U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27887480

Date: JULY 26, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, who describes himself as an "advertising and marketing specialist," seeks classification as an individual of exceptional ability in the sciences, arts or business. *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 Petitioner did not qualify 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 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) of the Act. For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability:

> (A) An official academic record showing that the [noncitizen] 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 [noncitizen] has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the [noncitizen] has commanded a salary, or other renumeration [sic] for services, which demonstrates exceptional ability;

(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.

8 C.F.R. § 204.5(k)(3)(ii).

In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides, "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

The Director concluded that the record does not satisfy at least three of the six exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii) and, therefore, the Petitioner is not eligible for second preference classification. More specifically, the Director found that the record satisfies the criteria at 8 C.F.R.

§ 204.5(k)(3)(ii)(A) and (C) but that the record does not satisfy the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B), (D), or (F). The Director did not comment in the decision on whether the record satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E); however, in a prior request for evidence (RFE), the Director specifically observed that the Petitioner had not submitted any evidence to establish that he satisfies that criterion. On appeal, the Petitioner reasserts that he satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B), (D), and (F), in addition the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (C). The Petitioner further asserts on appeal that comparable evidence, as contemplated by 8 C.F.R. § 204.5(k)(3)(iii), establishes his eligibility. For the reasons discussed below, we will withdraw the Director's conclusion that the record satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). Furthermore, for the reasons discussed below, the record does not establish that the Petitioner satisfies at least three of the exceptional ability criteria.

First, the criterion 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 [noncitizen] has at least ten years of full-time experience in the occupation for which he or she is being sought." The Director acknowledged that the record contains "contract information that the [P]etitioner worked on." However, the Director found that "the [P]etitioner's experience does not appear to be related to the proposed endeavor." Therefore, the Director concluded that the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

On appeal, the Petitioner generally asserts that he has "more than ten (10) years of full-time experience within the field of occupation, holding positions of high responsibilities" and he discusses the general duties of a "sports marketing professional." However, the Petitioner does not specifically state which particular items of evidence satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B). We note, however, that in response to the Director's RFE, the Petitioner listed the names of nine companies that have employed him since 1992, and he asserted that "evidence marked as Exhibit B" attached to his RFE response is "proof of [his] full-time experience within the occupation."

We first note that the Petitioner entirely omitted information in Part 6. Basic Information About the Proposed Employment on the Form I-140, Immigrant Petition for Alien Workers, such as the proposed employment's job title. Likewise, the Petitioner omitted his existing occupation from Part 5. Additional Information About the Petitioner. Despite the omission of basic information from the Form I-140, in support of the filing the Petitioner generally described the proposed endeavor as "act[ing] as an [a]dvertising and [m]arketing [s]pecialist . . . to maximize sales and increase revenues for his clients, which will range from print to TV to digital media providers." Therefore, the "occupation for which [the Petitioner] is being sought," for the purposes of 8 C.F.R. § 204.5(k)(3)(ii)(B), is an advertising and marketing specialist.

Neither the documents referenced by the Petitioner in response to the Director's RFE nor the remainder of the record satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B). Exhibit B of the Petitioner's RFE response consists of three one-page certificates written in a language other than English, and corresponding English translations of them. The documents certify that the Petitioner "correctly participat[ed] in the FIFA Litigation Course" in October 2022, that he "participat[ed] and correctly pass[ed] with a grade of 100/100 the Sports Law Course" in September 2022, and that he "correctly complet[ed] the FIFA Agent Course" in May of some unspecified year.

A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Neither of the certificates dated 2022 may establish eligibility because they are dated after the petition filing date in 2021. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. In turn, the undated certification bears minimal probative value because it does not establish the year in which the Petitioner acquired such certification; therefore, it does not establish that he held such certification at the time of filing. *See id.*

Even to the extent that the certificates can establish eligibility, none of the certificates, as translated in English, nor any other documents in the record, purport to be from a current or former employer of the Petitioner, nor do they describe duties the Petitioner performed while employed in order to establish whether the experience is in the occupation for which he is being sought, nor do they indicate whether the experience the Petitioner gained was on a full-time basis and the duration of his experience. Because the record does not contain evidence in the form of letters from current or former employers showing that the Petitioner has at least 10 years of full-time experience in the occupation for which he is being sought, it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

Next, the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) requires "[a] license to practice the profession or certification for a particular profession or occupation." As noted above, the Director concluded that "[t]he submitted evidence meets this criterion."

The record does not support the Director's conclusion that the record satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). As noted above, the Petitioner describes himself as an "advertising and marketing specialist." The record does not establish that advertising and marketing requires a license to practice the profession or the type of certification for a particular profession or occupation, as contemplated by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). Moreover, even if advertising and marketing required the type of license or certification contemplated by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C), the record does not contain evidence of a qualifying license or certification. As discussed above, the Petitioner submitted three one-page certifications written in a language other than English, and corresponding English translations of them. The documents certify that the Petitioner "correctly participat[ed] in the FIFA Litigation Course" in October 2022, that he "participat[ed] and correctly pass[ed] with a grade of 100/100 the Sports Law Course" in September 2022, and that he "correctly complet[ed] the FIFA Agent Course" in May of some unspecified year. These certifications relate to information regarding athletic competitions in general, and soccer more specifically; however, the record does not establish that the profession of advertising and marketing specialists—which covers subjects not limited to athletic competitions in general, and soccer more specifically—requires such certifications in order to advertise goods or services. Furthermore, as discussed above, none of the certifications establish that the Petitioner held such certification—regardless of their relevance to the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C)—at the time of filing. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. Based

on the foregoing, we withdraw the Director's conclusion that the record satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

Next, the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires "[e]vidence that the [noncitizen] has commanded a salary, or other renumeration [sic] for services, which demonstrates exceptional ability." The Director acknowledged that the record contains "information regarding payments for contract work the [P]etitioner received on various projects." However, the Director found that "the [P]etitioner did [not] submit evidence how [his] claimed exceptional ability led to a high salary or other remuneration relative to others in the field." Therefore, the Director concluded that the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

On appeal, the Petitioner asserts that "[the record] shows different pieces of evidence showing the attainment of remuneration for services within the field," which he describes as follows:

- [redacted] School [c]ontract to carry out the execution of a sports facility project;
- [redacted] Neighborhood Sports League ([i]ndoor football) contract for [m]aintenance [s]ervices of [f]ootball fields;
- College of Civil Engineers [redacted] synthetics grass maintenance contract;
- Construction of [c]ivil [w]orks of [a]thletic [t]rack inside the [redacted] Stadium in the city of [redacted] Ecuador "contract";
- Athletic [t]rack ESMA advisory services contract;
- Soccer [c]ourt [s]ynthetic [l]awn [m]aintenance contract (7,020 M[]2); and
- Purchase agreement contract "Sale and installation of sports synthetic grass for children's play area."

The record contains contracts written in a language other than English, and corresponding English translations of them, matching those described by the Petitioner. However, we first note that the document titled "Contract for the 'Construction of Civil Works of Athletic Track Inside the [redacted] Stadium in the City of [redacted] Province [redacted]" as translated in the record, does not identify the Petitioner or any entity apparently related to the Petitioner as a party to the contract or as a recipient of any remuneration. Therefore, the record does not establish how that contract relates to any remuneration the Petitioner has received. We next note that the evidence relating to the Petitioner's six hours of maintenance services for the [redacted] neighborhood sports league's "synthetic football fields" is a half-page letter confirming completion of the task, rather than a contract per se.

The record does not establish how the contracts to which the Petitioner is a party are evidence that the Petitioner has commanded a salary or other remuneration for services, *which demonstrates exceptional ability*, as required by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D). As noted above, the Petitioner purports to have an exceptional ability as an advertising and marketing specialist. However, the respective contracts in the record are generally for the construction, installation, or maintenance of athletic surfaces, not for advertising or marketing. The record does not establish how evidence of remuneration for the cost of goods and labor for the construction, installation, or maintenance of athletic surfaces is evidence of remuneration the Petitioner has received for advertising or marketing services. We note that, as an exception, the "[a]thletic [t]rack ESMA advisory services contract" referenced by the Petitioner indicates that he would provide "consulting services" and "advice of the

contracted goods," rather than construction, installation, or maintenance of athletic surfaces directly; however, again the record does not establish how evidence of remuneration for consulting services regarding the construction, installation, or maintenance of athletic surfaces is evidence of remuneration the Petitioner has received for advertising or marketing services.

Even to the extent that the contracts may relate to the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), as the Director noted, the record does not establish how the various remuneration the Petitioner received in connection with the contracts demonstrates any particular level of ability, whether exceptional or otherwise. For example, the record does not establish the context for the respective contracts' remuneration, whether they are relatively higher, lower, or average as compared to other remuneration for similar circumstances. Because the record does not contain evidence that the Petitioner has commanded a salary or other remuneration for services that demonstrates exceptional ability, it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

Next, the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." The Director concluded that the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) because "the evidence does not indicate that the achievements and significant contributions to the industry have been recognized by peers, governmental entities, or professional or business organizations."

On appeal, the Petitioner asserts that "several commercial and work references form multiple distinguished clients [sic]" satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), which the Petitioner summarizes as follows:

- [redacted] installation of 400 square meters of 20 mm syntetic grass project [sic];
- [redacted] Civil Work I.S.M. & ESMIL;
- Green [f]ields accreditation of distribution and installation of synthetic grass, construction of bases and drains, construction of perimeter gutters and maintenance work;
- [redacted] [i]ndoor football [s]ports [l]eague maintenance service for synthetic football fields;
- Evolux 680 square meter 13mm EPDM synthetic floor for [redacted] [sic]; and
- Arkano 13 mm cast in situ synthetic material at 675m2 for the [redacted] Performance in [redacted]

The record contains one-page letters from the parties identified by the Petitioner, written in a language other than English, and corresponding English translations. However, none of the letters, as translated in the record, constitute evidence of recognition for achievements and significant contributions to the industry or field of advertising and marketing—or any other industry or field. The respective letters assert that the Petitioner "carried out [work] to satisfaction," "is our client," was "our distributor of Sports, Flooring and Equipment Sports Partner in the territory of Ecuador," "performed the maintenance service for the synthetic football fields," "provided us with the materials and installation of a 680-square-meter 13mm EPDM synthetic floor . . . adhering to the requirements and demands of

the construction site," "installed us 13 mm cast-in-situ synthetic material . . . complying with installation times," and "[m]aintained the [s]ynthetic [s]occer [f]ield." Regardless of whether the completion of discrete projects between a contractor and a client constitute the type of contributions to an industry or field, as contemplated by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), the plain language of the letters from the Petitioner's clients merely indicate that he completed the projects for which the parties contracted, without stating how any of the work amounts to the type of achievements or *significant* contributions contemplated by 8 C.F.R. § 204.5(k)(3)(ii)(F). Moreover, as discussed above, the record does not establish how the Petitioner's completion of contracts for the construction, installation, or maintenance of athletic surfaces relate to the field of advertising and marketing. Because the client letters confirming the Petitioner's completion of construction, installation, or maintenance work for which he contracted do not establish how such work amounts to significant contributions to the industry or field of advertising and marketing, they do not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

The criterion at 8 C.F.R. § 204.5(k)(3)(iii) contemplates "comparable evidence to establish the beneficiary's eligibility" if the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation. On appeal, the Petitioner asserts that the Director "failed to make a final merit determination based on . . . comparable . . . evidence of eligibility." More specifically, the Petitioner asserts that he "has achieved numerous important contracts and sales within the sports field, thanks to his marketing exceptional abilities," and thus demonstrates "commercial success in the field" as comparable evidence of exceptional ability. The Petitioner also asserts that he "has established proof performance of [sic] a critical role in distinguished organizations in the field of sports marketing and sales such as [redacted], among others," and thus demonstrates "evidence of performance of a critical role in distinguished organizations" as comparable evidence of exceptional ability.

We first note that the Petitioner does not assert on appeal—nor does the record support the conclusion—that the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation of advertising and marketing specialists.[1] Instead, the Petitioner simply requests comparable evidence to be considered in lieu of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Even if the record established why the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to advertising and marketing specialists, the Petitioner's assertion on appeal that the contracts, discussed above, constitute comparable evidence of his exceptional ability, is misplaced. As noted above, the Petitioner purports to have an exceptional ability as an advertising and marketing specialist. However, as discussed above, the respective contracts in the record are generally for the construction, installation, or maintenance of athletic surfaces, not for advertising or marketing. The record does not establish how evidence of contracts for the construction, installation, or maintenance of athletic surfaces is evidence of the Petitioner's commercial success in the field of advertising and marketing. For example, the record does not establish that any of the parties to the contracts for the Petitioner's goods or services contracted with him as a result of his advertising or marketing, rather than for any other reason such as a referral, convenience, availability, more competitive bidding, or any other reason unrelated to the Petitioner's advertising or marketing.

[1] On the contrary, as discussed above, the Petitioner asserts that he satisfies five of the six exceptional ability criteria. The record furthermore does not reconcile why the exceptional ability criteria would not readily apply to advertising and marketing specialists if, as the Petitioner also asserts, he satisfies five of the six criteria.

Next, the Petitioner's assertion that he has performed a critical role of [redacted] and unspecified others is misplaced. More specifically, the Petitioner asserts that he "has become the authorized supplier/distributor of products manufactured by these distinguished companies in his country of origin" and that "[t]his must be considered a critical role for these companies, since no one except [him] has been designated as the representatives of products in his company." The record contains a document titled "Authorization Certificate," indicating that the Petitioner "is an authorized dealer of [redacted]." The record also contains a similar, one-page letter from [redacted], written in a language other than English and an accompanying English translation, acknowledging that the Petitioner's "company is credited as general representative of [redacted]." Neither the certificate nor the letter establishes that the Petitioner's role as supplier, distributor, or dealer is significant among other existing or potential suppliers, distributors, or dealers in Ecuador specifically or throughout the companies' areas of operations in general. In turn, the record does not establish how the Petitioner's performance of the role as supplier, distributor, or dealer for the respective companies has affected the companies' business operations, whether in Ecuador specifically or throughout the companies' areas of operations in general. More specifically, neither the certificate, nor the letter, nor any other evidence in the record establishes how the Petitioner's role as supplier, distributor, or dealer for the respective companies performs a critical role for the companies. In summation, even if the record established that the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation of advertising and market specialists, it does not establish that the referenced evidence establishes the Petitioner's eligibility for an individual of exceptional ability.

In summation, the Petitioner has not established that the record satisfies at least three of the exceptional ability criteria. The record also does not establish, in the alternative, that the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation and that comparable evidence establishes exceptional ability. Therefore, we need not determine whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See* section 203(b)(2)(A) of the Act; *see also* 8 C.F.R. § 204.5(k)(2); *Kazarian*, 596 F.3d 1115. We note, however, that if we were to conduct a final merits determination of the record, it would not support the conclusion that the Petitioner shows sustained national or international acclaim and demonstrates that he is among the small percentage at the very top of the field of endeavor. Furthermore, because the record does not establish that the Petitioner satisfies at least three of the exceptional ability criteria, it does not establish that he qualifies for second-preference classification as an individual of exceptional ability. *See* section 203(b)(2)(A) of the Act.

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an individual of exceptional ability; therefore, we conclude that the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.