U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31032145

Date: MAY. 29, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, 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 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish the Petitioner's eligibility for the EB2 classification as an individual of exceptional ability. In addition, the Director determined that the Petitioner did not merit a national interest waiver as a matter of discretion. 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. 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] If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence

[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 aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

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 U.S. Citizenship and Immigration Services (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

The Petitioner refers to his proposed endeavor as that of a "business developer," explaining in his response to the Director's request for evidence (RFE) that he intends to continue developing two companies in the United States. These are M-S- Inc., a supplier of optical transmission products for the IT and telecommunications market, and V-S- Corp., which he describes as devoted to helping foreign entrepreneurs in developing technology startup companies in the United States. The Petitioner also states that he will "advis[e] U.S. companies on how to plan, direct, and coordinate their business operations effectively."

A. Individual of Exceptional Ability

The Director concluded in her decision that the Petitioner met the requisite three of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3).[4] Specifically, she determined that the Petitioner established that he has a degree or diploma relating to his area of exceptional ability (A), ten years of full-time experience in the occupation (B), and a license to practice his profession or a certification for that profession (C). But we do not agree with the Director's assessment of the evidence submitted under subsections (B) and (C). The former criterion requires that letters from current or former employers must document ten years of full-time experience in the occupation sought, which in the case of a petition for a national interest waiver means the petitioner's proposed endeavor. Here, the Petitioner submitted letters from G-F-I-, T-B- S.A., M-S-T- LTDA, as well as letters and documents regarding his business [redacted], to support his claimed experience as a business developer or entrepreneur. But the letters from G-F-I- and T-B- S.A. indicate that he worked in technical positions, performing duties that are not those of an entrepreneur. And the CPA letter and corporate documents regarding [redacted] cover less than a two-year period during which the Petitioner worked as an entrepreneur beginning in 2017. Even if were to credit the

[3] *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).

[4] As the Petitioner did not claim to qualify for the EB-2 classification as a member of the professions holding an advanced degree, either before the Director or on appeal, we need not address his eligibility as such.

supervisory and management experience described in the letter from M-S-T- LTDA as relating to business development activities, this would add only three years and ten months to the qualifying experience from [redacted], and would therefore still be insufficient to total the required ten years. Accordingly, we withdraw the Director's conclusion regarding this criterion.

We also withdraw the Petitioner's conclusion about the Petitioner's qualification for the criterion at subsection (C) relating to a license or certification for the profession or occupation. The Petitioner presented a copy of his professional identity card issued by the Regional Council of Administration of Ceara, Brazil on August 30, 2018, which lists his registration as a "Technologist in Management Processes." In addition, he submitted a letter from the issuing organization, dated January 28, 2019, which states that the Petitioner is registered, has paid his annual fee for 2019, and so is "able to exercise the occupation." However, neither the letter nor the card specify which occupation the Petitioner is able to exercise by virtue of this registration, as they instead name the field of his degree. The academic transcripts for his degree show that he completed courses in a wide array of areas, including statistics, accounting, marketing, and supply chain management, knowledge which can be applied in a number of occupations. There is no suggestion in the evidence that this registration pertains to his proposed endeavor as an entrepreneur.

Further, licenses and certifications typically show that a person has the specific knowledge or skill needed to perform the duties of a job, and involves meeting certain standards established by a government body or professional association. Here, the only requirement specifically mentioned in the letter is the payment of annual dues. Therefore, this evidence does not establish that the Petitioner possesses a license or certification for the occupation in which he proposes to engage, and we withdraw the Director's affirmative conclusion pertaining to this criterion.

Per our withdrawal of the Director's conclusions regarding these two criteria, the Petitioner has not established that he meets at least three of the criteria under 8 C.F.R. § 204.5(k)(3), and thus he does not meet the initial evidence requirements for classification as an individual of exceptional ability. We note that on appeal, the Petitioner does not challenge the Director's decision regarding the other three criteria which he previously claimed to meet. However, because the Director conducted a final merits determination which the Petitioner does challenge on appeal, we will also consider whether he established that he possesses a degree of expertise significantly above that ordinarily encountered.

In his brief, the Petitioner generally asserts that the Director imposed a higher standard of proof then preponderance of the evidence, but does not identify a specific instance of this in the decision. Instead, he refers to a collection of evidence which he asserts show his "recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." While this language mirrors the sixth evidentiary criterion under 8 C.F.R. § 204.5(k)(3), this is not the overall standard for this classification which is applied in the final merits determination. Rather, as noted above, we consider whether the record establishes that a petitioner possesses a degree of expertise significantly above that ordinarily encountered in the field

The evidence referred to includes his educational credentials, letters regarding his work experience, corporate documents for his businesses, and certificates congratulating him on his participation in successful projects. As stated by the Director, these materials verify the Petitioner's possession of education and work experience needed to perform the duties of his proposed endeavor, but they do not

show that he stands out from his peers in a significant way. For example, F-G-K- wrote in his reference letter that he worked with the Petitioner at a company called [redacted] and referred to him as a "reliable technician" who became a supervisor in less than a year. The record also includes two certificates from [redacted] which recognize his work in scheduling and training for the company's installation department.

Another letter was written by F-A-M-, who indicates that he worked with the Petitioner on a project to install fiber optic cables and equipment in the Brazilian state of Ceara. The writer notes that the Petitioner "displayed a lot of technical application" in this and other projects, and that he "achieved the desired results."

These letters and certificates, and the others reviewed but not specifically mentioned here, show that the Petitioner has worked in the field of telecommunications infrastructure for several years, and has successfully completed projects for his employers. But they also illustrate a normal career trajectory, from technician to supervisor to executive, in which he gradually gained skills and responsibility, and do not demonstrate that he possesses a much higher level of expertise than that of his peers.

The record also includes evidence regarding the Petitioner's salary, including a salary survey for the position of business director in Brazil and evidence of the Petitioner's wages while employed by M-S-T- LTDA. We first note that there are problems with using the salary survey provided as a basis for comparison to determine whether the Petitioner's salary is indicative of his claimed exceptional ability relative to others in his field. The survey appears to be a national one, and thus does not take regional and municipal cost-of-living adjustments into account. In addition, the survey does not break the reported salaries down by field or industry, which can account for significant differences. Finally, it appears to report only average salaries at five levels of experience, and therefore does not display the full range of salaries for the position. Taking all of these shortcomings into account, the survey does not provide a reliable or probative view of the salaries in the Petitioner's field.

In addition, while the Petitioner provided sufficient evidence of his earnings at M-S-T- LTDA, these figures are below the average reported in the salary survey for those with his level of experience. He also submitted a letter from his accountant which states the salary that he earned with his own company [redacted] in 2018, but unlike the salary figures from his time at M-S-T- LTDA, this is not accompanied by copies of his tax returns or an explanation of their absence from the record. Aside from this being insufficient evidence of his earnings with [redacted] as stated above the salary survey lacks sufficient detail to serve as a basis for comparison of his earnings to those of others in his field.

Other evidence in the record includes the Petitioner's professional identity card, which was discussed above, and a statement from the Brazilian Association of Internet and Telecommunications Providers (BAITP) which affirms the membership of the Petitioner's company, [redacted] But in both cases, the record does not include supporting evidence which elaborates on the requirements for obtaining these documents. The letter from the Regional Council of Administration of Ceara states only that the Petitioner paid a fee to obtain his professional identity card, and the statement from BAITP likewise indicates that [redacted] is "up to date with the financial obligations to the association." The Petitioner has not established that the payment of an annual fee is indicative of recognition by others in his field that he possesses exceptional ability.

The Petitioner has not established that he meets the initial evidence requirements for classification as an individual of exceptional ability, as he has not met at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3). We also conclude that a review of the totality of the evidence in the record does not show that he has been recognized as having a degree of expertise significantly above that ordinarily encountered in his field, and thus he is not eligible for the EB-2 classification as an individual of exceptional ability.

B. National Interest Waiver

Because the Petitioner has not established his eligibility for the EB-2 classification, he is not eligible for a national interest waiver of the classification's job offer requirement. Nevertheless, we will briefly address his assertions on appeal related to the first prong of the *Dhanasar* analytical framework.

The first prong of the *Dhanasar* analytical framework, concerning the substantial merit and national importance of the proposed endeavor, focuses on the specific endeavor that the individual proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889.

In her decision, the Director concluded that the Petitioner's proposed endeavor is of substantial merit, but did not find it to be of national importance. Specifically, the Director noted that the Petitioner's claims that his companies in the United States would promote job creation and economic growth were not supported by documentary evidence in the record. In addition, she stated that the evidence regarding the business consulting aspect of the Petitioner's proposed endeavor, including letters from the owners of other companies about their intentions to partner with the Petitioner's companies, did not demonstrate any potential broader implications for the industry or field.

On appeal, the Petitioner initially makes vague statements concerning a deprivation of due process and a violation of fair treatment under the United States Constitution and unnamed international treaties, alleging that the Director "erroneously denied further analysis of NIW prongs and reasoned that there is no meaningful purpose for this analysis." Not only is this factually incorrect, as the Director went to determine that the Petitioner was well positioned to advance his proposed endeavor, but the Petitioner acknowledges that part of the Director's decision in the following paragraph. We will therefore not further entertain these arguments. *Cf. Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (declining to address a "passing reference" to an argument in a brief that did not provide legal support.)

The Petitioner goes on to present a variety of assertions regarding the national importance of his endeavor, first focusing on his experience in the telecommunications industry. But as stated above, the focus of the first prong of the *Dhanasar* analytical framework is the proposed endeavor's potential prospective impact, and factors such as the Petitioner's skills and experience are considered under the second prong. He also points to evidence regarding the importance of immigrants and entrepreneurs to the national economy. While there is no doubt about the economic contributions of both groups, our analysis of national importance concerns the specific endeavor proposed by the Petitioner, and the evidence he refers to does mention his endeavor. Accordingly, we agree with the Director's

conclusion that the Petitioner has not established that his proposed endeavor is of national importance, and that he therefore does not meet the requirements of the first prong of the *Dhanasar* framework.

III. CONCLUSION

A petitioner must meet all three prongs of the *Dhanasar* analytical framework in order to establish their eligibility for a national interest waiver. Since the identified bases for denial are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the second and third prongs of the 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).

ORDER: The appeal is dismissed.