U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31110377

Date: MAY 30, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a chief executive officer and coach, seeks classification as a member of the professions holding an advanced degree or 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. *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v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).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, concluding the record did not establish that the Petitioner qualified for classification as an individual of exceptional ability and a discretionary waiver of the job offer requirement, and thus a labor certification, was not merited upon application of the analytical framework we first explicated in *Matter of Dhanasar*, 26 I&N Dec. 884 (AA)O 2016). 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 petition 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." 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. 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 evaluate the national interest in waiving the requirement of a job offer and thus a labor certification.

Whilst neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, *see supra*. *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen is well positioned to advance the proposed endeavor, and (3) that on balance it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

II. ANALYSIS

The Petitioner is a chief executive officer and coach seeking to demonstrate eligibility in the EB-2 classification based on their exceptional ability. A petitioner must demonstrate expertise significantly above that ordinarily encountered to show that they are of exceptional ability. In support the Petitioner submitted several certificates attesting to their participation and training in events, seminars, courses and training programs in capoeira, a Brazilian marital art that combines elements of dance, fighting, acrobatics, and music. They also submitted letters purporting to demonstrate more than 10 years of full-time work experience teaching capoeira, evidence of membership in a regional capoeira association, and documents seeking to demonstrate the Petitioner's recognition for achievements and significant contributions to their field.

We agree with the Director's ultimate decision that the Petitioner is not of exceptional ability and therefore categorically ineligible for the EB-2 classification. The Director concluded that the Petitioner met two of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). Specifically, the Director concluded that the Petitioner demonstrated they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(E) and (F) but did not meet the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (C) or (D).[1] Upon de novo review, we conclude that the Petitioner has not demonstrated that they met any of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) for the reasons set forth below.

> *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).

We conclude the Petitioner has not met this criterion. The Petitioner initially provided 22 certificates issued by [redacted] The 22 certificates evidenced completion of courses, participation in festivals [redacted] and workshops, or internships. The evidence did not adequately establish how the certificates the Petitioner submitted were on level terms with degrees, diplomas, certificates or similar awards from a college, university, school, or other institution of learning. Nor did the evidence the Petitioner initially submitted consist of sufficient material, relevant, or probative evidence to demonstrate that the certificate issuing entities were colleges, universities, schools, or other institutions of learning relating to their area of exceptional ability.

In response to the Director's request for evidence (RFE), the Petitioner submitted four certificates issued by [redacted] purporting to represent the Petitioner's progression in the art of capoeira and permission to teach capoeira classes. But the four certificates the Petitioner submitted did not materially, relevantly, or probatively demonstrate that [redacted] was a college, university, school, or other institution of learning relating to the area of exceptional ability.

[1] The Petitioner conceded in response to the Director's RFE that "[t]here is no formal or legally regulated license or certification in Brazil that is required to practice [c]apoeira." So, the Petitioner did not demonstrate exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(C). And the Petitioner did not submit evidence to establish they have commanded a salary, or other remuneration for services, to demonstrate exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(D).

On appeal, the Petitioner asserts that [redacted] is a school. In support, the Petitioner re-submitted three letters from [redacted] that also accompanied the Petitioner's response to the RFE. But the letters only attest to the Petitioner's employment and business activities as an instructor and teacher. They do not adequately establish in a material, relevant, or probative manner that [redacted] is a college, university, school, or other institution of learning relating to the area of exceptional ability.

So, as we are unable to evaluate whether the certificates issued by [redacted] or any of the other entities that issued certificates to the Petitioner are issued by a college, university, school, or other institution of learning relating to the area of exceptional ability, we conclude the Petitioner has not met the requirements of this criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the noncitizen 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).

We conclude the Petitioner has not met this criterion. The Petitioner initially submitted four declaration format letters from [redacted] a representative of [redacted] and a representative of [redacted]

The letter from [redacted] states the Petitioner worked for "more than 10 (ten) years" as a capoeira teacher. The letter does not specify the month, day, and year of the start and end dates of employment. Nor does it specify if the Petitioner worked full-time. Moreover, the letter does not sufficiently describe the duties the Petitioner carried out in their capoeira teacher position. So, we are unable to determine whether the Petitioner's employment for "more than 10 (ten) years" is in the chief executive officer and coach position they intend to undertake in their proposed endeavor.

The letter from the representative of [redacted] states the Petitioner has been teaching "Capoeira classes and Afro Brazilian culture" since March 2015. This is a period less than 10 years from the present time as well as from the date the petition was filed. The letter also does not specify if the employment was full-time or part-time. Moreover, the letter does not contain a description of the duties the Petitioner performed teaching "Capoeira classes and Afro Brazilian culture" for us to determine if this is a similar occupation to the chief executive officer and coach position they intend to undertake in their proposed endeavor.

The letter from [redacted] verified that the Petitioner taught in their establishment, Red Tiger Taekwondo. The letter did not contain a description of their duties as a teacher in the establishment such that we could evaluate whether the duties the Petitioner carried out were in the chief executive officer and coach position they intend to undertake in their proposed endeavor. This is an especially notable omission considering the fact the business where the Petitioner was ostensibly employed is a taekwondo studio or focuses on a discipline other than the capoeira discipline the Petitioner is dedicated to. And the letter did not specify the start and end date of employment so that we could evaluate the length of employment, nor did it specify if the Petitioner's employment was part-time or full-time.

The letter from the representative of [redacted] also verified the Petitioner's employment without specifying the start and end date or describing the duties the Petitioner performed. Moreover, since the letter stated the Petitioner taught classes "during the evening and nocturnal periods" it is unclear if the work was part-time or full-time.

And the letters the Petitioner submitted in response to the Director's RFE from [redacted] do not consist of material, relevant, or probative evidence for the same reasons as the letters the Petitioner initially submitted. They do not have a detailed job description, do not precisely set forth the period of employment, and do not specify whether the work performed was part-time or full-time.

On appeal, the Petitioner asserts that the activities they performed teaching capoeira are in the same occupation as the chief executive officer and coach role they intend to occupy in their proposed endeavor. But, as described previously, the evidence they have submitted into the record does not contain detailed descriptions which can serve as a point of reference to evaluate the Petitioner's assertion that their previous work experience is in the same occupation they intend to conduct in their proposed endeavor.

We held in *Chawathe* that the standard of proof in immigration proceedings is the preponderance of the evidence, the burden of proof is always on the petitioner. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *also see* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). A petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits. When, as here, a petitioner has not met the burden of persuasion by a preponderance of the evidence because their evidence is not material, relevant, or probative it follows that they have failed to demonstrate eligibility for the benefit that they seek. For all the foregoing reasons, we conclude that the Petitioner has not demonstrated that they have at least 10 years of full-time experience in the occupation of financial analyst. So, the Petitioner did not and cannot satisfy the regulatory requirements to meet this criterion to demonstrate their exceptional ability.

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

We do not agree with the Director's conclusion that the Petitioner met this criterion and hereby withdraw it. The Petitioner's membership in the Espírito Santo State Capoeira Federation is not sufficient evidence of membership in a professional association. The Espírito Santo State Capoeira Federation is not a professional association. It is a "cultural, sport organization and administration state entity. A "cultural, sport organization, and administrative state entity" is not typically an organization composed of professionals or those individuals who require at least a bachelor's degree in a field related to the specialty required for their occupation. It is generally a loose collection of individuals with a common cultural or sport interest. The record does not sufficiently describe the composition of the federation and whether it is composed of professionals. Consequently, the record does not convincingly describe the federation as a professional association as that term is contemplated in the regulations, and we conclude the Petitioner has not met 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 Petitioner submitted several support letters/letters of recommendation, certificates, and pictures to document the recognition of their achievements and significant contributions to their field.[2]

The evidence the Petitioner submits does not meet the standard of proof because it does not satisfy the basic standards of the regulations. *See Matter of Chawathe*, 25 I&N Dec. at 374 n.7. The regulation requires evidence of recognition of achievements and significant contributions. When read together with the regulatory definition of exceptional ability, the evidence of recognition of achievement or significant contributions should show expertise significantly above that ordinarily encountered in the field.

The Petitioner's letters of recommendation contain complimentary statements about the Petitioner's performance of their duties that the Petitioner would like us to conclude are recognition of achievements and significant contributions. But these statements are not supported by any evidence in the record which reflects that these are noteworthy as achievements and significant contributions. For example, a writer emphasizes that the students the Petitioner has taught capoeira to have gone on to accomplishments and success themselves. But it is not evident how the accomplishments and success of the Petitioner's students are recognition of an achievement or significant contribution to their industry or field. Another writer listed social impact campaigns in which the Petitioner participated. But there is inadequate material, relevant, or probative evidence to describe that participation in social impact campaigns is a noteworthy achievement or significant contribution to the industry or field. Another writer speaks to the Petitioner's "adep[t] tailor[ing] [of] his instruction to cater to individual capabilities and needs." But it is not evident that the Petitioner's competent accomplishment of assigned job duties is an achievement or significant contribution above that ordinarily encountered demonstrating their exceptional ability.

Whilst it can be concluded from an overall evaluation of the letters that the Petitioner submitted that they are a seasoned professional whose competence and reliability as an employee is valued and appreciated, or as a teacher is gratefully acknowledged and respected, the letters did not evidence the Petitioner's achievement or significant contributions and expertise significantly above that ordinarily encountered in the field required to demonstrate the Petitioner's exceptional ability. So, we agree with the Director that the Petitioner does not meet this ground of eligibility.

III. CONCLUSION

The Petitioner has not established eligibility in any of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). So, they cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). And we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. In addition, we need not reach a decision on whether, as a matter of discretion, the Petitioner is eligible for or otherwise

[2] While we may not discuss every document submitted, we have reviewed and considered each one.

merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve these issues. *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 alternate issues on appeal where an applicant is otherwise ineligible). The appeal is dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.