U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30173300

Date: MAY 13, 2024

Appeal of Texas Service Center Decision

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

The Petitioner seeks classification as a member of the professions holding an advanced degree or of exceptional ability, 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 employment based second preference (EB-2) 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. *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v. Garland,* 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

The Director of the Texas Service Center denied the petition because the record did not establish that the Petitioner qualified for classification as an individual of exceptional ability and that they 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 pursuant to 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. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest, but only if a petitioner categorically establishes eligibility in the EB-2 classification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." In order to demonstrate exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

(A) 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;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

But meeting at least three criteria does not, in and of itself, establish eligibility for this classification.[1] 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.

If we conclude that a petitioner has an advanced degree or is of exceptional ability such that they have established their eligibility for classification as an immigrant in the EB-2 classification, we move to evaluate the national interest in waiving the requirement of a job offer and thus a labor certification under the three prongs of the analytical framework we first discussed in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[2]

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

[2] *See generally id.* at 888-91, for elaboration on these three prongs.

II. ANALYSIS

The Petitioner's appeal is essentially a reiteration of the documentation and argument they previously submitted with their RFE response. The Petitioner reasserts that they are of exceptional ability citing the same evidence, documentation, and arguments the Director evaluated in the initial petition and in the response to the RFE. They also re-emphasize their purported eligibility for a discretionary waiver of the job offer requirement, and thus a labor certification, under *Dhanasar* in the same manner that they did in the initial petition and in the response to the RFE.

Our authority over the USCIS service centers, the office that adjudicated the immigrant petition, is comparable to the relationship between a court of appeals and a district court. So based on a de novo review we will adopt and affirm the Director's decision that the Petitioner's inconsistent representations obscured the nature of their proposed endeavor rendering it impossible to evaluate its substantial merit or national importance. *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). The Director gave individualized consideration of the evidence the Petitioner submitted with their initial petition and their RFE response.

A Petitioner must demonstrate that they meet any three of the six regulatory criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). The Director's decision clearly illustrates why the Petitioner here has not done so. The Director correctly concluded that the Petitioner did not establish categorical eligibility for EB-2 classification because they did not demonstrate that they were of exceptional ability as required by the regulations. So, there is no purpose to conduct a final merits determination to decide whether the evidence in its totality shows that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. And consideration of the Petitioner's eligibility for a discretionary waiver of the requirement of a job offer, and thus labor certification, is not indicated when as here a petitioner is categorically ineligible for the EB-2 immigrant classification they seek.

ORDER: The appeal is dismissed.