U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26061033

Date: MAY 17, 2023

Appeal of Texas Service Center Decision

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

The Petitioner proposes to be a general and operations manager seeking 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 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
>
> (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 demonstrates that a petitioner is 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 seeking to demonstrate their proposal to be a general and operations manager would be an endeavor in the national interest. They contend they are categorically eligible for 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 they had earned an associate degree in tourism management, letters purporting to indicate more than 10 years of full-time work experience in the occupation of general and operations manager, and letters documenting the Petitioner has purportedly made significant contributions to and achievements in their field.

The Director concluded that the Petitioner is not of exceptional ability and therefore categorically ineligible for the EB-2 classification. Although the Petitioner had demonstrated that they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(A), they did not demonstrate eligibility under at least two out of the remaining 5 criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(B)-(F).[2] So the Petitioner has not demonstrated that they have exceptional ability for the reasons set forth below.

> *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).

The Petitioner submitted employment verification letters with the petition and response to the Director's request for evidence (RFE) to demonstrate that they had over 19 years of full-time experience in the general and operations manager occupation.

But the Petitioner's evidence did not meet even the minimum requirements of the regulation to reliably document the 10 years of full-time experience in the general and operation manager occupation let alone 19 years. The Petitioner provided five letters spanning the following time periods: (1) June 2004 to November 2005 as a student consultant trainee at [redacted] (2) July 2009 to July 2010 as a student development manager at [redacted] (STB); (3) August 6, 2012 to February 6, 2013 as a visa consultant at [redacted] (4) April 2013 to "Present" as an entrepreneur and owner of [redacted] and (5) since April 16, 2019 as personal assistant at [redacted] Although the total elapsed time of approximately 133 months described by these letters exceeds the regulatory minimum of 10 years, none of the experience the Petitioner documents was in an occupation same or similar to that of a general and operations manager.

The Petitioner's experience as a student consultant trainee at [redacted] appears correspondent to a residential advisor or camp counselor position wherein they were required to "guide students" to "develop their skills for success" or "monitor students' emotional well-being and overall

[2] The Petitioner did not provide evidence of a license to practice the profession or certification for a particular profession or occupation, evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability, or evidence of membership in professional associations which demonstrated exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(C), (D), or (E). So the Petitioner has abandoned those grounds.

adjustment." These job duties do not correspond with the job duties of a general and operations manager. So the Petitioner's experience cannot satisfy the regulatory requirements.

Similarly, the Petitioner's experience as a student development manager at STB is not correspondent with the duties of a general and operations manager either. The word "manager" in the title of the previous job is not determinative with respect to the question of whether the experience is in the general and operations manager occupation. When the duties are evaluated, it is plain that they are akin to a resident advisor or camp counselor providing "customer guidance," "translation of documents," facilitation of "accommodation," and "plan, conduct, and document student and accommodation orientations." So the Petitioner's experience at STB cannot satisfy the regulatory requirements.

This trend continues with the Petitioner's experience as a visa consultant with [redacted] The provision of "advice and guidance on how best to obtain required documentation to travel internationally" and advising regarding whether individuals and groups had "the necessary and correct documentation" corresponds closely to the role and responsibility of a travel agent than to a general & operations manager. This experience also cannot satisfy the regulatory requirements.

And the Petitioner's current employment with [redacted] commencing April 16, 2019 is also non-qualifying. In their capacity of personal assistant to the CEO and chairman, the Petitioner performs the duties of a reliable and competent executive assistant to "organize meetings and appointment and provide reminders to the Chairman and CEO," and facilitate the "preparation, printing and distribution" of meeting and project correspondence. It appears that the personal assistant at [redacted] also draws from their previous visa consultant experience to plan personal and business travel including lodging, meals, and security. Again, the Petitioner's job duties do not align with the job duties of a general and operations manager and cannot document eligibility under the applicable regulatory criterion.

The remaining period of previous work experience the Petitioner submitted was as an entrepreneur and owner at [redacted], the Petitioner's boutique for personalized fabric gifts. Some job duties provided are vague and non-specific, such as "internet sales" and "administrative work." It is also not apparent from the job duties what specific function the Petitioner conducts. Additionally, duties included in the description such as "providing customer service" and "contact with clients via social media and/or in person meetings" are not in the same category as the general and operations manager occupation. Moreover, the letter stated that the Petitioner has worked at [redacted] from April 2013 to "present." The Petitioner advises that they "continue operating [their] business overseeing all the operations, but have delegated most of the daily tasks to [their] manager and team." However the Petitioner contends that they commenced full-time employment with [redacted] on April 15, 2019 and has not provided any evidence explaining how they navigate concurrent employment. So the Petitioner's statement in their self-employment verification letter further draws into question whether their duties at [redacted] were in fact those of a general and operations manager.

So all 133 months of experience the Petitioner presented in its attempt to document eligibility under this criterion are wholly inapplicable. Whilst we held in *Chawathe* that the standard of proof in immigration proceedings is the preponderance of the evidence, the burden of proof is always on the petitioner. A petitioner's burden of proof comprises both the initial burden of production, as well as

the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *also see* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). A petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits. When, as here, a petitioner has not met the burden of persuasion by a preponderance of the evidence because their evidence is not material, relevant, or probative it follows that they have failed to demonstrate eligibility for the benefit that they seek. For all the foregoing reasons, we conclude that the Petitioner has not demonstrated that they have at least 10 years of full-time experience in the occupation of general and operations manager.

> *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 general and operations management 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 administrative duties in previous jobs 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 from the chairman and CEO of the law firm for whom the Petitioner currently works describes the facts and circumstances of their initial meeting with the Petitioner and the evolution of their duties from an entry level to more senior personal assistant. But the letter does not recognize any of the Petitioner's achievements or identify any significant contributions the Petitioner could be credited with. A letter from an employer during the Petitioner's previous position as a visa consultant credits the Petitioner with detail and overall professionalism as well as "superior skills in operational organization" which constituted a "record of success within [the] field [which] speaks for itself." 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 Petitioner's field. And the letter from the director/owner of the company where the Petitioner served as a student development manager merely describes the Petitioner's duties in some more detail in a more effusive tone but does not recognize any achievement or credit the Petitioner with any significant contributions. So we cannot conclude that the Petitioner meets this ground of eligibility.

III. CONCLUSION

The Petitioner has not established eligibility in any 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.