U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30814992

Date: MAY 9, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification.[1] *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not qualify for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability.[2] The matter is now before us on appeal.

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

"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). 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 a degree of expertise significantly above that ordinarily encountered in the field.

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[1] The Petitioner does not claim eligibility as a member of the professions holding an advanced degree.

[2] The Director did not render a determination as to whether the Petitioner had established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

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

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

A. Exceptional Ability

To qualify for the exceptional ability classification, an individual must substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States because of their exceptional ability. *See* Section 203(b)(2)(A) of the Act. The plain language of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F) requires evidence, among other things, of *academic records . . . relating to the area of exceptional ability* (A), work experience *in the occupation for which he or she is being sought* (B), and *a license to practice for a particular profession or occupation* (C). The initial notice seeking to implement these regulations, *Employment-Based Immigrants*, 56 Fed. Reg. 30714, (Jul. 5, 1991), advised "[t]he showing of prospective benefit to the United States is inherent in meeting these criteria," but if individuals are to perform services unrelated to their claimed area of expertise in the NIW petition, the statutorily mandated *substantial benefit* would not prospectively accrue to the nation by virtue of their exceptional ability. Accordingly, it is the Petitioner's burden to show that their occupation or endeavor being pursued in the United States is related to the field of expertise that is the basis of their claimed area of exceptional ability.[5]

In Part 6 of the Form I-140, under "Basic Information About the Proposed Employment," the Petitioner listed his "Job Title" as "Chief Executive."[6] His cover letter accompanying the petition asserted that he is a "manager and entrepreneur with 20 years of progressive experience in the field of business administrative and financial management." The Petitioner further stated that his proposed endeavor is "to act as an entrepreneur in the business sector, establishing his own company [redacted] that will provide service of housekeeping assistance to individuals and businesses with specific characteristics and needs, such as older adults, commercial rental properties that require quick and efficient housekeeping and individual service for adults with disabilities. The record includes a

[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] An individual whose endeavor is not directly related to their claimed areas of expertise ability would generally not qualify for the exceptional ability category. USCIS determines the relationship of the exceptional ability to the endeavor on a case-by-case basis and it is the petitioner's burden to demonstrate the relationship.

[6] Likewise, in box 9 of the Petitioner's accompanying Form ETA-750B, Statement of Qualifications of Alien, he listed the "Occupation in which Alien is Seeking Work" as "Chief Executive."

detailed business plan discussing the Petitioner's proposed endeavor to operate his cleaning services company in California.

The Petitioner asserted that he meets at least three of the regulatory criteria for classification as an individual of exceptional ability. In denying the petition, the Director determined that the Petitioner fulfilled only the membership criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E). In the appeal brief, the Petitioner maintains that he also meets the academic record criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), the ten years of full-time experience criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), the salary criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), and the recognition for achievements and significant contributions criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). After reviewing the evidence, we conclude that the record does not support a finding that the Petitioner satisfies the requirements of at least three criteria.

> *An official academic record showing that the alien 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 his "Technology in Data Processing" diploma and academic transcript from [redacted] Based on a review of the coursework, we agree with the Director that this diploma does not relate to the Petitioner's area of exceptional ability in entrepreneurship and management. While the Petitioner provided an "Expert Opinion Letter" from Dr. H-D-P- asserting that the Petitioner's academic subjects included "courses that provided a foundation of knowledge which lends itself towards business and entrepreneurship, including: Systems Analysis and Design, Entrepreneurship, Statistics and Financial Mathematics," the aforementioned courses represented only a small fraction of the Petitioner's "Technology in Data Processing" curriculum. Because the Petitioner's coursework consisted mainly of academic subjects relating to data processing, programming languages, and other data technologies, we are not persuaded by the advisory evaluation's claim that the Petitioner's diploma is indicative of exceptional ability in management and entrepreneurship.

In addition, the Petitioner presented certificate(s) of completion for individual courses in "Software Development" and "Python" from [redacted] as well as "Programming in Neurolinguistics" from the [redacted] but he has not demonstrated that these certificates relate to his area of exceptional ability in management and entrepreneurship. Nor has the Petitioner shown that his certificate from [redacted] is an official academic record and that [redacted] is a college, university, school, or other institution of learning as required by this criterion. While the Petitioner also provided certificate(s) of completion for individual courses in "Commodities" and "Professional Fixed Income" from [redacted] he has not demonstrated that his certificates are official academic records and that [redacted] is a college, university, school, or other institution of learning. Accordingly, the Petitioner has not established that he meets 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).

Based on the specific information the Petitioner provided in his Form I-140, Form ETA-750B, November 2022 cover letter, and detailed business plan, the "occupation" sought in this matter is chief executive/manager/entrepreneur. As evidence for this criterion, the Petitioner provided a declaration

from his accountant stating that the Petitioner "has been a self-employed service provider, which basically consists of providing courses in the company [redacted] in the period from June 2019 to date."[7] In addition, the Petitioner submitted a declaration from [redacted] indicating that the Petitioner was employed as a manager "from March 2013 to June 2020" and that he was responsible "for managing the entire team of operators, as well as sales proceeds." He also submitted a company formation document relating to his establishment of [redacted] in March 2012.

The Director issued a request for evidence (RFE) informing the Petitioner that the aforementioned documents "do not list whether the employment was full-time or part-time, nor do they describe any skills gained by the [Petitioner]. The submitted evidence does not support that the [Petitioner] has at least ten (10) years of full-time experience in the occupation."[8] Despite the opportunity to provide additional documentation relating to the Petitioner's full-time experience, no new evidence for this criterion was submitted in response to the RFE. Instead, the Petitioner resubmitted the aforementioned declarations and company formation document, stating:

> It is important to note that the declarations provided emphasize [the Petitioner's] role as a self-employed entrepreneur at the different business endeavors for which each declaration has been provided. Being an entrepreneur inherently involves full-time dedication and often extends well beyond the constraints of traditional employment timelines. While the declarations may not outline exact dates or employment hours, it is important to consider that entrepreneurship is a holistic endeavor that demands unwavering commitment.

The Director determined that the Petitioner had not demonstrated at least ten years of full-time experience in the occupation sought. The Petitioner contends on appeal that the Director overlooked the above statement he offered in response to the RFE, but these arguments do not overcome the deficiencies in the documentation submitted for this criterion. The Petitioner has not offered further evidence to corroborate the assertions that he has at least ten years of full-time experience in the occupation sought. Unsupported assertions have no evidentiary value and are insufficient to establish a filing party has satisfied their burden of proof. *See Matter of Mariscal-Hernandez*, 28 I&N Dec. 666, 673 (BIA 2022). Without adequate corroborating evidence showing that the Petitioner has at least ten years of full-time experience in the occupation sought, he has not established that he satisfies this criterion.

> *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).

The Petitioner submitted declarations from his accountant listing his "average monthly income" for 2019 – 2022 as well as his "average monthly income" from August 2021 until July 2022. The declarations stated that his monthly earnings derived from employment as "Professor of Courses for Operating in the Financial Market and Stock Exchange Broker." In response to the Director's RFE,

[7] The declaration is dated September 9, 2022.

[8] The regulation at 8 C.F.R. § 204.5(g) provides, in pertinent part: "Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered."

the Petitioner provided salary information for "Assistant Professors" in Brazil and the general population of "people working in Brazil."

To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of their exceptional ability relative to others in their occupation. Here, the Petitioner has not presented documentation showing that his earnings are indicative of exceptional ability relative to other Brazilian business managers or Chief Executives.[9] Instead, he submitted information relating to the salaries of "Assistant Professors" and the general population of "people working in Brazil." The Petitioner has not demonstrated that the compensation data he presented offer an appropriate basis for comparison.[10] The Director concluded that the Petitioner's evidence was insufficient to demonstrate that he has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. Based on the foregoing, we agree with the Director that the Petitioner has not demonstrated he meets this regulatory criterion.

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

The Petitioner provided a declaration from the Association of Independent Professionals in Brazil stating that he "has been regularly associated . . . as an Effective Member." The record, however, does not include information about this organization. The evidence is not sufficient to demonstrate that it has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association.[11] Accordingly, we withdraw the Director's determination that the Petitioner meets 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).

The Director's decision adequately addressed the letters of support and other evidence submitted for this criterion. Based on a de novo review, we will adopt and affirm the Director's determination that the Petitioner has not established he meets this criterion. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Prado-Gonzalez v. INS,* 75 F.3d 631, 632 (11th Cir. 1996) (joining "every court of appeals that has considered this issue" holding that an appellate body may affirm the lower court's decision for the reasons set forth therein); *Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting 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 F3d. 5, 8 (1st Cir. 1996) (joining eight U.S. Courts of Appeals in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case). Here, the Director's decision gave individualized consideration of the evidence the Petitioner submitted and correctly concluded that it did not satisfy the requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(F).

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[9] As discussed, in Part 6 of the Form I-140, under "Basic Information About the Proposed Employment," the Petitioner identified his "Job Title" as "Chief Executive."

[10] Even if we agreed that the Petitioner's earnings as a "Professor" were relevant to his exceptional ability, he provided compensation data for an "Assistant Professor" instead of a "Professor." The declarations from his accountant specifically state that he was a "Professor."

[11] The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation."

For the reasons set forth above, the Petitioner has not shown that he meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification.[12]

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. As previously outlined, in order to qualify for a national interest waiver, the Petitioner must first show that he qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. The Petitioner has not shown that he is an advanced degree professional or that he has satisfied the regulatory criteria and achieved the level of expertise required for exceptional ability classification. Accordingly, 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 his 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

The Petitioner has not established that he satisfies the regulatory requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[12] Because the Petitioner did not meet at least three criteria at 8 C.F.R. § 204.5(k)(3)(ii), it was unnecessary for the Director to conduct a final merits determination to decide whether the evidence in its totality shows that he 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).