U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30776302

Date: MAY 29, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a nurse, seeks employment-based second preference (EB-2) immigrant classification as an advanced degree professional or as an individual of exceptional ability. *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, 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.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not qualify for the EB-2 classification as either an advanced degree professional or as an individual of exceptional ability. The Director also determined that the Petitioner did not merit a national interest waiver as a matter of discretion. The matter is now before us on appeal. 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. Section 203(b)(2)(B)(i) of the Act.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

"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. 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.

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 USCIS may, as matter of discretion,[1] 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.

See Dhanasar, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

A. Advanced Degree

The Director determined the Petitioner did not establish that he qualified as an advanced degree professional because he did not demonstrate that he had a U.S. advanced degree or a foreign equivalent degree at the time his petition was filed. The petition was filed in May 2022, and the Petitioner submitted an academic record showing he obtained a master's degree in June 2023. On appeal, the Petitioner points to his advanced degree and maintains that he qualifies for the EB-2 classification based on his master's degree. However, because the degree post-dates the filing date of the petition, it is not relevant to demonstrating the Petitioner's eligibility; eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (stating that a petition cannot be approved at a future date after the self-petitioner becomes eligible under a new set of facts).

The Director further determined the Petitioner did not establish that he qualified as an advanced degree professional because he did not demonstrate that he had a U.S. bachelor's degree or a foreign equivalent degree and at least five years of progressive post-baccalaureate experience in his specialty. The Director explained that a letter submitted as evidence of the Petitioner's employment history stated that he was employed from November 2018 to April 2020, which reflects fewer than the required minimum of five years of progressive employment experience. On appeal, the Petitioner does not dispute the Director's conclusion regarding this point.

[1] *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 Petitioner has not demonstrated that he qualifies for the EB-2 classification as an advanced degree professional.

B. Exceptional Ability

As noted above, to demonstrate eligibility as an individual of exceptional ability, a petitioner must initially submit documentation that satisfies at least three of the six categories of evidence at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). The Director determined that the Petitioner satisfied the requirements at (A) and (C) regarding his degree and certification. The Director concluded, however, that the Petitioner did not meet the requirements of the following categories under which he claimed eligibility:

- Evidence in the form of letter(s) from current or former employer(s) showing that the individual 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);
- Evidence of membership in professional associations, 8 C.F.R. § 204.5(k)(3)(ii)(E);
- Evidence that the individual has commanded a salary, or other renumeration for services, which demonstrates exceptional ability, 8 C.F.R. § 204.5(k)(3)(ii)(D); and
- 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).

On appeal, the Petitioner does not contest the Director's conclusions concerning whether he met the requirements at 8 C.F.R. § 204.5(k)(3)(ii)(B), (E), or (F). We therefore consider the issue of whether the Petitioner qualifies under these categories to be waived. *See, e.g., Matter of O-R-E-,* 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-,* I&N Dec. 657, 658 n.2 (BIA 2012)).

As to whether the Petitioner met the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(D), on appeal, the Petitioner asserts that the initial evidence of record establishes his eligibility. In denying the petition, the Director discusses tax documents that the Petitioner submitted and determined that this evidence did not meet the criterion. The Petitioner provides the following in his appeal brief:

> I maintain that I did make a sufficient salary to demonstrate that I have exceptional ability. USCIS did not mention any salary range or even a minimum salary that would demonstrate exceptional ability . . . . Because there is no salary range, minimum salary or even any rules or criteria [that] would establish what a salary [would be] for someone with exceptional ability, I do not understand why I do not qualify. This is an erroneous conclusion by USCIS that should be reversed and clarified.

Prior to the denial of the petition, the Petitioner received a request for evidence (RFE) stating that, although the Petitioner had submitted tax documentation as evidence of his salary, he had not submitted documentary evidence to demonstrate that his salary was high relative to others in the field. The RFE advised the Petitioner to submit evidence to demonstrate how his claimed exceptional ability led to a high salary or other remuneration relative to others in the field or any other relevant evidence to show how his salary demonstrated exceptional ability. The Petitioner did not submit supporting evidence, such as documentation of comparable salaries in his field, or otherwise show how his salary was higher than that of others in his field as a result of his exceptional ability. The burden was and is

on the Petitioner to provide evidence to support his assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. He has not done so here. Therefore, the record does not satisfy this criterion.

Because the Petitioner has not established that he meets three of the six evidentiary criteria under 8 C.F.R. 204.5(k)(3)(ii), he has not met the initial requirement to demonstrate his eligibility as an individual of exceptional ability. Therefore, we need not conduct a final merits determination of whether he is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. Nevertheless, we have reviewed the totality of the evidence and conclude that he does not meet the elevated standard for this classification. While the Petitioner may have experience in the field of nursing, the record does not show that he has a level of expertise that is unusual or stands out in the field.

In sum, the Petitioner has not established eligibility for the EB-2 classification as either an advanced degree professional or as an individual of exceptional ability. Therefore, he is ineligible for a national interest waiver. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the *Dhanasar* framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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 meets the requirements of EB-2 classification. The petition will remain denied.

ORDER: The appeal is dismissed.