U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28543613

Date: DEC. 4, 2023

Appeal of Texas Service Center Decision

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

The Petitioner 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. The Director concluded that the record does not establish the Petitioner qualifies for classification as an individual of exceptional ability. The Director did not comment on whether 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.

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 a member of the professions holding an advanced degree 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. 8 C.F.R. § 204.5(k)(3)(ii). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[1] We then conduct a final merits determination to decide whether the evidence

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of

in its totality shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. *See* 8 C.F.R. § 204.5(k)(2).

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."

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 USCIS may, as matter of discretion,[2] 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

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). More specifically, although the Petitioner asserted that he satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(B), (E)-(F), the Director found that the record satisfies only the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (E). On appeal, the Petitioner reasserts that he satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) and (F), in addition to the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (E). The Petitioner does not assert on appeal, and the record does not support the conclusion, that the record satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D). The Petitioner also does not assert on appeal, and the record does not support the conclusion, 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. *See* 8 C.F.R. § 204.5(k)(3)(iii).

We note, however, that the Petitioner incorrectly states on appeal, "According to the Service [d]enial [d]ecision, [the] criterion [at 8 C.F.R. § 204.5(k)(3)(ii)(C)] has been met because the Appellant did not submit evidence to meet this criterion." On the contrary, the Director observed, "The [P]etitioner did not submit additional evidence [in response to the Director's prior request for evidence (RFE)] to meet this criterion as stated in the response. As such, the submitted evidence does not meet [the]

exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

[2] *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).

criterion [at 8 C.F.R. § 204.5(k)(3)(ii)(C)]." For brevity, we incorporate by reference the Director's discussion of the initial evidence's deficiencies as addressed in the RFE. The Petitioner does not address on appeal how the record may have satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C); therefore, the Petitioner has waived this issue on appeal. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

A. Evidence of a Qualifying Degree, Diploma, Certificate, or Similar Award

First, we withdraw the Director's conclusion that the record satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), which requires "[a]n 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." Although the record contains documents that indicate the Petitioner received training, the documents do not appear to have been issued by a college, university, school, or other institution of learning. Two documents identify themselves as "training certificate[s]" and two other, similar documents identify themselves as "recognition of participation in . . . training." The two training certificates indicate that the Petitioner attended training with "duration 3 days" for the topics of "car wrapping," provided by '[redacted]' at the location of '[redacted]' in 2020. Although one document, dated "4/24/19," indicates that the Petitioner participated in "3M Advanced Installer Training," it does not elaborate on the duration of the training, the extent of the Petitioner's participation, whether he completed the training and satisfied any training requirements, or what the presentation trained him to install, and other information that an official academic record from a qualifying institution of learning would contain. Similarly, another document, also dated "4/24/19," indicates that the Petitioner participated in '[redacted]' Endorsed Air-Wrangler™ Vehicle Wrap Training," although it does not elaborate on the duration of the training, the extent of the Petitioner's participation, and whether he completed the training and satisfied any training requirements, and other information that an official academic record from a qualifying institution of learning would contain. We note, though, that the two training certificates dated 2019 appear to indicate that the Petitioner attended both training presentations on the same date.

In support of the Form I-140, Immigrant Petition for Alien Workers, the Petitioner submitted an untitled document, dated February 14, 2022, in which he stated, "I am a professional [p]ilot of exceptional ability, with a degree of expertise significantly above that ordinarily encountered in the business section." The record does not elaborate on how the Petitioner's certificates of training in "car wrapping" and "vehicle wrap training" relate to the stated area of exceptional ability as a professional pilot, as required by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A). Therefore, the training certificates appear inapposite.

As noted above, the four training certificates appear to indicate the Petitioner attended a total of seven days of training in 2019 and 2020; however, they do not appear to have been issued by "a college, university, school, or other institution of learning." 8 C.F.R. § 204.5(k)(3)(ii)(A). Therefore, regardless of whether the training certificates are the type of degree, diploma, certificate, or similar award contemplated by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), and regardless of whether the training presentations sufficiently relate to the area of exceptional ability, they do not appear to have been issued by the type of institution of learning contemplated by the regulation. The Petitioner does not otherwise assert, and the record does not support the conclusion, that he otherwise received a

qualifying degree, diploma, certificate, or similar award. Therefore, we withdraw the Director's conclusion that the record satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

B. Evidence of at Least 10 Years of Full-time Experience in the Occupation

Next, 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 "[a] letter from [redacted] stating that the [P]etitioner was was [sic] employed from 08/2010 to 03/2016." However, the Director observed that "[t]he submitted evidence indicates that the [Petitioner] has approximately 5 years and 7 months experience," which does not establish at least ten years of full-time experience in the occupation, as required by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

On appeal, the Petitioner asserts that the letter from [redacted] establishes that he "worked for [redacted] for more than 12 years . . . from 08/2010 to 01/2023."

On the Form I-140, the Petitioner described his proposed occupation as "chief executive[]." The letter from [redacted] in the record, dated January 2023, indicates that she is the chief human resources officer of [redacted], Brazil. Her letter states that the Petitioner "worked full-time as a [c]hief [e]xecutive [o]fficer, [m]anager of [g]raphic [d]esigner [t]ea and [c]ar [w]rap [i]nstaller from 08/2010 to 03/2016 at [redacted]" The letter summarizes the Petitioner's duties in those three, apparently concurrent positions. The letter further states the following:

> Prior Position from 03/2016 to today
>
> Chief Executive Officer & Entrepreneur

The letter does not establish whether the Petitioner worked in the referenced position on a full-time basis between March 2016 and the time it was written in January 2023. In contrast, the letter specifically states, as noted above, that "[the Petitioner] worked full-time as a [c]hief [e]xecutive [o]fficer . . . from 08/2010 to 03/2016 at [redacted]" Without specific information to the contrary, on its face the letter indicates that the Petitioner no longer worked as a chief executive officer at [redacted] on a full-time basis after March 2016. Additionally, even if the letter otherwise established that the Petitioner continued to work as a chief executive officer on a full-time basis for [redacted] after March 2016, the letter omits a summary of what his duties may have been between March 2016 and January 2023, and how those duties may have differed from his chief executive officer duties between August 2010 and March 2016, as summarized in the letter. We also note that the Form I-140 states that the Petitioner resides in the United States and that he last entered the United States in March 2016. The letter does not indicate if he worked remotely as chief executive officer for [redacted] after his entry into the United States. We further note that the Petitioner filed the Form I-140 in June 2022; therefore, the Petitioner must establish that he had at least 10 years of full-time experience in the occupation he seeks as of the filing date in June 2022, not as of the letter's date of January 2023. *See* 8 C.F.R. § 103.2(b)(1) (requiring petitioners to establish eligibility "at the time of filing the benefit request").

In summation, the record does not satisfy the requirement of 8 C.F.R. § 204.5(k)(3)(ii)(B) that the Petitioner has at least 10 years of full-time experience in the occupation he seeks.

C. Evidence of Recognition for Achievements and Significant Contributions to the Industry or Field

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 acknowledged that the record contains "a letter of reference . . . from [redacted]" stating, in relevant part "that the author has 'interest in investing in [the Petitioner's] projects, ideas, startups, and company in the United States of America.'" However, the Director concluded that "[w]ithout documentation showing that the [Petitioner] has been recognized by peers, governmental entities, or professional or business organizations for achievements and significant contributions to the industry or field, USCIS cannot conclude that the [Petitioner] meets this criterion."

On appeal, the Petitioner asserts that letters of recommendation in the record "prove[] how the [Petitioner] meets this criterion."

We first note that the record contains inconsistent information from the Petitioner regarding what the industry or field, as contemplated by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), is. As noted above, the Petitioner submitted an untitled document dated February 14, 2022, in support of the Form I-140. Each page of the document bears a header of the Petitioner's full printed name, and the Petitioner signed the eighth and final page of the document. Directly below the Petitioner's full printed name on the second page, the Petitioner states "I am a professional [p]ilot of exceptional ability, with a degree of expertise significantly above that ordinarily encountered in the business sector," indicating that the industry or field in question may be piloting some kind of vehicle, business administration, or a combination of the two. However, the Petitioner states on the fourth page of the document, which also bears his full printed name as a header, "it is very likely that my endeavor in the commercial printing and vehicle color change sector will expand and create more jobs for American workers," indicating that the industry or field may be commercial printing, vehicle color changing, or a combination of the two. The record does not reconcile why the Petitioner asserted that he has exceptional piloting ability if the endeavor entails commercial printing and vehicle color changing, casting doubt on what the relevant industry or field may be, for the purposes of 8 C.F.R. § 204.5(k)(3)(ii)(F).

Doubt cast on any aspect of a petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Because the Petitioner's internally inconsistent statements regarding his exceptional ability and the focus of his proposed endeavor cast doubt on what the relevant industry or field may be, the credibility of the untitled document dated February 14, 2022, specifically, and the remaining evidence offered in support of the Form I-140 in general, is diminished. *See id.*

Further, the record does not establish what achievements or significant contributions the Petitioner has made to his industry or field. The record contains letters of recommendation from individuals who work for entities including hospitals, a commercial printer, and an unspecified business. The letters discuss work that the Petitioner oversaw or performed for clients, including graphics "on the doors of

entrances and exits of ambulances, consultancies, waiting rooms, . . . stickers for the floor that besides identification were anti-slip," "stickers for internal glass doors," and "plotting and enveloping vehicles . . . with adhesives to protect the paint and minimize wear and tear due to weather," and "installing graphics in some bank agencies in the capital." Although the letters describe work the Petitioner oversaw or performed for particular clients, they do not discuss achievements or contributions, significant or otherwise, that the Petitioner made to the industry or field of piloting, business administration, commercial printing, vehicle color changing, or any other industry or field, as contemplated by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). Because the record does not contain reliable, sufficient evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations, and moreover because the record does not establish what the relevant industry or field is, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

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 establishes the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. *See* 8 C.F.R. § 204.5(k)(2). 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 has a degree of expertise significantly above that ordinarily encountered in the field. *See id.* 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. Because that issue is dispositive, we reserve our opinion regarding whether the record satisfies the *Dhanasar* criteria for national interest waiver eligibility. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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); *Dhanasar*, 26 I&N Dec. at 889-90.

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.