U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22678677

Date: NOV. 17, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, 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 Petitioner had not established that he was individual of exceptional ability.

On appeal, the Petitioner asserts that he meets the requirements of the requested classification.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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.
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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 an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

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

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
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> *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.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

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

[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*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

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

II. ANALYSIS

Although the Director determined that the Petitioner met the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) and (E), for the reasons discussed below, we disagree. On appeal, the Petitioner asserts that he also meets two additional criteria.[3]

> *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.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The Director determined that the Petitioner met this criterion. However, for the reasons below, we must withdraw the Director's conclusion.

The Petitioner submitted a statement from an accountant[4], an "Amendment to the Articles of Incorporation" for a limited liability company (LLC) dated December 17, 2018, and evidence of the registration of the LLC on May 13, 2005. The plain language of the regulation, however, requires letter(s) which are *from current or former employers*. The Petitioner has not demonstrated that any of the provided documentation satisfies this requirement.

> *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).

The submitted evidence includes copies of recent Brazilian individual tax returns and paystubs for his position as an "administrator," along with salary information from the Salario BR website for the occupations of "entrepreneur" and "chef" for "little" companies. Regarding the Salario BR information, the Petitioner did not provide a full English translation for the occupation of "entrepreneur" as required by 8 C.F.R. § 103.2(b)(3), and, thus, cannot be considered.

To satisfy this criterion, the evidence must show that an individual has commanded a salary, or remuneration for services, that is indicative of his claimed exceptional ability relative to others in his occupation. Here, the Petitioner has not established how the submission of salary information for the occupation of "chef" and his earnings as an "administrator" are sufficient to demonstrate that he has commanded a salary that is indicative of his exceptional ability relative to other "entrepreneurs.[5]

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[3] As the Petitioner does not address the remaining criteria, we consider them abandoned. *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). *See also Sepulveda v. U.S. Att'y Gen.,* 401 F.3d 1226. 1228 n. 2 (11th Cir. 2005). citing *United States v. Cunningham,* 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark,* No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

[4] Beyond listing the Petitioner's job titles, the statement does not include such pertinent information as the job duties and whether the positions were full-time. In addition, the Petitioner has not established that the accountant qualifies as an employer, as required by the regulation.

[5] In Parts 5 and 6 of the Form I-140, the Petitioner identified both his "Occupation" and "Job Title" as "Entrepreneur."

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. For the reasons below, however, we must withdraw the Director's conclusion.

The Petitioner submitted documentation regarding his membership in the Institute of Gastronomy, Tourism and Culture, the Panela de Barro Institute, and the International Association of Culinary Professionals. He did not, however, provide supporting evidence, such as the membership requirements or by-laws, which establishes that any of the organizations are a professional association. As noted above, profession is defined as "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." 8 C.F.R. § 204.5(k)(2).

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 record includes a variety of certificates, awards, articles, and recommendation letters. While the evidence establishes that the Petitioner is well-respected and a contributing member of his community, the plain language of the criterion requires recognition for achievements and *significant contributions to the industry or field.* Without additional evidence, such as objective information regarding the significance of the requirements to receive these certificates and awards, and the Petitioner's specific and significant contributions to the restaurant industry or culinary field, he has not established that he meets this criterion.[6] We further note that, even if we were to determine that he met this criterion, he would still not establish that he is an individual of exceptional ability.

For the reasons set forth above, the evidence does not establish that the Petitioner satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification. As the Petitioner has not met the threshold requirement for this classification, further analysis of his eligibility for a national interest waiver would serve no meaningful purpose.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[6] Regarding the Petitioner's signature "dish," we note that chefs routinely create new recipes. While the record demonstrates its popularity, it does not establish how it has significantly contributed to the field or industry.