U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34905964

Date: NOV. 26, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding the Petitioner had not established eligibility for the underlying immigrant classification.[1] The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bear 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, petitioners must 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.[2] Section 203(b)(2)(B)(i) of the Act. The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: *"[e]xceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. Petitioners 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). However, meeting the minimum requirements by providing at least three types of initial evidence does not, in itself, establish that the individual in fact meets the requirements for exceptional ability. *See* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits

[1] The Director did not make a determination on the Petitioner's eligibility for a national interest waiver.

[2] The record does not indicate the Petitioner also claimed eligibility under the second preference immigrant classification as a member of the professionals holding an advanced degree.

determination. *Id.* The officer must determine whether or not the petitioner, by a preponderance of the evidence, has demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

II. ANALYSIS

As indicated above, the Petitioner must first meet at least three of the regulatory criteria for classification as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). The Director determined the Petitioner's qualification for only one criterion - 8 C.F.R. § 204.5(k)(3)(ii)(E) (membership in professional associations). On appeal, the Petitioner argues she satisfies three additional criteria.[3]

> *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.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires "[e]vidence 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."[4] Further, the regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence relating to qualifying experience or training shall be in the form of letters from current or former employers or trainers and shall include a specific description of the duties performed by the individual or of the training received. The Petitioner argues:

> [He] has the requisite 10 years of experience in the occupation that is directly relevant to his proposed endeavor. From 2013 to 2017, [the Petitioner] worked as a confectionery maker at [redacted] Russia . . . .
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> . . . .
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> Additionally, from 2016 to 2017, [the Petitioner] worked as a confectionery maker on a consulting basis at the artisan confectionary [redacted] Russia. Since June 2019, [the Petitioner] has been self-employed as a confectionary artisan in the United States.

Based on these statements, the Petitioner does not possess the required ten years of full-time experience. The Petitioner filed the petition in 2020. Eligibility must be established at the time of filing. See 8 C.F.R. §103.2(b)(1). The Petitioner's appellate claims cover approximately four-to-five years (2016 – 2020), short of the required ten years of full-time experience.

Furthermore, although the Petitioner provided employment letters from [redacted] neither letter indicates that the Petitioner has at least ten years of "full-time experience" as required by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B). Moreover, the record does not contain evidence in the form of employment letters for his self-employment claim.

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[3] Issues not raised on appeal are 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-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

[4] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

Finally, the Petitioner previously filed a first preference immigrant employment petition seeking classification as an individual of extraordinary ability under section 203(b)(1)(A) of the Act. The Director of the Nebraska Service denied the petition, and we subsequently dismissed the appeal. In our decision discussing the Petitioner's eligibility claim under the leading or critical criterion for the regulation at 8 C.F.R. § 204.5(h)(3)(viii), we stated:

> . . . [W]e note that the Petitioner indicated on his concurrently filed Form I-485, Application to Register Permanent Residence or Adjust Status, that he resided and worked in [redacted] Russia as a self-employed confectioner-technologist from January 2012 under November 2017 and does not mention his employment with [redacted] which is located in [redacted] is in eastern Russia on its border with China, while [redacted] is in western Russia on the Baltic Sea. In addition, we note that the Petitioner submitted copies of credentials indicating that he was a student at [redacted] school, completing pastry courses in 2013, 2014 and 2017, while also claiming that [redacted] relied on him to teach master classes during this time period. Based on these ambiguities in the record regarding the Petitioner's role with [redacted] [redacted] [the] letter alone is insufficient to corroborate the Petitioner's employment in a leading or critical role with that company.

This issue remains unresolved, and the Petitioner did not establish his employment with [redacted] The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

For all these reasons, the Petitioner has not shown he meets 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)(B).

The Petitioner argues:

> USCIS should find that the [Petitioner] qualifies for the classification as a person of exceptional ability via comparable evidence as presented in the record. Insofar as the licensing requirement is not applicable to the [Petitioner's] field of endeavor as it is not subject to licensing requirements, comparable evidence submitted herewith to establish that the [Petitioner] possesses a degree of expertise that is significantly above that ordinarily encountered in the field should be considered by the USCIS.

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides that "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." When evaluating such comparable evidence, officers consider whether the criteria are readily applicable to the beneficiary's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in the regulation. *See* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2). General assertions that any of the six objective criteria do not readily apply to the beneficiary's occupation are not acceptable, and the petitioner should explain why the evidence it has submitted is comparable. *Id.*

Here, the Petitioner has not supported his assertion that his occupation is not subject to licensing requirements. Furthermore, the Petitioner did not identify which evidence, if any, should be considered and how the evidence is comparable to establish his eligibility. The burden remains with the Petitioner to establish eligibility for the benefit. *Chawathe*, 25 I&N Dec. at 375-76.

Accordingly, the Petitioner did not establish that he meets this criterion through the submission of comparable evidence.

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

As indicated above, the Director determined that the Petitioner met this criterion. Because the record does not support the regulatory requirements, we will withdraw the Director's decision for this criterion.

The Director stated that "[t]he documentation you submitted from [redacted] appears to suggest that this organization was qualify [sic] as a professional association." However, for the reasons discussed under the employment criterion, the Petitioner has not presented independent, objective evidence establishing his employment or membership with [redacted]

Moreover, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations." Further, the regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation." The Petitioner did not demonstrate that [redacted] qualifies as a professional association, one that has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association consistent with this regulatory criterion.

For these reasons, we withdraw the Director's favorable determination for this criterion.

III. CONCLUSION

The Petitioner did not demonstrate eligibility for any of the criteria discussed above. Although the Petitioner also claims eligibility for the significant contributions criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), we need not reach this claim as he cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). Accordingly, 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.[5] Accordingly, we reserve these issues.[6] The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[5] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

[6] *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 alternate issues on appeal where applicants do not otherwise meet their burden of proof).