U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29095485

Date: JAN. 04, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneur in the field of audiovisual production, seeks second preference immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner had not established eligibility for the underlying EB-2 classification as a member of the advanced degree professionals or an individual of exceptional ability. In addition, the Director concluded that the Petitioner did not establish eligibility for a national interest waiver. 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)(B)(i) of the Act. Only those who demonstrate "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as individuals of exceptional ability. 8 C.F.R. § 204.5(k)(2).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F) sets forth the following six criteria, at least three of which an individual must meet in order to qualify as an individual of exceptional ability in the sciences, the arts, or business:

(A) An official academic record showing that the [individual] 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 [individual] 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 [individual] has commanded a salary, or other remuneration 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.

If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Kazarian* v. *USCIS,* 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); *See* USCIS 6 Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual.

Once a petitioner first demonstrates qualification for the underlying EB-2 visa classification, they must then demonstrate they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[1], grant a national interest waiver if the petitioner shows:

- 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

The Petitioner's proposed endeavor is "to advance his career as an entrepreneur by establishing [redacted] in the United States, which will operate as a full-service audiovisual production company, focusing on providing high end visual storytelling services." The Petitioner also submitted a business plan which states:

[1] *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).

> [The Petitioner] is a Brazilian citizen with vast experience in the Video Producing Industry. [The Petitioner] will direct the U.S.-based Company in Florida. He will also be the sole owner of the [redacted]. Upon approval of his EB-2 visa, [the Petitioner] will manage the [redacted] and work as its Owner and Video Producer.

A. Qualification for the EB-2 Classification

We will first address the threshold requirement that the Petitioner must qualify for classification under Section 203(b)(2)(B)(i) of the Act, either as an advanced degree professional or an individual of exceptional ability.

The Director concluded that the Petitioner did not qualify for the EB-2 classification as an advanced degree professional. On appeal, the Petitioner does not acknowledge or rebut the Director's specific finding on this issue, and thereby abandons this issue. An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

The Director also concluded that that the Petitioner satisfied only two criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (E) out of the required three to demonstrate eligibility for an individual of exceptional ability. On appeal, the Petitioner contends that he meets the remaining criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B), (C), (D), and (F). On appeal, the Petitioner contends that the Director erred by not considering comparable evidence in his analysis. Upon de novo review, we agree with the Director that the Petitioner has not met three of the six criteria for qualifying as an individual of exceptional ability, as discussed below.

1. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B)

The Director found that the Petitioner did not meet the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) which requires "evidence in the form of letter(s) from current or former employer(s) showing that the [individual] has at least ten years of full-time experience in the occupation for which he or she is being sought." On appeal, the Petitioner asserts that he submitted comparable evidence on record to demonstrate that he meets this criterion, namely his Employment and Social Security Book issued by the Brazilian government and reference letters from his previous employers. However, as the Director stated in the denial, neither the Employment and Social Security Book nor the letters of reference provide necessary details about the Petitioner's duties, the length of his employment, or whether he worked full time.

Although the Petitioner claims that the evidence provided "is sufficient and comparable to letters from current or former employers," for comparable evidence to be considered, the petitioner must explain why a particular evidentiary criterion listed in the regulations is not readily applicable to his or her occupation. *See generally* 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual. Here, the Petitioner merely asserted that evidence on record be accepted as comparable evidence but did not explain why he is not able to provide letters from previous and current employers attesting to the Petitioner's ten years of experience with relevant dates of employment, hours worked, and description of duties. Therefore, the Petitioner did not demonstrate that he meets this criterion.

2. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C)

This criterion requires "[a] license to practice the profession or certification for a particular profession or occupation." On appeal, the Petitioner contends that the submitted evidence, such as "his bachelor's degree in journalism, his work ID badges, press badges, certificates of completion for extended education courses, and other press credentials," are comparable evidence that meets this criterion.

A petitioner can submit comparable evidence to establish eligibility if the regulatory standards do not readily apply but must explain 1) why he has not submitted evidence that would satisfy the criteria set forth in 8 C.F.R. 204.5(k)(3)(ii); and 2) why the evidence he has submitted is "comparable" to that required under 8 C.F.R. 204.5(k)(3)(ii). *See generally* 6 USCIS Policy Manual F.5(B)(2). General assertions that any of the six objective criteria do not readily apply to the Petitioner's occupation are not acceptable. *Id.*

The Petitioner asserts that only "12.1% of Arts, design, entertainment, sports, and media professionals hold either a license or certification to practice the profession" according to the U.S. Bureau of the Labor Statistics (BLS).[2] While the cited page from BLS does not completely rule out license and certification requirements for media professionals, it supports that the regulatory standards may not readily apply to this profession. However, the Petitioner has not sufficiently demonstrated that the evidence he submitted is comparable to having a license to practice the profession.

First, we agree with the Director's conclusion that the Petitioner's bachelor's degree diploma "is not comparable to a license or certification to practice his occupation" as this type of evidence has already been addressed in the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) (requiring an official academic record showing that the individual has a degree, diploma, certificate or similar award from a college, university, school, or other institution of learning to the area of exceptional ability). In addition, while the Petitioner has submitted certificates of participation in various audiovisual workshops, he has not explained how these certificates are comparable to a license to practice his profession.

Secondly, we also find that the Petitioner did not demonstrate that his work ID or press badges are truly comparable evidence. Although the Petitioner claims that these badges establish his exceptional ability in audiovisual production, the record does not sufficiently demonstrate that the badges show the same caliber of expertise as receiving a license to practice the profession or a certification for a particular profession. Licensure to practice a profession and certification for a profession or occupation generally demonstrate a level of knowledge or skill associated with the related occupation. Here, the Petitioner has not provided any supporting evidence to establish the requirements, if any, for obtaining his badges. The Petitioner's general assertions, without more, are not probative evidence and do not demonstrate that possessing work ID or press badges is comparable to obtaining a license or certification commensurate with the criterion. Therefore, the Petitioner did not demonstrate that he meets this criterion through the submission of comparable evidence.

[2] Bureau of Labor Statistics, U.S. Dep't of Labor, *Current Population Survey*, Certification and licensing status of the employed by occupation (January 25, 2023), https://www.bls.gov/cps/cpsaat53.htm.

3. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D)

This criterion requires "[e]vidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability." To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of their claimed exceptional ability relative to others working in the field.

The Director noted insufficient and inconsistent information about the salary information presented by the Petitioner. For example, the Director stated that the copy of the Petitioner's salary information for the position of "Entrepreneur" from a Brazilian language website "did not indicate if the salaries presented were monthly, yearly, or weekly remunerations." The Director further stated that the Petitioner's remunerations for his prior work positions from 2016 to 2020 were not for the position of "Entrepreneur." In addition, the Petitioner did not submit evidence to demonstrate how his salaries as either "Entrepreneur" or as audiovisual employee were due to his exceptional ability. Therefore, we find that the record does not contain evidence to establish how the Petitioner's compensation compares to other entrepreneurs or other audiovisual employees in the same geographical area or that his income is a direct result of his exceptional ability.

On appeal, the Petitioner again requests that submitted evidence be reconsidered "as comparable evidence to show the Petitioner's salary or other remuneration for services that demonstrates his exceptional ability." However, the Petitioner has not explained how the regulatory standards do not readily apply in his case according to 8 C.F.R. 204.5(k)(3)(iii).

Moreover, the Petitioner initially submitted evidence of his salary but when the Director requested additional evidence to address insufficiencies in meeting this criterion, the Petitioner acknowledged in his response that this criterion is "will not be met." With the appeal, the Petitioner generally refer to articles on how compensation motivates performance and achievement but has not provided complete and probative evidence to satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D). Therefore, we conclude that the Petitioner has not met this criterion.

4. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F)

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." On appeal, the Petitioner claims that his reference letters demonstrate "his achievements and significant contributions to the field of audiovisual production" and "well-noted by his peers and employers." However, the support letters are from those who worked with the Petitioner in the past and contain general praise for the Petitioner's expertise and work ethics, but they do not indicate that the Petitioner's contributions go beyond being a dedicated and competent employee. The record lacks evidence demonstrating this represents a significant achievement or recognition in the field.

On appeal, the Petitioner specifically reference the letter from the senator of Brazil in the State of [redacted] who expresses familiarity of the Petitioner's "growth in the field of social communication" and "rapid professional development in the media outlets in Brazil" as well as his "prominent positions in national live broadcasts, as coverage of presidential visits and press

conferences." However, the senator does not offer any details regarding the level of prestige with the Petitioner's purported "prominent positions" or show how the Petitioner's contribution to the "field of social communication" is equal to significant achievement and contribution to the field of audiovisual production or entrepreneurship. Furthermore, the Petitioner has not offered any independent and corroborating documentation to support claims made in this reference letter. Therefore, we find that the evidence is insufficient in demonstrating evidence for this criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

For the reasons set forth above, the evidence does not establish that the Petitioner has not satisfied at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), and thus, we need not conduct a final merits determination. Nevertheless, we have reviewed the record in the aggregate and examined "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. at 376. While we acknowledge that the Petitioner has had a successful career in the field of audiovisual production, he has not demonstrated exceptional ability that rises above that ordinarily encountered in his field.

B. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. As previously outlined, the Petitioner has not established eligibility for the underlying EB-2 immigrant classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding his eligibility for a national interest waiver under the *Dhanasar* analytical framework. *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 alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not met at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.