U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20930614

Date: JUL. 25, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks classification as an individual of exceptional ability in business, 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). 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.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner had not established that he was an individual of exceptional ability or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. On appeal, the Petitioner asserts that the Director erred in his decision. In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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) [Noncitizens] who are members of the professions holding advanced degrees or [noncitizens] of exceptional ability. –
>
> (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.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that [a noncitizen's] services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> *Exceptional 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 following six criteria, at least three of which an individual must meet to qualify as an individual of exceptional ability in the sciences, the arts, or business:

> (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;
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> (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;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; or
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> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision

Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[2] grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

A. Exceptional Ability

The Petitioner seeks employment as an IT coordinator, asserting that he "will make important contributions to the U.S. through introducing automated purchasing processing systems and infrastructure services through his company, [E-]. As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability.[4]

The Petitioner does not assert nor does the record establish that he is eligible for the EB-2 classification as a member of the professions holding an advanced degree. Therefore, he must establish that he qualifies as an individual of exceptional ability. To do so, a petitioner must provide documentation that satisfies at least three of six regulatory criteria to meet the initial evidence requirements for this classification. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Matter of Chawathe,* 25 I&N Dec. at 376 (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality"). *See also Kazarian* v. *USCIS,* 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); *See* USCIS 6 Policy Manual F.2, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2.

In denying the petition, the Director determined that the Petitioner fulfilled the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (E). On appeal, the Petitioner asserts that he meets five of the criteria. We have reviewed the evidence in the record and conclude that it does not support a finding that the Petitioner meets the requirements of at least three criteria.[5]

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[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] The Petitioner does not assert nor does the record establish that he is eligible for the EB-2 classification as a member of the professions holding an advanced degree.

[5] While we may not discuss every document submitted, we have reviewed and considered each one.

> *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 Petitioner submitted an official academic transcript indicating that he earned a diploma in systems analysis from [redacted] in 2003. We agree with the Director that this criterion has been met.

> *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.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The Petitioner filed the petition in October 2020; thus, the Petitioner must establish that he had at least ten years of full-time experience in the occupation sought as of that date. 8 C.F.R. § 103.2(b)(1). The Petitioner indicates that he "seeks employment in the [information technology] IT networking industry." He provided a copy of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* subchapter entitled "Network and Computer Systems Administrators," which shows that individuals employed in this occupation typically:

> [A]re responsible for the day-to-day operation of [computer] networks. They organize, install, and support an organization's computer systems, including local area networks (LANs), wide area networks (WANs), network segments, intranets, and other data communication systems.

As the occupation in which the Petitioner seeks to be employed falls under this occupational category, we reviewed the evidence to determine whether he had the requisite years of employment within this occupation. The criterion 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 [individual] has at least ten years of full-time experience in the occupation for which he or she is being sought." Moreover, the regulation at 8 C.F.R. § 204.5(g)(1), provides in pertinent part that "[e]vidence relating to qualifying experience or training shall be in the form of letter(s)from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the [individual] or of the training received."

On appeal, the Petitioner outlines his qualifying employment experience with five employers, asserting that the letters confirm that he has more than 10 years of experience in the occupation. Taken together, the letters from [redacted] and the [redacted] show that he has five years and five months of full-time work experience in the occupation. However, without more the letters from the other employers are insufficient to show that he has at least the additional four years and seven months of required work experience in the occupation.

For instance, the July 2020 affidavit from an individual attesting to the Petitioner's employment with [redacted] [D-] states that he was hired in November 2011 as a systems analyst and worked for this company until March 2015. While the affiant provides a generic description of the duties that the Petitioner performed during the course of his employment, the affiant does not identify how he came to have knowledge about the Petitioner's employment there. Though the document is

signed, the affiant's signature is illegible, and he did not indicate the nature of his own employment with D-, if any, therein. The Petitioner also provides an undated affidavit from a former work colleague who outlines the Petitioner's work experience with D-, noting "[m]y professional experience with [the Petitioner] was during the period that we worked together at [D-], which does not substantiate the Petitioner's period of employment with D-. Notably, neither affiant appears to have been the Petitioner's former employer or supervisor, nor do they indicate whether his employment with D- was fulltime.

The Petitioner self-reported his employment history from September 2014 to September 2018, indicating that he worked as the owner and technical manager (part-time) in his own business. He described the operational activities of his business, stating that the company "provided various IT services including installation of security equipment for both residences and business locations, electrical maintenance of computer networks, maintenance of computers and peripheral equipment, as well as communication equipment."

In his describing his ownership and technical manager role with the company, the Petitioner indicates that he performed a variety of tasks involving "business development, management and administration of sales and technical teams," "[i]mplementation of network IT projects including cabling, support outsourcing, system administration and IT supplies," and "[c]onfiguring Cisco routers and switches. . . .," among other things. The Petitioner has not provided sufficient evidence regarding the scope and nature of his business' operations to establish the nature of his role therein, nor has he explained how much time he allocated to the various duties that he performed. While the Petitioner indicates that he was employed parttime as a technical manager, but he does not detail whether he was employed in this business on a fulltime basis. We also note that performing duties such as business development and performing administrative and management oversight of the company's sales teams do not comport to the typical duties performed within the network and computer systems administrators occupation.

Additionally, the affidavits regarding his employment with D- assert that he commenced employment with that firm in 2011 and remained employed there until March 2015, while the Petitioner indicates in his own letter that he was employed in his own business from September 2014 until September 2018. These overlapping employment timeframes add further ambiguity to the record. The Petitioner must resolve the aforementioned inconsistencies and ambiguities 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).

We also conclude that the evidence provided regarding the Petitioner's employment from 2011 to 2018 does not comport with the evidentiary requirements specified in 8 C.F.R. § 204.5(g)(1) for work experience letters. It appears that the Petitioner appears to be submitting this documentation as "comparable evidence" to meet this criterion. 8 C.F.R. § 204.5(k)(3)(iii) provides that "[i]f the [regulatory] standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish [his] eligibility." The Petitioner has not adequately explained how the evidence required under the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) *does not readily* apply to his occupation. Here. the Petitioner's documentation falls short in demonstrating that he has at least ten years of full-time experience in the Network and Computer Systems Administrators occupation. This criterion has not been met.

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

As discussed, the Petitioner seeks employment in the network and computer systems administrators occupation. However, he did not submit evidence sufficient to show that a license or certification is required for his occupation, or that he possesses such a license or certification. On appeal, the Petitioner points to certificates issued by private computer technology training firms that document his "participation in training" focused on various IT programming languages and tools, such as Modern Javascript, object-oriented programing with Java, and full stack. The Petitioner has not explained how attending computer-related training courses constitutes his *certification* for the occupation. This criterion has not been met.

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

Since the Petitioner does not challenge the Director's determination that he does not meet the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), we consider this issue waived on appeal. See *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012), (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived).

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

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations."[6] 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 Director determined the Petitioner met this criterion. Based on our *de novo* review of the record, we withdraw his determination for the following reasons. In response to the Director's request for evidence (RFE) the Petitioner provided evidence showing that as of July 2020 he became a member of the [redacted] [B-]. The information provided about B- indicates that it is a non-profit scientific society that "brings together students, teachers, professionals, researchers, and enthusiasts in Computer Science and Information Technology from all over Brazil." The Petitioner has not provided documentation to establish the membership requirements for this organization such that we can determine whether the association is professional in nature, and the basis used by the organization to admit the Petitioner as a member. Thus, the Petitioner has not established that he belongs to an organization that qualifies as a professional association. Accordingly, the Petitioner has not met 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).

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

Although the Petitioner asserts eligibility for this criterion on appeal, we need not reach his assertions as he cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). Moreover, we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for the exceptional ability aspect of the EB-2 classification.

Nonetheless, we will briefly discuss the Petitioner's assertion on appeal that the letters of support reviewed by the Director demonstrate "significant recognition" under this criterion. The Director indicated in the denial that the letters provide generalized information about how the Petitioner helped the companies that employed him, but that the letters did not establish that he has made significant contributions to the industry or field. Collectively considering the letters of support and the other evidence submitted in support of the petition, we conclude that the evidence does not show that the Petitioner's work has had an impact beyond his employers, clientele, and their projects at a level indicative of achievements and significant contributions to the industry or field. Therefore, we agree with the Director that the evidence of record is inadequate to demonstrate that he received recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. For these reasons, the Petitioner has not established that he fulfills this criterion.

As the record does not support a finding that the Petitioner has met any of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii), the Petitioner has not established eligibility as an individual of exceptional ability under section 203(b)(2)(A) of the Act.

B. National Interest Waiver

The Petitioner has not established that he is eligible for the EB-2 classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding the remaining issues, including whether he is eligible for a national interest waiver. *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 M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not demonstrated that he qualifies as a member of the professions holding an advanced degree or as an individual of exceptional ability under section 203(b)(2)(A) of the Act. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.