U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30361060

Date: MAR. 29, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, the general operations manager of an automobile repair and rental shop, 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. 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 did not establish that the Petitioner qualifies for: (1) classification as an individual of exceptional ability; and (2) the national interest waiver. The Director also concluded that the Petitioner had not submitted a completed form necessary to apply for the national interest waiver. The matter is now before us on appeal under 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 a national interest waiver, a petitioner must first show eligibility 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.

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] USCIS will then conduct a final merits determination to decide whether the evidence as a whole shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

Once a petitioner demonstrates EB-2 eligibility, 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,[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.

II. ANALYSIS

From 2005 until 2015, the Petitioner was the general manager of operations for an automobile repair shop in his native Brazil. He established his own company in the same business in 2015, working there until 2021. He then entered the United States as an F-1 nonimmigrant student to study English as a second language in Florida. He seeks to operate a dealership engaged in "[r]esale of electric-hybrid cars" and "[r]ental of adapted minivans for people with physical disabilities."

We withdraw the Director's determination that the Petitioner did not submit a properly completed ETA Form 750 Part B because an executed and signed form is present in the record, submitted when the Petitioner filed the petition in November 2022. The Director did not identify any specific deficiencies or material omissions in the form that the Petitioner submitted.

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.

[2] 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.
[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).

If the above standards do not readily apply to the individual's occupation, the petitioner may submit comparable evidence to establish eligibility. 8 C.F.R. § 204.5(k)(3)(iii). 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 determination). *See also, generally,* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

The Petitioner claims to have submitted evidence to satisfy four of the six regulatory criteria, as discussed below. In the denial notice, the Director concluded that the Petitioner had satisfied only one regulatory criterion. Specifically, the Petitioner satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) by submitting letters from former employers showing that the Petitioner has at least ten years of full-time experience in the occupation of a general operations manager. We will address the three remaining criteria below.

> *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).

In an effort to satisfy this criterion, the Petitioner submitted a translated copy of a Brazilian income tax return, showing total income of R$276,700 in 2020. The Director concluded that the Petitioner had not shown that this amount "was above average in the petitioner's field." We agree with the Director's determination, as explained below.

The Petitioner asserted that his earnings were "well above average," and submitted a screen capture from a Brazilian website, indicating that the "average wage" for a general manager is R$5,072. The Petitioner stated that this is a monthly figure, which annualizes to R$60,684 per year, but the screen capture does not specify the interval. The screen capture also did not show a range of salaries. The Petitioner's appeal brief includes another screen capture from a different source, stating: "The average salary for [a] General Manager in Brazil is R$3,454.00," ranging from R$2,076 to R$6,353. As before, the Petitioner claims that this figure is monthly, but the evidence does not confirm this assertion.

Because the evidence submitted does not show the interval of the submitted averages, we cannot compare those figures with the Petitioner's reported earnings. Also, the average claimed on appeal is more than 30% lower than the previous figure, which raises questions about the reliability and precision of the figures. The screen captures do not indicate the source of the information or the range of businesses from which the average was calculated. This information is important because compensation could vary for reasons unrelated to an individual's exceptional ability, such as the size or type of the business. The screen captures are undated, and therefore we cannot determine whether the information was current at the time of their submission.

Also, the tax return does not identify the specific source of the Petitioner's income, and the Petitioner did not submit other corroborating materials such as pay receipts to show that source. Materials in the record indicate that the Petitioner owned a business in 2020, organized through a registered business entity, but on that year's tax return he reported no income from "self-employment" or from "legal entities" such as his business. Instead, the translated tax return showed the above amount as "income

received from individuals," under a column with the heading "alimony and others." Therefore, the tax return does not specify how much, if any, of his 2020 income the Petitioner received from his business. Without documentation showing the source(s) of his income, the Petitioner has not shown how much of his income could be attributed to his claimed exceptional ability in business.

The incomplete and inconsistent information in the record is not sufficient to meet the Petitioner's burden of proof to satisfy the requirements of this criterion.

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

In January 2022, the Petitioner joined the American Management Association (AMA), which he called "the leading institution that promotes the development of quality management, services, and development for individuals, organizations, and society at large." The Director determined that this membership did not satisfy the regulatory requirements.

On appeal, the Petitioner's only new commentary about his AMA membership is that he completed an online quiz, prompting the website to recommend that the Petitioner "review the application process for the AMA Certification in Professional Management™." The record does not show that the Petitioner actually applied for that certification, nor does it establish the requirements for that certification.

The wording of the regulatory criterion requires membership in professional associations. 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),[4] or an occupation whose minimum requirement for entry is a U.S. baccalaureate degree or its foreign equivalent. The Petitioner has not established that the AMA restricts its membership to professionals, as defined in the regulation. The Petitioner refers to himself as a "professional," but he claims no education beyond high school and he has submitted no evidence to show that a bachelor's degree is ordinarily required for an individual to start and manage an automobile business – either to repair cars and sell tires, as in his past work, or to rent and resell vehicles as he intends to do in the future.

Because the Petitioner has not satisfied three of the initial regulatory criteria for exceptional ability, we need not undertake a final merits determination as detailed in *Kazarian*. But if the proceeding had reached that stage, then it would have been relevant to observe that the Petitioner has not established the requirements for membership in the AMA, and therefore he has not shown that such membership demonstrates a level of expertise above that ordinarily encountered in his occupation. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

The Petitioner has not met his burden of proof to meet the requirements of 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).

[4] The occupations listed in this section are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

The Petitioner submitted no evidence of formal recognition, relying instead on statements from several individuals. While several of these individuals praised the Petitioner's skill and performance of his job, they did not identify any significant contributions to the Petitioner's industry or field. For example, his former employer stated that the Petitioner "found several solutions and collaborated for the development and growth of the company," but the employer did not explain how, or demonstrate that, the Petitioner's efforts amounted to significant contributions to his industry or field. Satisfied customers described the services that the Petitioner and his company provided, including adaptation of a vehicle to meet the needs of a disabled customer. These statements attest to the Petitioner's diligence and dedication, but they do not establish that the Petitioner has made significant contributions to the field or industry.

Other individuals focused on areas outside the Petitioner's occupation, stating that they found inspiration in a book the Petitioner wrote about his recovery from a life-threatening illness. We do not dispute the effect that the Petitioner's story may have had on these individuals, but the Petitioner has not explained how his authorship and promotion of this book amounts to a significant contribution to the field of general operational management.

The Petitioner has not met his burden of proof to satisfy the requirements of this criterion.

For the reasons set forth above, the evidence does not establish that the Petitioner satisfies at least three of the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii).

Beyond the specified criteria, the Petitioner cited other materials, stating "[o]ther comparable proof of eligibility." But the regulation at 8 C.F.R. § 204.5(k)(3)(iii) permits consideration of "comparable evidence" only when the six initial criteria "do not readily apply to the beneficiary's occupation." The Petitioner has not claimed that, or shown how, the criteria do not readily apply to his occupation. Furthermore, several of the alternative submissions have no readily apparent relation to his intended occupation as manager of a car dealership. For example, the materials include publicity materials for his book and documentation that he obtained a student visa to study English as a second language.

Because the Petitioner has not established eligibility for the underlying EB-2 classification as an individual of exceptional ability, he has not shown that he is eligible for the national interest waiver of the job offer requirement. Discussion of his national interest waiver claim, therefore, cannot change the outcome of this appeal. Therefore, we reserve argument regarding the national interest waiver.[5]

III. CONCLUSION

The Petitioner has not met his burden of proof to establish eligibility for classification as an individual of exceptional ability in the sciences, the arts, or business. Therefore, we will dismiss the appeal.

ORDER: The appeal is dismissed.

[5] *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).