U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31109708

Date: MAY 23, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur seeking to establish a security guard service, 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) the classification sought and (2) 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 at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2]

[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).

[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.

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

In his native Brazil, the Petitioner served in the [redacted] first as a police officer from 1992 to 2005, and then as an analyst dealing with security and other matters from 2005 to 2018. The Petitioner arrived in the United States in January 2019 as an F-1 nonimmigrant student.

The Petitioner does not claim to be eligible for classification as a member of the professions holding an advanced degree. Instead, he claims eligibility as an individual of exceptional ability in the sciences, arts, or business.

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.

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)

[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).

(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 five of the six regulatory criteria. The Director concluded that the Petitioner had satisfied three of the criteria, pertaining to degrees, experience, and memberships, but that a final merits determination did not show that the Petitioner had established exceptional ability. The Director concluded that the Petitioner had not satisfied the criteria related to licenses and recognition for achievements and significant contributions. The Petitioner does not dispute the Director's conclusions relating to licensure at 8 C.F.R. § 204.5(k)(3)(ii)(C).

Because the Director denied the petition based on a final merits determination, we will begin our analysis there. The purpose of the final merits determination is to consider the petition in its entirety to determine whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the beneficiary has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See, generally*, 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2). The petitioner must demonstrate that the beneficiary is above others in the field; qualifications possessed by most members of a given field cannot demonstrate a degree of expertise significantly above that ordinarily encountered. *Id.*

The Director acknowledged the Petitioner's receipt of "some academic certificates relating to the area of interest," which, the Director determined, satisfied the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). But the Director concluded that "the evidence does not establish that the petitioner possesses training which was above that ordinarily encountered in the field."

On appeal, the Petitioner states that his training "certificates signify a foundational knowledge base and commitment to their area of expertise. The [Petitioner's] educational background should be seen as a solid foundation upon which their exceptional ability is built." The burden, however, is on the Petitioner to establish not merely expertise, but a degree of expertise significantly above that ordinarily encountered. The Petitioner does not explain how his training certificates distinguish him from others in his field to establish that degree of expertise. The Petitioner must establish how, and to what extent, his expertise exceeds that ordinarily encountered in his field.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires evidence of at least ten years of full-time experience in the occupation. The Petitioner submitted letters attesting to his past employment as a police officer, flight controller, and analyst with [redacted] and related state agencies in [redacted] from 1992 to 2018. The Director acknowledged the Petitioner's experience, but concluded that the Petitioner had not shown that the evidence "set[s] the petitioner apart from others in his field."

On appeal, the Petitioner states that his "extensive work history demonstrates . . . their ability to excel in a highly competitive field for an extended period." As above, the Petitioner cites no evidence to show how, and to what extent, his experience constitutes expertise that exceeds that ordinarily encountered in his field.

Finally, the Director determined that the Petitioner had established membership in professional associations to satisfy the requirements at 8 C.F.R. § 204.5(k)(3)(ii)(E), but the Director stated that these "memberships do not reflect that [the Petitioner] participated based on his expertise, but were likely a normal function of being a professional in his country." Being a member of professional associations satisfies the regulatory criterion, but in the final merits determination, we evaluate each membership to determine whether it indicates a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See, generally*, 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

On appeal, the Petitioner states: "it is important to consider that being a member of these organizations often requires a certain level of expertise and recognition within the field. The [Petitioner's] memberships indicate their active involvement and recognition by peers, which is a testament to their exceptional ability." The Petitioner does not cite any evidence in the record to support this assertion. Statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight. *Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998).

The Petitioner had claimed membership in the [redacted] and the [redacted] of the State of [redacted] A copy of [redacted] governing documents does not show expertise-based requirements for the Petitioner's class of membership. The [redacted] does not appear to be an association at all. Rather, the record indicates that it is a pension fund, to which police officers in [redacted] make "compulsory" contributions.

Beyond the above issues, the Petitioner, on appeal, also disputes the Director's determination that the Petitioner had not submitted evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations, as described at 8 C.F.R. § 204.5(k)(3)(ii)(F). The Petitioner asserts that the "recommendation letters . . . should not be dismissed. These . . . endorsements from industry experts can demonstrate that the [Petitioner's] skills and contributions are highly regarded within their professional community."

The language of the regulation calls for "evidence of recognition for achievements *and* significant contributions to the industry or field." As such, materials that identify an individual's achievements but not significant contributions to the industry or field cannot suffice to satisfy the regulatory requirements. *See Matter of Echeverria*, 25 I&N Dec. 512, 518 (BIA 2011) (holding that "[t]he use of the conjunction 'and'" in a series of regulatory requirements "constitutes a clear indication that [one] must satisfy each of the [listed] requirements").

The Petitioner submitted letters from pastors and parishioners at churches he has attended both in Brazil and more recently in Oklahoma. These individuals state that the Petitioner helped with security arrangements at the churches. While these individuals expressed appreciation for the Petitioner's work on behalf of the churches, their letters do not constitute recognition for achievements and significant contributions to the Petitioner's industry or field.

One of the Petitioner's co-parishioners in Brazil also worked for a contractor that provided computer services for the [redacted] This individual stated that the Petitioner created a computerized registry that stores information for "around 35,000 individuals who were involved in police or criminal proceedings."

The Petitioner did not establish the significance of this contribution to the field of law enforcement. For example, the Petitioner did not show that other jurisdictions adopted his system.

Formal recognition in the form of certificates and other documentation that are contemporaneous with an individual's claimed contributions and achievements may have more weight than letters prepared for the petition recognizing the beneficiary's achievements. *See*, *generally*, 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2). To illustrate this point, we note the Petitioner's submission of a statement from the commander of the [redacted] indicating that the Beneficiary received "8 Individual Compliments," "30 Valuable Notes," and "4 Written Compliments Mentions" during his career. The commander did not detail the circumstances under which the Petitioner received any of these claimed recognitions, and the Petitioner did not individually document them. A letter counting these claimed recognitions without further information or corroboration has little weight, and the Petitioner did not provide establish that the recognitions demonstrate the necessary degree of expertise.

In terms of first-hand evidence, certificates show that the Petitioner he received two "Medals of Military Merit," which he received for length of service (10 years and 20 years) rather than for contributions. The Petitioner also submitted translations of two certificates from the [redacted] One certificate named the Petitioner "Prominent Professor" for his work to "develop the trainings held" and "assist[ing] in the update and structuring of courses." The other certificate named him a "Prominent Public Safety Analyst" for his "systematic and permanent follow-up of [various] affairs" and for overseeing a "Basic Course of Intelligence Activity" and "surveys and data analysis." The certificates do not explain how the Petitioner's contributions were significant not only to his employer, but more broadly to the field.

In a request for evidence, the Director stated that evidence of recognition "must provide as much detail as possible about the petitioner's contribution and must explain, in detail, how the contribution was significant."

In response, the Petitioner submitted three letters from the owners of businesses in Oklahoma. These individuals did not identify any achievements or significant contributions to the industry or field by the Petitioner. Rather, they stated that they intend to engage the Petitioner's company to provide security services. These expressions of interest do not satisfy the regulatory requirements.

The Director concluded that the submitted letters "were not accompanied by any corroborative evidence [showing] the impact of the petitioner's work in the field." On appeal, the Petitioner states that the Director should have given more weight to "endorsements from industry experts" but does not elaborate or rebut the specific points the Director made in the denial decision.

Because the Petitioner has not overcome the Director's conclusions, we will dismiss the appeal.

We also note an additional important issue. The Petitioner has accumulated decades of experience in various public law enforcement positions, and most of his evidence concerns that employment and related activities. But the Petitioner does not seek employment as a public law enforcement officer. Rather, he intends to serve as the chief executive officer of his own private security company. The Petitioner must establish exceptional ability in that capacity, and therefore must show that he possesses

a level of expertise significantly above that ordinarily encountered among individuals who run private security firms.

This is particularly significant because one of the criteria that the Director granted calls for evidence of at least ten years of full-time experience in the occupation in which the petitioner seeks employment. *See* 8 C.F.R. § 204.5(k)(3)(ii)(B). While the Petitioner's employment with the [redacted] spanned decades, the Petitioner does not seek employment in any the occupations that he held during that time. Rather, the occupation that the Petitioner intends to pursue is "as a Chief Executive in the field of security services," as he states on appeal. This work is *related* to his past experience, but the regulation requires that the experience must be "*in the occupation*" in which the Petitioner intends to work. The Petitioner has not documented any experience as the chief executive of a private security firm. This important consideration indicates that the Director erred by determining that the Petitioner had satisfied the criterion relating to experience in the occupation.

In light of the above conclusions, the Petitioner has not met his burden of proof to show that he qualifies for EB-2 classification as an individual of exceptional ability in the sciences, arts, or business. This conclusion determines the outcome of the appeal. Therefore, we decline to reach, and hereby reserve, the Petitioner's arguments on appeal regarding the national interest waiver.[4]

III. CONCLUSION

The Petitioner has not established eligibility for classification as an individual of exceptional ability. Therefore, the Petitioner has not shown eligibility for consideration for the national interest waiver, and we will dismiss the appeal as a matter of discretion.

ORDER: The appeal is dismissed.

[4] *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).