U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30231657

Date: MAY 2, 2024

Appeal of Texas Service Center Decision

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

The Petitioner is a graphical design entrepreneur who seeks employment-based second preference 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 Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding that the record did not establish that the Petitioner qualified for the underlying visa classification, nor did he merit a discretionary waiver of the job offer requirement in the national interest. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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.

The Director decided the Petitioner met three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F), but noted that meeting at least three criteria did not, in and of itself, establish eligibility for this immigrant classification. The Director then turned to a final merits determination to decide whether the totality of the evidence in the record showed that the Petitioner was recognized as having a degree of expertise significantly above that ordinarily encountered in the field. 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* B.2, https://www.uscis.gov/policy-manual. And in doing so, the Director determined that the Petitioner did not have a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Ultimately, the Director included five independent grounds in the decision and denied the petition on four of those grounds. First, the Director addressed the categories of evidence the Petitioner must meet within the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F), and the Director found that he met the requirements of at least three categories. Second, the Director performed a final merits determination considering the totality of the evidence, and they decided the Petitioner did not demonstrate he enjoys a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

And finally, the Director concluded the Petitioner did not meet any of the three prongs outlined in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), with each prong serving as its own individual independent ground of eligibility. To summarize, the Director found the Petitioner met three criteria but did not show overall eligibility as an individual of exceptional ability, nor did he demonstrate he met any of the three *Dhanasar* prongs. Each of these individual issues standing alone would serve as an independent basis for a denial. Therefore, the appellant here, must demonstrate that every stated ground for the denial was incorrect.

We observe two procedural failings in the Petitioner's appeal. First, the Petitioner did not file the appeal before us in a timely manner. And, he failed to address one independent basis of the denial in which the Director performed a final merits determination and found the totality of the evidence deficient.

I. TIMELINESS

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party or the attorney or representative of record must submit the complete appeal within 30 days of service of the unfavorable decision. If the decision was only mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.8(b). The date of filing is not the date of submission, but the date of actual receipt with the required fee. *See* 8 C.F.R. § 103.2(a)(7)(i).

The Director's June 21, 2023 petition denial afforded the Petitioner until July 24, 2023, to properly file an appeal. Following the Director's denial, the Petitioner filed his initial appeal on the Form I-290B, Notice of Appeal or Motion. USCIS rejected that appeal due to his failure to properly complete the form in accordance with the form instructions. Every form, benefit request, or other document must be executed in accordance with the instructions on the form, which are incorporated into the regulation requiring its submission. 8 C.F.R. § 103.2(a)(1). Further discussion of the filing requirements for these documents is found at 8 C.F.R. § 103.2(b)(1), which provides that "[e]ach benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions." Therefore, the failure to follow the form instructions are tantamount to not complying with the regulation.

After we rejected the appeal, the Petitioner held onto and did not resubmit a corrected appeal for another 23 days meaning he filed the corrected appeal on September 6, 2023, or 77 days after the Director denied the petition. Within that second appeal filing, the Petitioner notes the rejected appeal and requests that we "retain the appeal date—July 21, 2023, as the received date on the basis of *Nunc Pro Tunc Doctrine*."

The Petitioner's reference to a nunc pro tunc action appears to connote that USCIS committed some procedural error resulting in us rejecting his appeal, and that we could remedy that mistake with a nunc pro tunc action. However, it was the Petitioner's error in his failure to adhere to the Form I-290B instructions that resulted in his first appeal being rejected. We therefore, will not retain the original appeal filing date through a nunc pro tunc action for the untimely filed appeal that was filed late due to the Petitioner's actions.

Appellate filing deadlines are essential for the overall working of our immigration system in order to bring cases to a final conclusion. *Matter of Morales-Morales* 28 I&N Dec. 714, 716 (2023) recognized that "it is important to note that a deadline for filing a notice of appeal is essential for the overall working of an immigration [] system in order to bring cases to a final conclusion. Without a deadline for filing an appeal, a respondent [] could delay proceedings indefinitely." They further acknowledged that "'[f]iling deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced.'" *Id.* (quoting *United States v. Locke*, 471 U.S. 84, 101 (1985)).

II. WAIVER, ABANDONMENT, OR FORFEITURE OF DISPOSITIVE ISSUE

Within the appeal, the Petitioner incorrectly indicates that the Director decided that he did not satisfy at least three of the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F). In making that flawed assumption, his appeal brief failed to address the next logical step of contesting the Director's final merits determination. And as we noted above, the final merits determination is a dispositive issue that can serve as its own independent basis to deny the petition as the second step in the adjudicative process.

Any issue the Petitioner fails to contest on appeal, we consider that requirement to be waived, abandoned, or forfeited. *Matter of F-C-S-*, 28 I&N Dec. 788, 789 n.3, 791 n.6 (BIA 2024) (finding issues not challenged on appeal are waived); *Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1134 n.6 (11th Cir. June 17, 2019). When a filing party does not address and waives an issue that is required for them to prevail on appeal, that failure is dispositive of the appeal. At that point, it is unnecessary for us to make a decision on any additional issues because it is not possible for them to fully demonstrate they are eligible for the benefit.

Because the Petitioner's waiver of the issue of the Director's adverse decision regarding the final merits determination is dispositive of this appeal, we will not address and we reserve the Petitioner's remaining appellate arguments. *Patel v. Garland*, 596 U.S. 328, 332 (2022) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25–26 (1976) (finding agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision)); *see also Matter of Chen*, 28 I&N Dec. 676, 677 n.1, 678 (BIA 2023) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.