U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26375453

Date: APR. 24, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur and manager in the field of construction, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability. *See* 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 EB-2 immigrant 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.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualified for the underlying EB-2 classification and, therefore, the issue of qualifying for a national interest waiver was moot to the petition's decisional outcome. 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

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] If a petitioner does so, 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.

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

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

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[3], grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.[4]

II. ANALYSIS

The Petitioner intends to work as a security management specialist it the field of construction, claiming qualification as an individual of exceptional ability.

As stated above, establishing that a petitioner is an individual of exceptional ability requires satisfaction of at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner initially claimed—and does so again on appeal—that he qualifies under the following five[5] categories of evidence:

- (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.

- (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.

- (D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability.

- (E) Evidence of membership in professional associations.

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

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[3] *See also 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).

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

[5] The Petitioner does not claim or otherwise reference the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). We therefore consider this category to be waived.

The Director determined that the Petitioner met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E) by demonstrating his membership in the American Management Association (AMA). The Director also determined, however, that the evidence of record did not establish that the Petitioner met any of the other criteria under which he claimed eligibility as an individual of exceptional ability. Because the Petitioner did not meet at least three of the six criteria to establish his eligibility for the EB-2 classification, the Director deemed the issue of whether he qualifies for a national interest waiver moot and denied the petition, concluding that the Petitioner did not establish eligibility for the benefit sought.

We adopt and affirm the Director's decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

The Director thoroughly reviewed, discussed, and analyzed the evidence of record, which largely included, in response to a request for evidence, the resubmission of documents originally contained within the record. The Director considered how the evidence submitted related to the criteria for establishing exceptional ability and explained how the evidence did not meet the requirements of four of the five the criteria claimed.

On appeal, the Petitioner has again submitted much of the same documentation previously included in the record, requesting that USCIS reopen and reconsider his case.[6] In addition to his brief, the Petitioner has submitted additional evidence to support his eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(F); this evidence is in the form of declarations from two architects, two real estate brokers, a civil engineer, and a public defender who attest to the Petitioner's competence and the quality of his work as it relates to his management of various construction projects. While these letters collectively speak to the Petitioner's character and the caliber of his work, they do not speak to any achievements or significant contributions that the Petitioner has made to the construction industry. After review of the entirety of the record, we conclude that the Petitioner has not established that he qualifies as an individual of exceptional ability.

The record does not establish that the Petitioner meets the requirements for EB-2 classification. Because the identified basis for dismissal is dispositive of the Petitioner's appeal, we decline to reach and reserve arguments concerning the Petitioner's eligibility for a national interest waiver under the *Dhanasar* framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that "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 alternative issues on appeal where an applicant is otherwise ineligible).

[6] Rather than treat this filing as a motion to reopen and reconsider, because the Petitioner checked box 1.a. under Part 2 of his Form I-290B, Notice of Appeal or Motion, we have treated this filing as an appeal and have reviewed the evidence of record de novo.

III. CONCLUSION

In conjunction with the foregoing analysis, we adopt and affirm the Director's decision. The petition will remain denied.

ORDER: The appeal is dismissed.