U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24570782

Date: APR. 10, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, a photographer, seeks classification as a member of the professions holding an advanced degree or of exceptional ability, Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this employment based second preference (EB-2) classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so. *See Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

The Director of the Texas Service Center denied the petition, concluding that analysis of whether a discretionary waiver of the job offer requirement, and thus a labor certification, was not required because the record did not establish that the Petitioner qualified for classification as an individual of exceptional ability. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petition 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, but only if a petitioner categorically establishes eligibility in the EB-2 classification.

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 the sciences, arts, or business." To demonstrate

exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

> (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;
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> (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;
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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 alien 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
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> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

But meeting at least three criteria does not, in and of itself, establish eligibility for this classification.[1] We will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

If we conclude that a petitioner has an advanced degree or is of exceptional ability such that they have established their eligibility for classification as an immigrant in the EB-2 classification, we evaluate the national interest in waiving the requirement of a job offer and thus a labor certification.

Whilst 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). *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen 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.

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exemptional ability. *See generally* 5 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

II. ANALYSIS

The Petitioner is a photographer seeking to demonstrate eligibility in the EB-2 classification based on their exceptional ability. A Petitioner must demonstrate expertise significantly above that ordinarily encountered to show that they are of exceptional ability. In support, the Petitioner submitted an official academic record showing that they had earned a certificate in photography from a national vocational institution of learning, letters purporting to indicate more than 10 years of full-time work experience as a self-employed or independently contracting/freelance photographer who has made significant contributions and achievements to the field, a Federal Aviation Administration (FAA) license to pilot drone aircraft purported as required for the occupation, and evidence of membership in "professional organizations."

We agree with the Director's ultimate decision that the Petitioner is not of exceptional ability and therefore categorically ineligible for the EB-2 classification. Although the Petitioner has demonstrated that they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(A), we disagree with the Director that the Petitioner met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(B), (C), and (E). And we do not find that the Petitioner demonstrated eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(F). So the Petitioner has not demonstrated that they have exceptional ability for the reasons set forth below.[2]

> *Evidence in the form of letter(s) from current or former employer(s) showing that the noncitizen 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 disagree with the Director's conclusion that the Petitioner met this criterion and hereby withdraw it. The Petitioner has submitted unexplained conflicting information about their full-time engagement in the occupation for a 10-year period. Unexplained and conflicting information casts doubt on whether the Petitioner has the requisite full-time experience they attest to. It is incumbent upon the Petitioner to explain and resolve any inconsistencies in the record. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

With their initial submission, the Petitioner attempted to establish that they had 10 years of full-time employment as a photographer with numerous recommendation letters from individuals who had engaged them for their services from time to time at individual milestone events in the writer's families. With their RFE response, the Petitioner supplemented the recommendation letters with three letters. One letter was written by an individual representing themselves as an accountant who worked with the Petitioner's businesses in Brazil attesting that they worked full time as a photographer 40 to 50 hours per week from August 2007 to November 2019. One letter was written by a person on behalf of a company attesting to have utilized the Petitioner's photography services but not specifying whether this was on a full time or part time basis for the period that they worked with the Petitioner. One final letter was written by the representative of an event center, who stated that the event center had utilized the Petitioner's services from 2003 to 2018.

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[2] The Petitioner did not provide evidence of a salary, or other remuneration for services, which demonstrates exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(D). So the Petitioner has abandoned that ground.

The Petitioner also submitted their personal statement with the RFE within which they expressed that they started their photography career at the age of 16 and enjoyed a military career from the age of 18 in 1985 to 2015 when they retired. There is no objective evidence in the record of the Petitioner's career between the ages of 16 and 18. It is also unclear from the record how the Petitioner could have dedicated themselves full time to their military career and simultaneously been working 40 to 50 hours a week as a photographer. The Petitioner states that they restricted their activities as a photographer so as not to interfere with their military career despite the photography activities being more financially lucrative. The Petitioner also states in their personal statement that their photography activities during their military career were "extra activities." It appears that the Petitioner's photography activities during their military career were a hobby or part time employment and not the full-time employment the Petitioner is representing.

The record contains documents that could tend to show that the Petitioner took on photography as a full-time pursuit after their 2015 retirement from their military career. But 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." And less than 10 years have elapsed from 2015 to the date of filing of this petition.

The Petitioner has the burden to establish eligibility for the requested immigration benefit. *See* section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Specifically, the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing of the application or petition and continuing through the issuance of the final decision (unless otherwise specified in the Act or regulations). *See* 8 C.F.R. § 103.2(b). Because of the unresolved inconsistencies in the documents and information the Petitioner has submitted into the record, we cannot conclude that the Petitioner has the requisite 10 years of full-time experience in the occupation of photographer.

> *Evidence of a license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

We disagree with the Director's conclusion that the Petitioner met this criterion based on their FAA license to pilot a drone and hereby withdraw it. The Petitioner's occupation is that of a photographer. The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C) requires a petitioner present a license to practice their profession or certification for their particular profession or occupation. A profession as defined at section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), includes but is not limited to architects, engineers, lawyers, physicians, surgeons, teachers in elementary or secondary schools, colleges, academies, or seminaries. The U.S. Department of Labor maintains a non-dispositive list of professional occupations that customarily requires a bachelor's or higher degree. *See* Update to Appendix A to the Preamble-Education and Training Categories by O*NET-SOC Occupations; Labor Certification for Permanent Employment of Immigrants in the United States and Procedures To Establish Job Zone Values When O*NET Job Zone Data Are Unavailable, 86 Fed. Reg. 63070 (Nov. 15, 2021). The occupation of photographer is not included in the statutory list, nor does it appear as an occupation that customarily requires a bachelor's or higher degree. Additionally, the DOL's *Occupational Outlook Handbook* (*Handbook*) reflects that the typical entry-level education requirement for a photographer is a high school diploma. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Photographers (Sept. 8, 2022),

https://www.bls.gov/ooh/photographers.htm. So a photographer is not a member of the professions per the statute.

And an FAA license to pilot drones is not a license or certification for the photography occupation. Irrespective of the fact that a part of the Petitioner's work as a photographer utilizes drones for which he needs a license, the license is not a mandatory requirement for their job as a photographer. A person can be a photographer without an FAA drone license. An FAA license to pilot a drone is required for the occupation of a drone pilot. As drone pilot is not the endeavor the Petitioner seeks to undertake, it follows that the license is not required for the particular profession or occupation and is therefore not sufficient to meet the requirements of the regulation. Accordingly, we cannot conclude that the Petitioner has a license to practice the profession or certification for a particular profession or occupation.

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

We do not agree with the Director's conclusion that the Petitioner met this criterion and hereby withdraw it. The Petitioner's membership in the Professional Photographers of America is not sufficient evidence of membership in a professional association. The Professional Photographers of America is not a professional association. As noted above, the occupation of photographer does not appear in the list of professions contained at section 101(a)(32) of the Act, and it is not included as an occupation that customarily requires a bachelor's or higher degree. *See* Update to Appendix A to the Preamble-Education and Training Categories by O*NET-SOC Occupations; Labor Certification for Permanent Employment of Immigrants in the United States and Procedures To Establish Job Zone Values When O*NET Job Zone Data Are Unavailable, 86 Fed. Reg. 63070 (Nov. 15, 2021). Consequently, an association of photographers is not a professional association as that term is contemplated in the regulations, and the Petitioner has not met this criterion.

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 Petitioner argued in their RFE response and now argues at appeal that the Petitioner has been recognized for achievements and significant contributions to photography by peers, governmental entities or professional or business organizations. In support, the Petitioner submitted numerous letters of recommendation prepared contemporaneously with these immigrant petition proceedings.

The evidence the Petitioner submits does not meet the standard of proof because it does not satisfy the basic standards of the regulations. *See Matter of Chawathe*, 25 I&N Dec. at 374 n.7. The regulation requires evidence of recognition of achievements and significant contributions. When read together with the regulatory definition of exceptional ability, the evidence of recognition of achievement of significant contributions should show expertise significantly above that ordinarily encountered in the field. The Petitioner's letters of recommendation contain vague statements about the Petitioner's photographic skills that the Petitioner would like us to conclude are recognition of achievements and significant contributions. But these statements are not supported by any evidence in the record which reflects that these are noteworthy as achievements and significant contributions. For example, a letter in the record supported by photos taken at altitude credits the Petitioner with the achievement of taking

good photographs under difficult conditions. However, the evidence in the record does not show why this is especially noteworthy and how it constituted an achievement in, and a significant contribution to, the field of photography. Numerous individuals wrote effusive statements of appreciation to the Petitioner for documenting major life events such as family weddings. They credited the Petitioner with preserving their happy memories through the skill of his work. The record contains many pictures purportedly taken by the Petitioner of weddings and other events. However, it is not clear from the evidence how the wedding pictures the Petitioner takes are achievements in, and significant contributions to, the field of photography significantly above that ordinarily encountered in the field of photography. In a similar vein, local business owners attest that the Petitioner's activities resulted in better web presences for their business. Again, the business owners' attestations are not supported by evidence in the record demonstrating an achievement in and significant contribution to the field of photography above that ordinarily encountered in the field. So we cannot conclude that the Petitioner meets this ground of eligibility.

III. CONCLUSION

The Petitioner has established eligibility in only one of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). So they cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). And 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, the Petitioner is eligible for or otherwise merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve these issues. *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 alternate issues on appeal where an applicant is otherwise ineligible). The appeal is dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.