U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 22642780

Date: NOV. 3, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, a freight transportation entrepreneur,[1] 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies as an individual of exceptional ability. The Director further concluded that the Petitioner had not established that a waiver of the required 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. –

[1] In response to the Director's request for evidence (RFE), the Petitioner submitted, in relevant part, a statement, indicating that the proposed endeavor would be working "as the founder and owner of a business in the . . . field of freight transportation."

(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 Director concluded that the Petitioner satisfied the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (C), and (E), the Director concluded that the record does not establish that the Petitioner is an individual of exceptional ability under a *Kazarian* final merits determination. *See Kazarian*, 596 F.3d at 119-20. For the reasons discussed below, we withdraw the Director's conclusion that the record established 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 documents written in a language other than English, and their accompanying English translations, indicating that the [redacted] University in Uzbekistan awarded the Petitioner a bachelor's degree in mathematics. The record also contains a one-page evaluation from an academic credentials evaluation service, opining that the Petitioner "has the academic equivalent of a bachelor's degree in mathematics from a regionally accredited institution in the United States." The Director concluded that the record established that the Petitioner "has completed equivalent education to a U.S. [b]accalaureate degree. As such, the submitted evidence meets [the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A)]." However, the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) requires evidence of a qualifying degree relating to the area of exceptional ability.

In response to the RFE, the Petitioner asserted, "[o]verall, my proposed business endeavor is to enhance the standard of trucking and logistics services in the U.S. by providing value-added services that ensure freight is safely stored and transported in a way that preserves quality." The record does not establish how a bachelor's degree in mathematics relates to this business endeavor.[2] Because the

[2] The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 369.

record does not establish that the Petitioner has a qualifying degree relating to the area of exceptional ability, it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), and we withdraw the Director's statement to the contrary.

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." The record contains a copy of a commercial driver license (CDL) issued by the commonwealth of Pennsylvania to the Petitioner on "09/17/2021." The Director concluded that "[the Petitioner] submitted copies of commercial [*sic*] driver's license (CDL). As such, the submitted evidence meets [the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C)]." However, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C) contemplates a license to practice the profession or certification for a particular profession or occupation.

As noted above, the commonwealth of Pennsylvania issued the CDL to the Petitioner in 2021, after the 2019 petition filing date. A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Because the Petitioner's CDL is dated after the petition filing date, it presents a new set of facts that do 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; *Matter of Izummi*, 22 I&N Dec. at 176.

Moreover, even if the record established that the Petitioner had been issued a CDL as of the petition filing date, which it does not, it does not establish that a CDL is required to practice the Petitioner's profession or occupation. Specifically, the Petitioner also submitted a business plan, dated 2021, indicating that his position would be "chief executive officer," and generally describing his managerial duties. The business plan does not indicate that the Petitioner's duties would include operating a vehicle that would require a CDL. Because the record does not establish that the Petitioner had a license to practice, or a certification for, the profession or occupation of chief executive officer of a freight transportation company as of the petition filing date, it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C), and we withdraw the Director's statement to the contrary.

Next, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional organizations." The record contains a document, indicating that the Petitioner was a member of the Owner-Operator Independent Drivers Association (OOIDA) "since 10/21" with an expiration date of "10/06/2022." The Director concluded that "[the Petitioner] submitted a copy of his membership in OOIDA. As such, the submitted evidence meets [the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E)]." However, similar to the CDL discussed above, because the Petitioner's membership in the OOIDA is dated "10/21," after the petition filing date, it presents a new set of facts that may 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; *Matter of Izummi*, 22 I&N Dec. at 176. Because the OOIDA membership does not establish eligibility, we reserve our opinion regarding whether the OOIDA is the type of professional organization contemplated by 8 C.F.R. § 204.5(k)(3)(ii)(E). *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). Because the record does not contain evidence of membership in a professional organization as of the petition filing date, it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E), and we withdraw the Director's statement to the contrary.

The Director further concluded that "[the Petitioner] has not provided sufficient evidence to demonstrate that he has commanded a salary, or other remuneration for services, which demonstrates exceptional ability," referencing the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D). We agree that the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

In response to the RFE, the Petitioner asserted that he satisfied the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (C), and (E); however, he did not assert, and the record does not support the conclusion, that he satisfied the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) or (F). Furthermore, the Petitioner does not assert, and the record does not support the conclusion, 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.

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 exceptional 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 at 25, *supra*; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7, *supra*.

## III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an individual of exceptional ability; therefore, we conclude that the Petitioner has not established eligibility for the immigration benefit sought.

**ORDER:** The appeal is dismissed.