U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27310821

Date: JULY 12, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in the areas of foreign trade, business development, transportation management, and logistics management, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability as well as a national interest waiver of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner is 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. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Petitioner contends that the Director did not apply the proper standard of proof in this case, instead imposing a stricter standard, and erroneously applied the law to his detriment.

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 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. Section 203(b)(2)(B)(i) of the Act.

"Exceptional ability" in the sciences, arts, or business 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. *See* 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. We will then conduct a final merits determination to decide

[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).

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.[2]

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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.

II. ANALYSIS

As indicated above, the Petitioner must first 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 the Petitioner did not meet at least three of the six criteria. On appeal, the Petitioner maintains that he meets at least three of the six criteria. After reviewing the evidence in its totality, we conclude that the record does not support that he meets at least three criteria.

> *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 Director determined that the Petitioner did not establish eligibility for this criterion. The Petitioner contends that he meets this criterion based on the documents submitted at the time of filing his petition and in response to a request for evidence (RFE). A review of the record of proceeding reflects that the Petitioner submitted sufficient documentary evidence establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A).

In response to the RFE, the Petitioner submitted copies of certificates of various courses taken in learning institutions, which show that he has completed Microsoft Access, Excel, Introduction to Computer Science and Typing, Introduction to Maritime Transportation, Quality System, Introduction to Lotus, Lotus Notes, and Integrated Foreign Trade System in various learning institutions. The Petitioner proposed to work in the United States as an entrepreneur in the areas of foreign trade, business development, transportation management, and logistics management. The courses taken by the Petitioner are related to the areas of his claimed exceptional ability. Accordingly, he meets this criterion.

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

[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).

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).

The Director determined that the Petitioner established eligibility for this criterion. A review of the record of proceeding reflects that the Petitioner submitted sufficient documentary evidence establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B).

The Petitioner submitted a letter from [redacted], the vice president of [redacted][4] which states that the Petitioner was the chief executive officer of the company from May 2005 and May 2016. The Petitioner also submitted a letter from [redacted], the vice president of [redacted][5] which states that the Petitioner has been the chief executive officer of the company since August 2018. Although these letters do not indicate whether the Petitioner worked for the company full-time or part-time, we determine that these letters establish by a preponderance of the evidence that the Petitioner has at least 10 years of full-time experience in the occupation for which he is being sought based on the length of the Petitioner's employment and the job responsibilities described in the letters. Accordingly, he meets this criterion.

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

The Director determined that the Petitioner did not establish eligibility for this criterion. The Petitioner maintains that he meets this criterion based on the documents submitted at the time of filing his petition and in response to the RFE. However, a review of the record of proceeding does not reflect that the Petitioner submitted sufficient documentary evidence establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C) for the reasons stated below.

In response to the RFE, the Petitioner submitted a copy of his customs agent identification card, which shows that he was registered as a customs agent with the [redacted] in the [redacted] in Brazil from September 18, 2016 to July 12, 2020. The Petitioner also submitted a copy of the [redacted] dated October 16, 2006, which indicates the Petitioner was registered with the [redacted] in Brazil on October 11, 2006 to be a customs broker helper and a customs broker. While these documents show the Petitioner's professional registration as a customs agent, a customs broker helper, and a customs broker in Brazil, they do not establish that he had a license to practice the profession or certification for a profession to meet this criterion. Accordingly, the Petitioner does not meet 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).

[4] The Articles of Association of [redacted] dated May 6, 2004, states that the company will provide foreign trade consulting services, freight services, charter services, and logistics services.

[5] The Articles of Association of [redacted] dated August 7, 2018, states that the company was formed to engage in maritime agency activities and to be a shipping or clearance agent.

The Director determined that the Petitioner did not establish eligibility for this criterion. The Petitioner claims that he meets this criterion based on the documents submitted at the time of filing his petition and in response to the RFE. However, a review of the record of proceeding does not reflect that the Petitioner submitted sufficient documentary evidence establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D) for the reasons outlined below.

In response to the RFE, the Petitioner submitted a letter from his accountant, [redacted] states that the Petitioner earned 265,000 Brazilian real (BRL), which is equivalent to $85,000, from [redacted] in 2015, BRL 280,000 and BRL 270,000, from [redacted] in 2016 and 2017, and BRL 320,000 from [redacted] in 2018. The Petitioner also submitted federal tax returns of [redacted] from 2020 and 2021 and his and his spouse's federal tax returns from 2020 to 2021. The Petitioner and his spouse's tax returns reflect that their taxable income was $55,420 in 2020 and $70,385 in 2021.

Regarding the letter from his accountant, as the Director noted, the Petitioner did not provide evidence of his salary, such as his paystubs, bank statements, or other sufficient evidence. Statements made without supporting documentation are of limited probative value and are not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). In addition, tax returns of a business entity of which the Petitioner is the president do not provide evidence of the Petitioner's income because a corporation and an individual are two separate legal entities. *See Matter of Soffici*, 22 I&N Dec. 158, 162 (Assoc. Comm'r 1998). This is true even if the individual is the sole shareholder of the business. *See id.* at 161-63. Moreover, tax returns of the Petitioner for 2020 and 2021 - one year after filing his petition - does not establish his eligibility at the time of filing his visa petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). That decision, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), further provides that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

Furthermore, the record does not contain sufficient evidence of an average salary of an entrepreneur in the areas of foreign trade, business development, transportation management, and logistics management in Brazil during the period of the Petitioner's employment or other sufficient evidence to establish that the Petitioner's salaries were indicative of his claimed exceptional ability relative to others working in the field. Without sufficient corroborating evidence, the Petitioner did not demonstrate that he commanded a salary or other remuneration for services, which demonstrates exceptional ability. Accordingly, he does not meet this criterion.

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

The Director determined that the Petitioner did not establish eligibility for this criterion. The Petitioner contends that he meets this criterion based on the documents submitted in response to the RFE. However, a review of the record of proceeding does not reflect that the Petitioner submitted sufficient

documentary evidence establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) for the reasons stated below.

The Petitioner claimed eligibility for this criterion based on his memberships with American Management Association (AMA), DOT Compliance Group, International Association of Movers (IAM), and Association of Supply Chain Management (ASCM) and provided evidence of the claimed memberships and printouts from the websites of these organizations.

The AMA website indicates that the AMA is a leadership training company that provides resources and guidance to individuals and organizations. The DOT Compliance Group website indicates that DOT Compliance Group serves the trucking industry with an automated and affordable program to meet Federal drug and alcohol testing requirements. The IAM website states that the IAM is a global trade association of the moving and forwarding industry, and it comprises companies that provide moving, forwarding, shipping, logistics, and related services in more than 170 countries. The ASCM website states that the ASCM is a nonprofit association of supply chain. The record does not reflect that these organizations are professional associations. "Profession" means one of the occupations listed in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32),[6] as well as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. 8 C.F.R. § 204.5(k)(2).

In addition, a certificate of membership of the IMA, which was provided as evidence of the Petitioner's claimed membership with the IMA, listed [redacted] as a member of the IMA. The Petitioner is not listed as a member of the IMA, and the IMA website indicates that the IMA comprises companies that provide moving, forwarding, shipping, logistics, and related services. Since the Petitioner is not a company, he cannot be a member of this organization. The Petitioner has not established that he is a member of the IMA or a professional association. Accordingly, the Petitioner does not meet 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 Director determined that the Petitioner did not establish eligibility for this criterion. The Petitioner contends that he meets this criterion based on the documents submitted at the time of filing his petition and in response to the RFE. The Petitioner further contends that he was deprived of due process rights and a fair treatment under USCIS policy, the U.S. Constitution, and international treaties. The Petitioner claims that the Director erroneously denied further analysis of this criterion. A review of the record of proceeding does not reflect that the Petitioner submitted sufficient documentary evidence establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) for the reasons outlined below.

[6] 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. Section 101(a)(32) of the Act.

USCIS administers the EB-2 program pursuant to statutory and regulatory authorities, and the Petitioner does not argue that a specific provision of the EB-2 statute or regulations is unconstitutional. To the extent that the Petitioner's due process argument had been grounded in the constitutionality of the EB-5 statute and regulations, we lack jurisdiction to rule on the constitutionality of laws enacted by Congress or of regulations promulgated by the Department of Homeland Security. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). Therefore, we will consider the Petitioner's due process concerns as they relate to whether the Director complied with the applicable statute and regulations.

In support of his application for permanent residence in the United States, the Petitioner submitted various letters from his former colleagues, business partners, and employers. These writers provided their professional or business backgrounds, explained their relationships with the Petitioner or his companies in Brazil, and described the projects they worked together with the Petitioner's companies and the work provided by the Petitioner for their companies. These writers praise the Petitioner's excellent management ability, extensive network, professional experience, knowledge in customs, and logistic expertise, and acknowledge positive outcome their companies achieved or positive feedback they received from their customers through the transportation or logistics services provided by the Petitioner and his companies. However, these letters do not discuss the Petitioner's achievements or significant contributions to the areas of foreign trade, business development, transportation management, and logistics management. While helpful, the support letters do not sufficiently demonstrate recognition for the Petitioner's achievements and significant contributions to the Petitioner's field by his peers or business organizations. Accordingly, the Petitioner does not meet this criterion.

For the reasons we have discussed above, the Petitioner has not established by a preponderance of the evidence that he meets at least three of the six regulatory criteria. Since the Petitioner has not established eligibility for at least three of the six criteria, we need not provide a final merits determination to evaluate whether the Petitioner has achieved the level of expertise required for exceptional ability classification. Furthermore, because the issue identified in this decision determines the outcome of the Petitioner's appeal, we need not reach a decision on whether he is eligible for or otherwise merits a national interest waiver as a matter of discretion under the *Dhanasar* analytical framework. We will reserve these issues for future consideration should the need arise.[7]

III. CONCLUSION

As the Petitioner has not established by a preponderance of the evidence that he is a member of the professions holding an advanced degree or an individual of exceptional ability, the Petitioner has not demonstrated eligibility for the EB-2 visa classification.

The appeal will be dismissed for the above-stated reasons, with each considered as an independent and alternate basis for the decision.

[7] *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).

ORDER: The appeal is dismissed.