U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22973022

Date: OCT. 21, 2022

Motion on Administrative Appeals Office 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 Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner met the requisite three evidentiary criteria to show that he met the initial evidence requirement for this classification. In addition, the Director determined that a waiver of the job offer requirement, and thus of a labor certification, would not be in the national interest. The Petitioner subsequently appealed the Director's decision. After considering the Petitioner's response to our notice of intent to dismiss (NOID), we concluded that the Petitioner made willful misrepresentations of material facts relating to his work experience, his contributions to his field of endeavor, and his positioning to advance his proposed endeavor, and was therefore ineligible for the requested benefit. He now files a motion to reconsider.

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 review, we will dismiss the motion.

I. LAW

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider.

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.

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.

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). This, however, is only the first step, and the successful submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for this classification.[1] When a petitioner submits sufficient evidence at the first step, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the beneficiary is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(i)(3)(i).

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*, PM-602-0005.1 (Dec. 22, 2010).

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.[2] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, 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

In our appeal decision, we found that the Petitioner made several willful misrepresentations regarding his qualifications which were material to his eligibility as an individual of exceptional ability and to whether he merits a national interest waiver of the job offer requirement inherent to that immigrant classification. Specifically, we concluded that the record does not sufficiently corroborate his previous work experience with O-P-, nor does it support his claims to have authored several patents which were implemented at this business and others. We noted that in an attempt to support these claims, he submitted patents which were either unrelated to his claims or authored by another person. In addition, we concluded that the record includes inconsistencies and unsubstantiated assertions regarding the Petitioner's work experience with D-S-, a company which he claimed to serve as founding director. When he was provided with an opportunity to address these many inconsistencies and unsupported assertions, the Petitioner did not submit sufficient evidence to overcome them.

In his motion to reconsider, the Petitioner primarily reiterates the arguments he presented on appeal and in response to our NOID, and does not specify any law or policy which was incorrectly applied in our previous decision. For example, he states again that P- LLC is the "doing business" name of O-P- and that we erred in our conclusion that he misrepresented the nature of his duties with O-P-, but simply repeats that his father's position as a partial owner allowed him to evaluate the Petitioner's "ability to perform as a high-ranking CEO." He asserts that his rapid promotion is not unusual for a family business, as closer interactions with the owner allow "potential heirs to the business have more intimate knowledge about the business operations, and therefore are promoted faster than outside hires." While this may be true, this statement does not adequately address the inconsistencies in the record regarding his employment with O-P- or fill in the gaps in the record to support his claims of possessing "outstanding expertise and ability in the field of [redacted] technology" at the time of his hiring.

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[2] 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*).

[3] To establish that it would be in the national interest to waive the job offer requirement, a petitioner must go beyond showing their expertise in a particular field. The regulation at 8 C.F.R. § 204.5(k)(2) defines ·'exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute. individuals of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given petitioner seeks classification as an individual of exceptional ability, or as a member of the professions holding an advanced degree, they must go beyond demonstrating a degree of expertise significantly above that ordinarily encountered in their field of expertise to establish eligibility for a national interest waiver. *See Dhanasar,* 26 I&N Dec. at 886 n.3.

In addition, the Petitioner does not address many of the other material inconsistencies and unsupported assertions which led us to find that he had willfully misrepresented facts regarding his eligibility. For instance, despite his claims to have utilized his own patented technologies in [redacted] projects for O-P-, the Petitioner does not indicate that our determination that the record lacks evidence of any patents related to [redacted] prior to the filing of his petition was in error or not in compliance with applicable law or USCIS policy.

Finally, we note that the Petitioner submits a copy of what he claims to be the amended filing of his 2019 tax return, which now shows on Schedule C that his company B- is engaged in "electrician service" rather than "janitorial services" as did the initially filed copy. However, as noted above, we do not consider new facts or evidence with a motion to reconsider. Further, even if we were to consider this evidence, it would fall far short of resolving the multiple inconsistencies and material misrepresentations in the record.

III. CONCLUSION

The Petitioner has not established that our previous decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. He has therefore not overcome our finding that he willfully misrepresented material facts in seeking eligibility as an individual of exceptional ability and a national interest waiver of that classification's job offer requirement.

ORDER: The motion to reconsider is dismissed.