he meets this criterion.

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

The Director acknowledged that the Petitioner submitted evidence of his membership in the Brazilian Online Education Association (ABED); however, the Director concluded that the Petitioner did not establish ABED was a professional association. The regulation at 8 C.F.R. § 204.5(k)(2) defines a "profession" as an occupation listed at section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32)[11], or an occupation whose minimum requirement for entry is a U.S. baccalaureate degree or its foreign equivalent. As such, to establish membership in a professional association, a petitioner must demonstrate the membership requirements for the association so that we can ascertain whether it is professional in nature.

The Director explained that the evidence provided, which appeared to be "an outline of the organization," did not establish that the organization is professional in nature, as it did not include an explanation of the membership requirements. On appeal, rather than provide the requirements, the Petitioner asserts that the documentation on record is not an "outline of the association," but "is the actual declaration of membership by that association." Regardless of the more appropriate descriptor of the document, it only establishes that the Petitioner is an "individual" member. It does not demonstrate that ABED has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that it otherwise constitutes a professional association. Without evidence of the membership requirements, we cannot conclude that the Petitioner has satisfied 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).

To satisfy this criterion, the Petitioner submitted evidence of his [redacted] course packages available for purchase; articles discussing [redacted] and the Petitioner's courses; and evidence of the Petitioner's e-book [redacted]
The record also contains letters from others in the business and online instruction field attesting to the Petitioner's expertise in successfully implementing various projects. The Director determined the evidence on record did not demonstrate the Petitioner had made significant contributions to the field.

On appeal, the Petitioner also points to the awards and recognitions he received from [redacted] specifically that he was the fastest global instructor to reach 1,000 students in the company's history and a recipient of the [redacted] Award, awarded to the top ten global instructors at [redacted] The Petitioner also notes that the letter from S-A, country manager at [redacted] states that the Petitioner's work helped the company to be known worldwide, and the company was able to make its initial share

[10] For example, the charts submitted on appeal state that the total remuneration may include income from promotions, affiliate programs, ad programs, and external partners, among others.
[11] The occupations listed in this section are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

offering by "drawing from the strength of the [Petitioner]'s resourcefulness and professionalism which helped the company to be known worldwide."

Upon de novo review of the record, we agree with the Director's determination. First, the Petitioner's assertion that the company drew from his professionalism and resourcefulness to make its initial share offering is not supported by the letter from S-A-. The letter states "[i]n 2021, [redacted] made its share offering on the stock exchange, and [the Petitioner] made all the difference for the company to be known worldwide." S-A- did not indicate that the company made its share offerings due to the Petitioner's work. Yet, even if the Petitioner's statement were supported by the record, it does not establish a significant contribution to his industry, as any contributions were limited to [redacted] Moreover, the course outline and articles discussing [redacted] only establish the Petitioner's work specifically with that company, and several of the articles are specifically identified as "advertising," designed to promote the Petitioner and the company. In addition, the record does not establish that the Petitioner's e-book made a significant contribution to the industry. The Petitioner has only demonstrated that it is available for purchase. Moreover, like his contributions to [redacted] the letters from other individuals in the field only provide recognition of the Petitioner's contributions to his customers, not to the industry in general. As such, the Petitioner has not met this criterion.

While we acknowledge the Petitioner has had a successful career, the record does not establish that he meets at least three of the evidentiary criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(A) through (F). Since the Petitioner did not satisfy the initial evidence requirements, we need not conduct a final merits analysis to determine whether the evidence in its totality shows that he is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).

B. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. Here, the Petitioner has not established eligibility for the underlying EB-2 immigrant classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding the Petitioner's eligibility for a national interest waiver under the *Dhanasar* analytical framework. *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"); *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).

III. CONCLUSION

As the Petitioner has not established that he qualifies for EB-2 classification, the appeal will be dismissed.

ORDER: The appeal is dismissed.