U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23052630

Date: OCT. 24, 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 commercial pilot, 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 Acting Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established his eligibility as an individual of exceptional ability and 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 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.

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 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). However, meeting the minimum requirements by providing at least three types of initial evidence does not, in itself, establish that the individual in fact meets the requirements for exceptional ability. *See* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. *Id.* The officer must determine whether or not the petitioner, by a preponderance of the evidence, has demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

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.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

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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*, 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 second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate 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. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate 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

Because he has not indicated or established that he qualifies as a member of the professions holding an advanced degree, the Petitioner must meet at least three of the regulatory criteria for classification as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). In denying the petition, the Director determined that although the Petitioner fulfilled four of the regulatory criteria, he did not show his degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. After reviewing the evidence in the record, we will not disturb the Director's decision relating to the license criterion under 8 C.F.R. § 204.5(k)(3)(ii)(C). However, for the reasons discussed further below, we will withdraw the Director's decision relating to the official academic criterion under 8 C.F.R. § 204.5(k)(3)(ii)(A), the ten years of full-time experience criterion under 8 C.F.R. § 204.5(k)(3)(ii)(B), and the membership criterion under 8 C.F.R. § 204.5(k)(3)(ii)(E).[4]

> *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).

As indicated above, although the Director concluded that the Petitioner met this criterion, we will withdraw that decision. The record reflects that the Petitioner submitted a "CERTIFICATE" from [redacted] his employer, indicating that the Petitioner "has participated" in three courses. In addition, the Petitioner provided a "STUDIES CERTIFICATE" from the [redacted]

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

[4] The Director also determined that the Petitioner did not meet the salary criterion under 8 C.F.R. § 204.5(k)(3)(ii)(D) and recognition for achievements and significant contributions criterion under 8 C.F.R. § 204.5(k)(3)(ii)(F). The Petitioner does not contest the Director's determinations for these criteria on appeal. Issues or claims not addressed on appeal are deemed to be waived. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived).

reflecting that he "has been a student of the [redacted] course of 'COMMERCIAL PILOT'" and completed various subjects.

The issue for this criterion is whether an individual offered "[a]n 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" as required by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A).[5] The Petitioner, however, did not establish that the presented certificates represent "official academic record[s]" from the entities consistent with this regulatory criterion, nor do the certificates indicate that they constitute official academic records. Moreover, while the evidence shows that the Petitioner participated and completed courses, the documentation does not demonstrate that he received "a degree, diploma, certificate, or similar award." In addition, the Petitioner did not demonstrate that [redacted] or [redacted] qualify as "a college, university, school, or other institution of learning" pursuant to this regulatory criterion; he did not support the record with background information or other evidence reflecting status as a college, university, school, or other institution of learning.

For these reasons, the Petitioner did not establish that he satisfies this criterion; and therefore, we withdraw the Director's determination for this criterion.

> *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).

We will withdraw this criterion for the following reason. The Petitioner submitted a letter, entitled "WORK CERTIFICATE," from [redacted] stating that the Petitioner "serves in our company since August 10th, 2004, as a COMMANDER A319." In addition, the Petitioner offered documentation regarding his flight hours in 2018. 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 alien has at least ten years of full-time experience in the occupation for which he or she is being sought."[6] Further, the regulation at 8 C.F.R. § 204.5(g)(1) also provides that evidence relating to qualifying experience or training shall be in the form of letters from current or former employers or trainers and shall include a specific description of the duties performed by the individual or of the training received. In this case, the work certificate letter does not indicate that the Petitioner has at least ten years of "full-time experience." Although the letter states that he has been employed since 2004, the letter does not specify whether the Petitioner has been employed in a full-time capacity or has at least ten years of full-time experience with [redacted]

Because the employer letter does not show that the Petitioner has at least ten years of full-time experience, we withdraw the decision of the Director for this criterion.

[5] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).
[6] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

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 based on his membership with the Pilot Union of [redacted] Because the record does not support the regulatory requirements, we will withdraw the Director's decision for this criterion.

The record reflects that the Petitioner submitted a letter from [redacted] of the Pilots Union of [redacted] who stated:

> The Pilot Union of [redacted] has as its fundamental mission to defend labor rights, to maintain the security and efficiency of [redacted] Pilots at the highest level that they are affiliated and seek effective solutions to the controversies that arise with the Company and the aeronautical authorities in order to improve the quality of life in a favorable work environment based on the values of justice, equity and fair treatment.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations."[7] Here, the Petitioner did not establish that his membership with the Pilot Union of [redacted] is tantamount to his membership in a "professional" association. The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "*[p]rofession* 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."[8] In this case, the Petitioner did not show how a union-affiliated association qualifies as a professional association. The documentation does not reflect that the Pilot Union of [redacted] has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association consistent with this regulatory criterion.

Accordingly, the Petitioner did not demonstrate that he fulfills the regulatory requirements, and we withdraw the Director's determination for this criterion.

III. CONCLUSION

For the reasons discussed above, the Petitioner established eligibility for only one criterion, in which he must meet at least three. As such, we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. In addition, we need not reach a decision on whether, as a matter of discretion, he is eligible for or otherwise merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly,

[7] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

[8] Section 101(a)(32) of the Act defines "the 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."

we reserve these issues.[9] 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.

[9] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, n.7 (declining to reach alternate issues on appeal where an applicant is otherwise ineligible).