U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21482246

Date: AUG. 8, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a nurse, 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. *See* 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 that the record did not establish that the Petitioner qualified for classification as an individual of exceptional ability. The Director further concluded 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. On appeal, the Petitioner reasserts that he qualifies for classification as an individual of exceptional ability and that a waiver of the job offer, and thus of the labor certification, would be in the national interest.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their

equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability:

(A) 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;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien 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).

In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

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 sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *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. 369, 376 (AAO 2010).

II. ANALYSIS

As noted above, the Director concluded that the record did not establish that the Petitioner qualified for classification as an individual of exceptional ability. Specifically, although the Petitioner asserted that he satisfied the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(A)-(C) and (F), the Director concluded that the Petitioner satisfied none of them. On appeal, the Petitioner reasserts that he satisfies the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(A)-(C) and (F). The Petitioner does not assert, and the record does not support the conclusion, that he satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D)-(E), or that the standards at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation, such that comparable evidence may establish eligibility. The Petitioner also does not assert, and the record does not support the conclusion, that the Petitioner may qualify as a member of the professions holding an advanced degree. For the reasons discussed below, the record does not establish that the Petitioner has satisfied at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) requires "[a]n official academic record showing that the [noncitizen] 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." The record contains two diplomas written in a language other than English, accompanying academic records, and their English translations. One diploma indicates that the Petitioner received a diploma for completing the "technical course in nursing high school level" from the [redacted] in [redacted] Brazil. The other diploma indicates that the Petitioner received a diploma for completing the nursing technician professional qualification course from [redacted] which describes itself as a health care specialized education company. In response to the Director's request for evidence (RFE), the Petitioner submitted an academic evaluation from United States Credential Evaluations, which opined that the Beneficiary "has no less than the equivalent of an [a]ssociate's [d]egree in [n]ursing."

The Director concluded that "an associate's degree is the lowest level of degree one can obtain to work in any nursing field[; therefore, the Beneficiary's] education does not reflect 'a degree of expertise significantly above that ordinarily encountered in the sciences.'" On appeal, the Petitioner asserts that "not every person qualifies for a Bachelor's degree (the person must have a previous academic education), nor to receive a license to practice in his field (it is required for the applicant to have graduated from a University)."

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) does not specify a required level of "degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability." Specifically, it does not require education that reflects "a degree of expertise significantly above that ordinarily encountered in the sciences" as stated by the Director. Accordingly, the Petitioner's equivalent to an associate's degree in nursing from an institution of learning, relating to the proposed endeavor in the field of nursing, satisfies the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A), and we withdraw the Director's conclusion to the contrary.

Next, 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 [noncitizen] has at least ten years of full-time experience in the occupation for which he or she is being sought." The record contains letters, most of which are written in a language other than English, regarding the Petitioner's work experience, and their English translations.

The Director noted that the letters in the record regarding the Petitioner's experience "are not properly certified in accordance with 8 C.F.R. § 103.2(b)(3)." The Director further noted that the letters "do not provide 'a specific description of the duties performed by [the Petitioner],'" citing 8 C.F.R. § 204.5(g)(1). On appeal, the Petitioner generally asserts that the record satisfies the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B), without addressing how the Director may have erred in concluding that the letters do not provide a specific description of the duties performed by the Petitioner. The Petitioner does not submit any additional documentary evidence regarding this criterion on appeal.

We first note that, in response to the RFE, the Petitioner submitted a letter regarding employment he held from October 2020 through the date of writing, June 2021; however, petitioners must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). The Petitioner filed the Form I-140, Immigrant Petition for Alien Workers, in July 2020; therefore, the letter regarding his employment beginning in October 2020 may not establish eligibility. Accordingly, we need not address that letter further.

Although the Director erred by stating that the English translations of the letters in the record referencing the Petitioner's employment as of the petition filing date "are not properly certified," the Director correctly noted that the letters do not provide a specific description of the duties performed by the Petitioner. Moreover, none of the letters indicate whether the Petitioner's experience was on a full-time basis. For example, one letter from the [redacted] Brazil, municipal government merely lists the location and starting and end dates during which the Petitioner worked as a "nursing technician" through temporary contracts, without elaborating on the duties the Petitioner performed and whether he performed them on a full-time basis. As another example, a letter from [redacted] in [redacted] Brazil, asserts that the Petitioner "was responsible for the following tasks: provide regular and/or emergency care, doing first aid actions, actin [*sic*] onshore and offshore" as a "licensed practice nurse" from May through November 2017; however, it does not elaborate on what regular and emergency care are and how they may differ when performed onshore and offshore, or whether the Petitioner provided that care on a full-time basis. As another example, a letter from [redacted] asserts that the Petitioner "[held] the position of offshore nursing technician" from May 2018 to May 2019, without elaborating on the duties the Petitioner

performed and whether he performed them on a full-time basis. The other letters in the record regarding the Petitioner's work experience provide similarly limited information about his employment. Because the letters in the record regarding the Petitioner's work experience neither provide a specific description of the duties performed by him nor a statement that he performed those duties on a full-time basis, they do not establish that he has at least 10 years of full-time experience in the occupation. *See* 8 C.F.R. § 204.5(k)(3)(ii)(B); *see also* 8 C.F.R. § 204.5(g)(1).

Next, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C) requires "[a] license to practice the profession or certification for a particular profession or occupation." In support of the petition, the Petitioner submitted an identification card written in a language other than English, and its English translation. The card indicates that the Petitioner was enrolled with the Federal Nursing Council of Brazil with an issuing date of "4/11/2014" and an expiration date of "4/10/2019," prior to the July 2020 petition filing date. In response to the Director's RFE, the Petitioner submitted a certificate from the Regional Nursing Council of [redacted] Brazil, and its English translation, certifying the Petitioner as a nurse technician from "08/08/2021" through "02/03/2022." The Petitioner also submitted a bilingual document from the Brazilian Maritime Authority with a "validity" ending "12/07/2021." The document indicates that the Petitioner has passed the personal safety and social responsibilities examination carried out in [redacted] from "04/04/2016" through "31/5/2016."

The Director noted that the identification card that expired in 2019 did not establish eligibility as of the petition filing date and that the Brazilian Maritime Authority document does not establish how it satisfies the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C). The Director concluded that the record did not establish that the Regional Nursing Council of [redacted] certificate "is reflective of 'a degree of expertise significantly above that ordinarily encountered in the sciences.'" On appeal, the Petitioner generally reasserts that the record satisfies the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C), without addressing how the Director may have erred in concluding that the various documents do not establish eligibility. The Petitioner does not submit any additional documentary evidence regarding this criterion on appeal.

We first note that the identification card is not a license to practice a profession or certification for a particular profession or occupation; moreover, it expired prior to the petition filing date. Therefore, the identification card does not satisfy the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C) in either form or substance. Similarly, although the bilingual document indicates that the Petitioner passed an examination, the record does not establish how the document is a license to practice a profession or certification for a particular profession. Specifically, the record does not establish that passing the examination and earning the document is required to practice a particular profession. The Director incorrectly required the Regional Nursing Council of [redacted] certificate to be "reflective of 'a degree of expertise significantly above that ordinarily encountered in the sciences.'" The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C) does not require a license to practice the profession or certification for a particular profession or occupation to demonstrate such a level of expertise—it merely requires a valid license or certificate to practice the particular profession or occupation. However, although the certificate asserts that the Petitioner has held "permanent active registration since 04/07/2014" as a nurse technician, the certificate specifically states, "This Certificate was issued on 08/08/2021 at 11:41:00 PM," after the July 2020 petition filing date. Because the certificate was issued after the petition filing date, it does not establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of*

Michelin Tire Corp., 17 I&N Dec. at 249. Even if the certificate could establish eligibility—which it does not—its reference to the Petitioner having held "permanent active registration since 04/07/2014" specifically addresses *registration* prior to the petition filing date, which is distinct from licensure or certification to practice a particular profession. In summation, the record does not establish that the Petitioner had a license to practice the profession or certification for a particular profession or occupation as of the petition filing date. *See* 8 C.F.R. § 204.5(k)(3)(ii)(C); *see also* 8 C.F.R. § 103.2(b)(1); *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249.

Next, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." The record contains four letters from the Petitioner's former colleagues at [redacted] Hospital, and [redacted] The Director noted that the letters discuss the Petitioner's skills and abilities but they do not demonstrate that the Petitioner made significant contributions to the industry or field. On appeal, the Petitioner generally reasserts that he satisfies the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), without specifying how the Director may have erred in concluding the contrary. The Petitioner does not submit any additional documentary evidence regarding this criterion on appeal.

The reference letters in the record address the Petitioner's qualifications to work as a nurse and provide examples of how he benefitted his various employers and their clients or workers; however, as the Director noted, the letters do not address how the Petitioner may have earned achievements or made significant contributions to the healthcare industry or nursing field. Because the record does not contain evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations, it does not satisfy the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F).

In summation, the record does not satisfy at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, the record does not establish that the Petitioner qualifies for second-preference classification as an individual of extraordinary ability. *See* section 203(b)(2)(A) of the Act. We reserve our opinion regarding whether the Petitioner satisfies any of the criteria set forth in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("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).

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an individual of extraordinary ability; therefore, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.