U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32483512

Date: OCT. 07, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a radiologist, 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 a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Director specified the Petitioner did not demonstrate he is eligible for the underlying visa classification, or that he is eligible for the national interest waiver because he did not establish his proposed endeavor is of national importance; he is well-positioned to advance the proposed endeavor; and, on balance, waiving the job offer would benefit the United States. 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 the underlying EB-2 visa classification, a petitioner must establish they are an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. 8 C.F.R. § 204.5(k)(2). A U.S. 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. *Id.*

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 in its totality shows that they are recognized as having the requisite degree of expertise and will substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate 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.

Id.

II. ADVANCED DEGREE AND EXCEPTIONAL ABILITY

The Applicant proposes to establish and serve as a general and operations manager for a business focused on radiological protection management solutions. The company plans to provide consulting, advising, and training through both in-person and digital platforms.

A. Member of the Professions Holding an Advanced Degree

The Director determined the Petitioner did not establish he qualifies for EB-2 classification as either an advanced degree professional or an individual of exceptional ability. The Director found that the record did not establish, and the Petitioner did not assert, eligibility for EB-2 classification as a member of the professions holding an advanced degree. We concur with the Director's determination in this respect. The Petitioner does not dispute this finding on appeal.

B. Exceptional Ability

On appeal, the Petitioner asserts he is a professional of exceptional ability, as he meets at least three of the regulatory criteria for this classification. As stated, a petitioner is initially required to submit

[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 individuals of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.
[3] *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 is discretionary in nature).

documentation that satisfies at least three of the six relevant categories of evidence. In denying the petition, the Director determined the Petitioner met two of the exceptional ability criteria listed at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). After reviewing the evidence, we agree with the Director that the record does not support a finding the Petitioner meets at least three criteria to demonstrate exceptional ability for EB-2 visa classification.

1. Official Academic Record

This criterion requires an official academic record showing the noncitizen's possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner previously submitted a 2005 diploma from [redacted] in Brazil for his technician in medical radiology degree. The Petitioner also submitted related transcripts from the same institution. As the Petitioner submitted an official academic record for a degree in radiology, an area related to the claimed area of exceptional ability, we concur with the Director that the Petitioner has met this criterion.

2. Ten Years of Full-Time Experience

This criterion requires evidence in the form of a letter from current or former employers showing that the noncitizen has at least 10 years of full-time experience in the proposed occupation. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner asserts on appeal that he has over two decades of work experience in the radiological sciences. The Director determined the Petitioner did not meet this criterion, finding the letters from his previous employers did not contain job descriptions. The Director indicated an inability, therefore, to determine the Petitioner's work was in the proposed occupation, as required.

Petitioner submitted before the Director letters from previous employers: [redacted] indicated the Petitioner worked 25 hours a week as a radiology technician, from December 2015 to September 2018; [redacted] indicated the Petitioner worked 30 hours a week as a radiology technician, from July 2014 to September 2018; [redacted] indicated the Petitioner worked 22 hours a week as a radiology technician from December 2011 to May 2014; [redacted] indicated the Petitioner worked 30 hours a week as a radiology technician, from July 2009 to December 2014; and the [redacted] indicated the Petitioner worked as a voluntary intern employee from January 2006 to January 2009. Overall, the submitted documentation relates to the Petitioner's previous employment in the position of radiology technician. However, these letters do not establish the Petitioner's employment related to the occupation outlined in the proposed endeavor, general and operations manager. In addition, apart from the last letter, they do not contain a specific description of the duties performed by the Petitioner as required by 8 C.F.R. § 204.5(g)(1) As such, the Petitioner has not demonstrated the requisite period of employment in his proposed occupation. As the record lacks evidence of the Petitioner's experience `in the proposed endeavor, we concur with the Director that the Petitioner has not met this criterion.

3. License or Certification

This criterion requires evidence of 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 registration identification from the Regional Council of Radiology Technicians 3rd Region (CRTR-3) before the Director, asserting it demonstrated he was granted the requisite license to work in the radiology technician profession by CRTR. However, the EB-2 regulations define "profession" as "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. 204.5(k)(2). The Petitioner has not asserted, and the record does not otherwise demonstrate, that a bachelor's degree is required for employment as a radiology technician. Accordingly, the Petitioner has not demonstrated his registration identification from CRTR qualifies either as a license to practice the profession or certification for a profession, for EB-2 purposes. In addition, the Petitioner has not demonstrated or asserted that he qualifies for this criterion under any other ground. Accordingly, we withdraw the Director's determination and conclude the Petitioner does not meet this criterion.

4. Salary or Other Remuneration

This criterion requires evidence that an individual "has commanded a salary, or other remuneration for services, which demonstrates exceptional ability." 8 C.F.R. § 204.5(k)(3)(ii)(D). The Director indicated the Petitioner did not submit evidence establishing he "commanded a salary or remuneration for services which demonstrate exceptional ability" by "providing independent objective comparable evidence" showing the salary of other radiology technicians in the relevant geographical location. In the denial decision, the Director found the Petitioner had not submitted any new evidence on this criterion in response to the request for evidence. The Petitioner previously submitted his tax documentation from 2013 to 2017, and information related to a website containing the average salary for a "radiology and imaging technologist" in Brazil for 2023, to support his assertion that his salary was higher than average. On appeal, the Petitioner relies upon this previously submitted documentation. However, the Petitioner has not submitted figures or supporting evidence for the purported average salary nor demonstrated the average radiology and imaging technologist salary data from 2023 is an appropriate comparison for his own wages from 2013 to 2018, due to the five-year gap in data points. We also note the hours worked for the Petitioner's prior positions, as listed above, vary significantly between employers. The Petitioner has also not accounted for or discussed any variation in hours he worked for his employers compared to the submitted average salary data. Accordingly, we concur with the Director that the Petitioner has not demonstrated he meets this criterion.

5. Membership in Professional Associations

This criterion requires evidence of "membership in professional associations." 8 C.F.R. § 204.5(k)(3)(ii)(E). As stated above, the EB-2 regulations define "profession" as "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. 204.5(k)(2). The Petitioner asserts he has been a member of the Regional Council of Radiology Technicians since June 2010. The Petitioner also submitted evidence of membership in "The AMA – American Management Association" and "Global Entrepreneurship Institute" in March 2023. However, the Petitioner has not asserted, and the record does not otherwise demonstrate, that any of these organizations require its members to possess the equivalent of a U.S. bachelor's degree. Consequently, the Petitioner has not shown that any of these

organizations are a professional association within the meaning of the regulations at 8 C.F.R. § 204.5(k)(2) and (3)(ii)(E). As such, the Petitioner has not demonstrated he meets this criterion.

6. Additional Criteria and Eligibility

As the Petitioner has not met his burden of satisfying at least three of the six exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii), he has not established eligibility for underlying EB-2 classification as an individual of exceptional ability. We therefore need not determine whether he satisfies the additional exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii)(E), (F) or conduct a final merits determination, and reserve our opinion on these additional issues on appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that "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 alternative issues on appeal where an applicant is otherwise ineligible). As this issue is dispositive of the Petitioner's appeal, we likewise decline to reach and hereby reserve the remaining issue before us of his eligibility for a waiver of the job offer requirement in the national interest.

III. CONCLUSION

The Petitioner does not meet at least three of the regulatory criteria to establish exceptional ability and is consequently ineligible for EB-2 classification.

ORDER: The appeal is dismissed.