U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22180388

Date: SEP. 13, 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 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 Petitioner did not qualify for the EB-2 classification, and that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner submits a brief asserting that he is an individual of exceptional ability and is eligible for a national interest waiver. 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) Aliens who are members of the professions holding advanced degrees or [individuals] 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 [individual'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)(3)(ii) sets forth the following six criteria, at least three of which an individual must meet in order to qualify as an individual of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the [individual] 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 [individual] 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 [individual] 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
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

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 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.

Only those who demonstrate "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as individuals of exceptional ability. 8 C.F.R. § 204.5(k)(2).

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.

II. ANALYSIS

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. On appeal, 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.

A. Area of Exceptional Ability

As a preliminary matter, we conclude that the Petitioner has presented insufficient and inconsistent evidence regarding the nature of the occupation in which he is seeks employment in the petition. He indicated that his prospective job title is "entrepreneur," in the initially submitted Application for Alien Employment Certification, Form ETA-750 Part B, and in part 6 of the petition. He also submitted a letter describing his prospective emloyment, as follows:

> I seek employment as [an] independent business owner in the field of luxury private transportation in the U.S. Private transportation services exist to make people's [lives] easier. The main idea and goal of many private transportation services is to pick clients up at a scheduled time, driving a luxury vehicle, and taking them directly to their destination with fewer stops and less down time along the way. In light of [the] COVID-19 pandemic, my goal is to provide CDC-compliant luxury travel in a diversified fleet on-time, anytime, anywhere. . . .

The Director determined that the record did not sufficiently detail the substantive nature of his prospective employment as an "entrepreneur," observing that the Petitioner had not provided a business model or plan for his proposed business in a notice of intent to deny the petition (NOID). However, the Petitioner did not sufficiently address this aspect. In the NOID response, the Petitioner asserts that he will be "an indepenent business owner in the field of luxury private transportation in the United States and assisting the company in carrying out its mission of providing a safe vehicle and a professional and experienced

[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).

chauffeur." However, the Petitioner did not explain how he would establish and operate this business, the proposed magnitude of its business operations, or the role that he would perform therein.

On appeal, the Petitioner alleges through counsel that he "seeks employment in the field of agriculture," indicating "[u]pon being granted permanent residency, [the Petitioner] will operate a substantial business, which will result in substantial beneficial impact, the ripple effect of which will likely span across industries and, therefore, will be national in scope." The Petitioner's initial description of the proposed endeavor did not include plans to seek employment in the field of agriculture; instead, the Petitioner initially indicated that he would operate a luxury car transportation company. We conclude the appeal brief presents a new set of facts regarding the occupation in which the Petitioner seeks employment through this petition, which is material to eligibility for a national interest waiver. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *see* also *Dhanasar*, 26 I&N Dec. at 889-90.

The Petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). Here, the Petitioner's plans to seek employment in the field of agriculture presented after the filing date cannot retroactively establish eligibility. A petitioner may not make material changes to a petition that has already been filed to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which requires that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. We conclude that the Petitioner has not provided sufficient and consistent evidence to establish what his prospective occupational field will be, in order to demonstrate that he possesses "a degree of expertise significantly above that ordinarily encountered" within that occupation. 8 C.F.R. § 204.5(k)(2). Therefore, the Petitioner has not demonstrated that he is an individual of exceptional ability and that he qualifies for the EB-2 classification.

B. Evidentiary Criteria for Exceptional Ability

As discussed, the Petitioner asserted at the time of filing the petition that he is seeking employment as an "entrepreneur" through his ownership and operation of a luxury car transportation company. We reviewed and considered the evidence of record within the context of this occupational field to determine whether the Petitioner satisfies at least three of six regulatory criteria to meet the initial evidence requirements for this classification but conclude for the following reasons that he has not done so.

> *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 a "Bakalavr Diplomi" for a program of study in the field of zoology issued by the [redacted] in Uzbekistan in 1999 in support of this criterion. The Director explained in the denial and NOID that according to the Uzbekistan country overview in the Electronic Database for Global Education (EDGE), the Bakalavr Diplomi degree was first awarded in Uzbekistan

in 2000, a year after the Petitioner's diploma was issued.[3] Though requested by the Director, the Petitioner did not submit a copy of his course transcripts, an evaluation of his education credentials, or evidence that would establish how he obtained this degree in 1999, prior to when such degrees were issued by his institution of higher learning in Uzbekistan. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

On appeal, the Petitioner asserts that he holds a "Bachelor's degree in Agriculture from [redacted] in Uzbekistan," but he does not address the concerns raised by the Director in the denial and NOID. The Petitioner must resolve these 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). Without more, the Petitioner has not substantiated the authenticity of the education credential submitted in support of the petition.

Additionally, while the Petitioner asserts on appeal that his education "is directly related to [his] proposed endeavor," he has not explained how his purported degree relates to his intended occupation - ownership and operation of a luxury transportation company. The Petitioner has not met this regulatory criterion.

> *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 Director determined the Petitioner did not meet this criterion because the employment letter submitted in support of this criterion was insufficient to establish the Petitioner has at least 10 years of full-time work experience in the occupation. The 2017 letter provided by D- indicates that the Petitioner worked for "more than 10 years" as a "zoology engineer specializing in safety and lowering the risk of infectious [diseases] and safety of the environment." As noted by the Director in the denial, the letter did not provide the Petitioner's dates of employment, indicate whether the employment was full-time, or give specific details concerning the nature of his duties and responsibilities.

On appeal, the Petitioner alleges that he "has the requisite 10 years of experience in the occupation that is directly related to his proposed endeavor," but he does not address the Director's concerns about the submitted evidence which were discussed in detail within the denial. 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." Here, the record does not include letters that comport with the evidentiary requirements for this criterion.

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[3] EDGE is operated by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO is described on its website as "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions in over 40 countries." http://www.aacrao.org/who-we-are. EDGE is described on its registration page as "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. *See* https://www.aacrao.org/edge/country/credentials/uzbekistan.

Notably, the Petitioner indicated in his initial letter and in the NOID response that commencing in 2002 he was employed for over 15 years in his "own bird breeding business. . . . in which I bred birds for their eggs, for meat and to be sold." The Petitioner has not explained his concurrent employment by D- as a zoology engineer and operation of his bird breeding business relates to his proposed luxury car transportation business. *Matter of Ho*, 19 I&N Dec. at 591-92. 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)

In response to the NOID, the Petitioner asserted that he met this criterion through comparable evidence provided in the record. The Director determined that the Petitioner did not meet this criterion as he had not demonstrated that his employment in the proposed occupation requires a license, and the evidence in the record did not show that the Petitioner has licensure or a certification to practice for any particular profession or occupation. We agree.

On appeal, the Petitioner reiterates that he meets this criterion through comparable evidence, but he does not identify or discuss the specific evidence, if any, in the record that should be considered as part of this determination. When dismissing an appeal, we generally do not address issues that were not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be "waived."[4] Since the Petitioner did not address this issue with specificity on appeal, we deem the issue waived and conclude the Petitioner has not met this criterion.

> *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 Petitioner did not assert eligibility under this criterion before the Director, thus, the Director determined that the Petitioner did not meet this criterion. On appeal, the Petitioner asserts "[b]ased on the documentation in the record, the [Petitioner] clearly established that this criterion has been met, and USCIS erred in finding otherwise," but he does not identify or discuss the specific evidence, if any, in the record that should be considered as part of this determination. Since the Petitioner did not address this issue with specificity on appeal, we deem the issue waived and find the Petitioner has not established that he meets this regulatory criterion.

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

Since the Petitioner does not raise this issue on appeal, we deem the issue waived and find the Petitioner has not established that he meets this regulatory criterion.

[4] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). The courts' view of issue waiver varies from circuit to circuit. *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); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (finding that an issue referred to in an affected party's statement of the case but not discussed in the body of the brief is deemed waived); *but see Hoxha v. Holder*, 559 F.3d 157, 163 (3d Cir. 2009) (issue raised in notice of appeal form is not waived, despite failure to address in the brief).

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 Director concluded that the evidence of record was insufficient to meet this criterion. On appeal, the Petitioner asserts that the Director erred in his determination, but he does not identify the basis for his assertions regarding error on the part of the Director. Since the Petitioner did not address this issue with specificity on appeal, we deem the issue waived and find the Petitioner has not established that he meets this regulatory criterion.

In summary, the record supports the Director's finding that the Petitioner did not meet at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, 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.

C. 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 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.