U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31092693

Date: SEPT. 26, 2024

Appeal of Texas Service Center Decision

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

The Petitioner is an entrepreneur business consultant who seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver (NIW) 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 Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding that the Petitioner did not establish that he qualified for the underlying visa classification, nor did he merit a discretionary waiver of the job offer requirement in the national interest. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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 an NIW, 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. 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). Meeting at least three criteria, however, 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. USCIS has 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.

Once a petitioner demonstrates eligibility for the EB-2 classification, 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 NIW petitions. *Dhanasar* states that USCIS may, as matter of discretion, grant an NIW 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.

The purely discretionary determination of whether to grant or deny an NIW rests solely with USCIS. *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining four U.S. Circuit Courts of Appeals in concluding that USCIS' decision to grant or deny an NIW to be discretionary in nature).

II. ANALYSIS

The Director determined that the Petitioner was not eligible for the EB-2 classification as an individual of exceptional ability. The Petitioner's initial filing reflected his company will provide consulting services for bars, restaurants, and events, which he proposed would generate jobs in the United States, improve working conditions, and spur investment in the local and regional communities. It appears his work would have a particular focus on restaurants and bars and be similar to the occupational title "Management Analysts" in the U.S. Department of Labor's *Occupational Outlook Handbook*. Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Management Analysts (Apr. 17, 2024), https://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-2.

The Director concluded that the Petitioner offered adequate evidence of at least 10 years of full-time experience in the sought after occupation under 8 C.F.R. § 204.5(k)(3)(ii)(B) but made an adverse determination on the Petitioner's claims relating to an official academic record, a license or certification, membership in professional associations, and recognition for his achievements and significant contributions. On appeal, the Petitioner at least asserts that he meets each of the criteria the Director denied. After reviewing all the evidence in the record, we conclude he has not satisfied at least three of the regulatory 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 explained why the Petitioner's claims and evidence did not satisfy this criterion, but his appeal brief only refers back to the portion of his response to the request for evidence "where we have submitted [the Petitioner's] certificates from institutions of learning related to his area." The Petitioner makes no effort to refute the Director's findings and therefore has waived his ability to address this criterion within these proceedings. *Matter of Garcia*, 28 I&N Dec. 693, 693 (BIA 2023) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) and finding issues that are not meaningfully challenged in the appeal are waived).

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

The Petitioner presented a Food Handler Training Program certificate issued by the Florida Restaurant and Lodging Association. He presented additional evidence regarding the certification that indicated the Florida Department of Business and Professional Regulation requires all managers in a licensed food service operation to become certified food managers, and that a certified food manager must always be present in the operation when four or more employees are on duty. The Director found that the certificate was not sufficiently related to his intended work in the United States. On appeal, the Petitioner disagrees with that assessment, claiming, without evidence, that certification from a food handler training program is not a mere formality, but a vital requirement for food service managers and entrepreneurs. -

Even though the Florida Restaurant and Lodging Association certified that the Petitioner completed the program, he did not submit analysis or evidence to establish that this document is a license to practice a profession or certification for a particular profession or occupation. Consequently, he has not persuaded us that the Director was incorrect to make an adverse determination under this criterion.

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

To meet the requirements of this criterion, the Petitioner must show membership in a "professional association." 8 C.F.R. § 204.5(k)(3)(ii)(E). The regulation defines "profession" to include "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries" or "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) (incorporating by reference Section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32)).

The Petitioner offered his memberships in the United States Bartender's Guild as well as the Florida Restaurant & Lodging Association. The Director noted a lack of supporting evidence to establish these are professional organizations or the basis the organizations use to admit members. On appeal, the Petitioner discusses both organizations' history and purpose, but he offers no arguments or evidence addressing the requirement that the associations require those on their rolls to be members of a profession as defined in the regulation. The Petitioner has not met this criterion's requirements.

We conclude that although the Petitioner satisfies the official academic record criterion, he does not meet the criteria regarding licensure or certification, or membership. While he argues and submits evidence for one additional criterion on appeal relating to recognition for his achievements and significant contributions to the industry at 8 C.F.R. § 204.5(k)(3)(ii)(F), it is unnecessary that we make a decision on this additional ground because he cannot numerically meet the required number of criteria. As the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii), we reserve this remaining issue of his achievements and significant contributions. *Patel v. Garland*, 596 U.S. 328, 332 (2022) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25–26 (1976) (finding agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision)); *see also Matter of Chen*, 28 I&N Dec. 676, 677 n.1, 678 (BIA 2023) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

It is also unnecessary that we provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119–20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the high level of expertise required for this immigrant classification.

And finally, because the Petitioner has not established he is qualified for the EB-2 classification as an individual of exceptional ability, he has failed to satisfy the antecedent requirement for consideration of an NIW. We therefore reserve our opinion on whether the Petitioner meets additional eligibility requirements under the *Dhanasar* analytical framework as well. *Patel*, 596 U.S. at 332.

ORDER: The appeal is dismissed.