U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34702563

Date: NOV. 14, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, the chief executive of [redacted] and 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 that the Petitioner qualifies for the underlying EB-2 classification or 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 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. 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.

[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).

If 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,[2] 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.

Id.

II. EXCEPTIONAL ABILITY

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 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) (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.

In the denial, the Director determined that the Petitioner did not satisfy any of the six criteria to demonstrate eligibility as an individual of exceptional ability. On appeal, the Petitioner maintains that the evidence submitted satisfies all the criteria except the requirement for the ten years of full-time experience in the occupation. The Petitioner relies upon the documents previously submitted in his initial filing and in the response to the request for additional evidence (RFE) and asserts that the Director applied an incorrect standard of proof.

The Petitioner contends that the Director misapplied the preponderance of the evidence standard and did not review the entirety of the evidence submitted for the national interest waiver. As the Petitioner

[2] *See also 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).

asserts, the standard of proof in this proceeding is preponderance of the evidence, meaning that a petitioner must show that what is claimed is "more likely than not" or "probably" true. *Matter of Chawathe*, 25 I&N Dec. at 375-76. To determine whether a petitioner has met the burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.*; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). Upon de novo review of the record, we agree with the Director's evaluation of the evidence, and conclude it does not establish, by a preponderance of the evidence, that the Petitioner has established eligibility for the underlying classification.

The Petitioner intends to be the chief executive of [redacted] an online platform that will provide a variety of business education courses to individuals. As explained below, we conclude that the Petitioner has not satisfied the regulatory requirements for any of the claimed criteria.

> *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).

The Director's analysis in determining that the Petitioner did not establish he obtained a degree, diploma or similar award in Business Management and Entrepreneurship from a university, college or school is correct. On appeal, the Petitioner reiterates that he completed a Bachelor's Degree in Business and Enterprise Management from [redacted] in 2012 [redacted], and that all relevant degrees, transcripts and diplomas were included in the RFE. The RFE also includes an affidavit explaining that the visa consultant made an incorrect entry in the Petitioner's B-2 nonimmigrant visa application completed in 2016 when it was indicated the Petitioner had not completed studies at educational institutions at a secondary level or above. Further, in the B-2 nonimmigrant visa application, the Petitioner failed to note that he had studied at [redacted] The Petitioner's assertion that the consultancy firm made an incorrect entry in the application is not persuasive. The Petitioner's signature "establishes a strong presumption" they knew and assented to the contents. *See Matter of Valdez*, 27 I&N Dec. 496, 499 (BIA 2018). Further, in the RFE the Petitioner details the inability to obtain a credential evaluation from World Education Services (WES) because of a strike at the university and instead submitted information regarding the strike, and affidavits certifying the awarding of the degree and transcripts, among other documents. The record on appeal lacks probative documentation or a detailed explanation to overcome the Director's evaluation of this issue, instead restating the claims made in response to the RFE. The Petitioner has not met the burden of proof to satisfy the requirements of this criterion.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

In support of this criterion, the Petitioner submitted a license registered with the Regional Council of Administration, Brazil and a certificate of good standing from the same administration. As detailed by the Director and also explained by counsel on appeal, the Petitioner has not described how this license authorizes him to work as a chief executive or entrepreneur. Therefore, this information does not establish the Petitioner is licensed to practice a profession or is certified for a particular profession or occupation as required by 8 C.F.R. § 204.5(k)(3)(ii)(C). The Petitioner has not established he meets this criterion.

Evidence that of a salary or other remuneration for services which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

In response to the RFE, the Petitioner submitted copies of tax returns, a profit and loss statement and bank statements. Although he asserts on appeal that these documents prove he has a significantly high remuneration in the field of chief executives or entrepreneurs, the record lacks evidence such as industry reports, comparisons to similar executives, or other probative evidence to support the assertions that he commands a salary demonstrating exceptional ability. Therefore, the Petitioner has not established eligibility for this criterion.

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

On appeal the Petitioner reasserts that his memberships in the Strategic Management Society, the Academy for International Business, the American Society of Administrative Professionals and the American Management Association establish membership in professional associations. However, as the Director determined, and we agree, the Petitioner has not demonstrated that membership in these associations relates to his job as chief executive. Further, he has not explained that these associations are comprised of individuals for which a U.S. baccalaureate degree or the foreign equivalent is the minimum entry in the occupation. *See* 8 C.F.R § 204.5(k)(2). We conclude that the Petitioner has not met his burden of proof to show that he meets the requirements of this regulatory 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 plain 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 the use of the conjunction "and" in a series of regulatory requirements "is a clear indication" that one "must satisfy each of the [listed] requirements"). After reviewing the testimonials, commendations, and letters from individuals discussing the Petitioner's background and achievements, the Director concluded that the Petitioner has not established that he received recognition for contributions to the industry or field. On appeal, the Petitioner reiterates the arguments made in the RFE and the record on appeal lacks evidence to support a determination that he has made a significant contribution to the industry. The letters of intent to invest in the Petitioner's business were created after the time of filing, the photographs lack a detailed description of the events, and the online information does not provide sufficient information regarding the Petitioner's significant contributions to the field. Therefore, the Petitioner has not met his burden of proof to meet the regulatory requirements of this criterion.

Because the Petitioner has not met his burden of proof to satisfy at least three of the initial criteria at 8 C.F.R. § 204.5(k)(3)(ii), we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Further, because the petition cannot be approved without an

underlying determination that the Petitioner qualifies for EB-2 visa classification, we will reserve discussion of the Petitioner's national interest waiver claim under the *Dhanasar* framework.[3]

III. CONCLUSION

The Petitioner has not established that he qualifies as an individual of exceptional ability. Therefore, the Petitioner has not shown eligibility for EB-2 classification. Without such a showing, the Petitioner cannot qualify for the national interest waiver.

ORDER: The appeal is dismissed.

[3] *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).