U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26358243

Date: MAY 31, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a motorcycle customizer, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business. 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).

The Director of the Texas Service Center denied the petition, concluding the Petitioner did not establish eligibility for the EB-2 classification or for a national interest waiver under the *Dhanasar* framework. 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.

On appeal, the Petitioner submits a brief referencing the same arguments and evidence previously submitted and considered. The Petitioner does not dispute the Director's determination that he did not establish eligibility for the EB-2 classification as an advanced degree professional.

The Director determined the Petitioner did not qualify as an individual of exceptional ability. Specifically, the Director concluded the evidence did not establish the Petitioner met at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). We adopt and affirm the Director's decision regarding the specific issue of eligibility for the EB-2 classification. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

The Director concluded the Petitioner did not demonstrate an official academic record showing he 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 pursuant to 8 C.F.R. § 204.5(k)(3)(ii)(A). On appeal, the Petitioner reiterates his earlier assertions that he provided certificates demonstrating completion of art courses, and a transcript for an incomplete marketing course from the Universidade [redacted] a "well-known institution" officially recognized by the Ministry of Education of Brazil. However, the Director correctly determined that the Petitioner did not demonstrate the relationship between the field of marketing and the Petitioner's claimed exceptional ability of motorcycle customization. In addition, since the Petitioner did not complete this course, he did not receive a degree, diploma, certificate of similar award from that institution. On appeal, the Petitioner did not provide any documentation or evidence to overcome the Director's concerns. Accordingly, we conclude the evidence is insufficient to establish eligibility under the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Director considered the Petitioner's evidence regarding whether he commanded a salary, or other remuneration for services, which could demonstrate exceptional ability pursuant to 8 C.F.R. § 204.5(k)(3)(ii)(D) and explained it did not establish that his earnings as a custom motorcycle specialist were indicative of exceptional ability relative to others in his field. On appeal, the Petitioner reiterates his monthly earnings from 2020 to 2022 where he was earning from $5,000 to $8,000 a month. However, those earnings took place after the date the current petition was filed. USCIS regulations affirmatively require a petitioner to 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 the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). 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). The Petitioner therefore did not provide evidence overcoming the Director's concerns.

On appeal, the Petitioner reemphasizes his career successes, skills, and professional relationships, and relies upon previously provided evidence, such as support letters and certificates, to establish his eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(F). The evidence suggests his colleagues respect and appreciate him; however, it does not indicate the Petitioner has been recognized for achievements and significant contributions to the motorcycle customization industry as a whole.

The evidence does not establish the Petitioner met at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii) at the time of filing. Therefore, the Petitioner has not established eligibility as an individual of exceptional ability under section 203(b)(2)(A) of the Act. A final merits determination is not required. As the Petitioner has not established the threshold requirement of eligibility for the EB-2 classification, analyzing his eligibility for a national interest waiver under the *Dhanasar* framework is unnecessary. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the arguments concerning eligibility under the *Dhanasar* framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that "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). Nevertheless, we reviewed the evidence in its totality and agree with the Director's conclusion that the record does not establish the Petitioner's eligibility for a national interest waiver.

The Petitioner has not demonstrated that he qualifies as a member of the professions holding an advanced degree or as an individual of exceptional ability under section 203(b)(2)(A) of the Act. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The appeal is dismissed.