U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33404714

Date: SEP. 04, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an information technology specialist, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business. 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).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate his eligibility for the underlying EB-2 immigrant classification or for the requested national interest waiver. The matter is now before us on appeal. 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. 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.

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:

> (A) An official academic record showing that the individual 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 individual 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 individual has commanded a salary, or other renumeration 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.

8 C.F.R. § 204.5(k)(3)(ii).[1]

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[2] 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 Visinscaia v. Beers, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); Rijal v. USCIS, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." Matter of Chawathe, 25 I&N Dec. at 376.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they must then establish eligibility for a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. 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. While neither the

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[2] We have previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. See generally 6 USCIS Policy Manual F.5(B)(2), https: //www.uscis.gov/policy-manual.

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,[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. ANALYSIS

The Petitioner proposes to establish a software and game development business in the United States for which he would be its chief executive officer. The Director found that the Petitioner did not establish eligibility for the underlying EB-2 classification as an individual of exceptional ability. The Director further found that the Petitioner did not merit a discretionary waiver of the job offer requirement in the national interest.

With respect to the underlying EB-2 classification, the Petitioner submitted evidence to meet four of the six criteria for exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii). The Director concluded that the Petitioner only met two of the regulatory criteria, salary or remuneration for services demonstrating his exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(D) and membership in professional associations at 8 C.F.R. § 204.5(k)(3)(ii)(E). However, as discussed below, the record does not support the conclusion that the Petitioner meets either criterion.

On appeal, the Petitioner reasserts being an individual of exceptional ability by satisfying two criteria, academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A) and recognition for achievements and significant contributions to the industry at 8 C.F.R. § 204.5(k)(3)(ii)(F). After reviewing the evidence in the record, the Petitioner has not demonstrated satisfying at least three of the six initial evidentiary criteria for being an individual of exceptional ability and is not otherwise eligible for the requested benefit.[4]

> An official academic record showing that the individual 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).

To meet this criterion, the Petitioner claims to have a degree in software engineering and submitted two academic evaluations and a document entitled "information about period of study" from [redacted] in Russia. The information document states that the Petitioner studied software engineering at [redacted] for three years and two months from September 2015 to November 2018, and that the "[s]tandard period of completion of education program in full-time education format" is four years. The document also includes a list of the courses he completed. With

[3] See Flores v. Garland, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third Circuit Court in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[4] While we do not discuss each piece of evidence in the record individually, we have reviewed and considered each one.

his petition, the Petitioner included an academic evaluation stating the Petitioner "attained a Diploma in Software Engineering from [redacted] Russia in the year 2018" and that "the Diploma in Software Engineering attained by [the Petitioner] is equivalent of Bachelor of Science in Software Engineering granted by an accredited university in the United States." The Director issued a request for evidence notifying the Petitioner that the evaluation stated he attained a diploma in software engineering, however, a diploma was not submitted with his petition. The Director also notified the Petitioner that the evaluation contradicted evidence in the record about his completion of the program.

With his RFE response, the Petitioner stated that he "holds a degree in Software Engineering from [redacted] and submitted a second academic evaluation. Similar to the initial academic evaluation, this second evaluation indicates that the Petitioner has a diploma in software engineering from [redacted] However, this second evaluation indicates that a diploma in software engineering is a three-year degree program, which differs from the initial evaluation which states it is a two-year program and the information document from [redacted] which states it is a four-year program. The second evaluation also states that the courses completed for the diploma in software engineering "is equivalent to completing three years of post-secondary education from an accredited University in the United States" and "to an Associate Degree in Information System Development Technologies awarded by an accredited university in the United States."

On appeal, the Petitioner argues that the evidence establishes he met the criterion. He explains that he was enrolled in the software engineering program at [redacted] and completed three years of the four-year program as demonstrated in the information document from [redacted] Although he did not graduate with a diploma, the Petitioner claims that he completed a "substantial portion" of the software engineering program which shows his exceptional ability. In addition, he argues that the second academic evaluation states that his completed coursework is equivalent to an associate degree in information system development technologies from an accredited U.S. university, which is in his area of exceptional ability.

Although the Petitioner submitted evidence showing he completed a portion of a diploma program in his area of exceptional ability, he did not submit an official academic record showing he has a degree, diploma, certificate, or similar award from a learning institution relating to his area of exceptional ability. Therefore, the Petitioner has not established that he meets the plain language of the criterion.

> Evidence that the individual has commanded a salary, or other renumeration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

The Director found that the Petitioner met this criterion based on his statement of income for his work with [redacted] during the years 2020 and 2021, as well as salary information from the Federal State Statistics Service of Russia relating to average salaries for information and communication activities.

In support of this criterion, the Petitioner also submitted an English translation of a letter from his previous employer, [redacted] which explains the Petitioner's dates of employment from 2018 to 2021, his job duties, and its inclusion of the Petitioner's salary information compared to others in his field. However, while the English translation letter is accompanied by a foreign language

translation certification stating the letter was translated from Russian to English, the record does not include the foreign language letter. The Petitioner is required to submit a copy of foreign language documents accompanied by a full English language translation. See 8 C.F.R. § 103.2(b)(3). Without the foreign language document, we are unable to determine the evidence's relevance and reliability on the issue of whether the Petitioner has commanded a salary or other renumeration for services demonstrating his exceptional ability.

Had the Petitioner submitted the required foreign language employment letter, the evidence would nevertheless be insufficient to meet the criterion. The comparison salary information in the Federal State Statistics Service of Russia relates to average salaries for information and communication activities. Without further evidence explaining what constitutes information and communication activities, we are unable to determine that the comparison salary is in the Petitioner's field of software and game development.

For these reasons, we withdraw the Director's determination for this criterion, as the Petitioner has not established that he commanded a salary indicative of his claimed exceptional ability relative to others working in the field.

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

The Director determined that the Petitioner met this criterion based on his membership in the International Game Developers Association and in the American Management Association.

This criterion requires evidence of membership in a professional association. The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation having a minimum requirement of a U.S. bachelor's degree or foreign equivalent for entry into the occupation. The record includes information about each of the associations, however it does not show that either the International Game Developers Association or the American Management Association is comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that it otherwise constitutes a professional association. Therefore, the Petitioner has not demonstrated his membership in a professional association under this criterion. We withdraw the Director's determination for 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 Director found that the Petitioner did not meet the criterion after considering letters from the Petitioner's colleagues in the field. On appeal, the Petitioner claims that his education, professional experience, and skills "have enabled him to contribute significantly to his field . . . ."

The Petitioner argues the letters of recommendation detail his development of immersive software and gaming applications which show "his expertise and influence in the industry" and his contributions to technological advancements. He also maintains the letters of recommendation attest to his "professional reputation and standing within his network" and "serve as a testament to [his] recognition by peers and professional organizations." As pointed out by the Director, the letters of

recommendation from his colleagues explain the Petitioner's previous projects and work experience in the field. While they also provide general support and praise for the Petitioner's work and his abilities to start his software and game development business, his colleagues do not identify, and thus do not demonstrate that the Petitioner has been recognized for achievements and significant contributions to his industry or field, as required under the criterion.

The Petitioner claims he has been recognized for his achievements pointing to his awards, including a [redacted] Award and the [redacted] Award. The record includes a certificate indicating the project [redacted] was awarded "the most creative project" of the [redacted] Other certificates indicate the Petitioner participated in certain events, including a "students hackathon" and an [redacted] However, the certificates do not show recognition for the Petitioner's achievements and significant contributions to his field.

The record also includes published articles about the Petitioner detailing his academic and professional experience with software and game development. However, the articles do not include the names of the authors. We reviewed the websites for the articles published in New York Weekly, CEO Weekly, and Entertainment Post, and the website articles also do not include the names of the articles' authors. Instead, the articles on the websites include the statement, "This article features branded content from a third-party. Opinions in this article do not reflect the opinions and beliefs" of the publication. Without an author, we cannot determine whether the articles are marketing material or independent, objective published articles about the Petitioner for consideration as evidence of his achievements and significant contributions to his field by peers, government entities, or professional or business organizations.

Based on the above, the Petitioner has not demonstrated he meets this criterion.

Because the Petitioner has not established that he meets at least three of the initial evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F), we need not conduct a final merits analysis to determine whether the evidence in its totality shows that he is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). Nevertheless, we advise that we have reviewed the record in the aggregate and conclude that it does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability.

III. CONCLUSION

The Petitioner has not established his qualification for the EB-2 classification as an individual of exceptional ability in the sciences, arts, or business, and is therefore ineligible for a national interest waiver. While the Petitioner asserts on appeal that he meets all three of the prongs under the Dhanasar analytical framework and is otherwise eligible for the national interest waiver, we reserve our opinion regarding these issues. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) (noting 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).

The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.