U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28429492

Date: OCT. 10, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneur in the bakery industry, seeks 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 Nebraska Service Center denied the petition, concluding the record did not establish that the Petitioner qualified for classification as an individual of exceptional ability and a discretionary waiver of the job offer requirement, and thus a labor certification, was not required upon application of the analytical framework we first explicated in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). 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. 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
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> (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. We will then conduct a final merits determination to decide whether the evidence in its totality shows that they are 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*, *see supra*. *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.

II. ANALYSIS

The Petitioner is an entrepreneur seeking to demonstrate eligibility in 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 certification in Advanced Bakery Technical Training from [redacted], proof of status and registration for their business [redacted] on Brazil's National Register of Legal Entities, screenshot of a webpage from a database of the National Register of Legal Entities identifying the Petitioner as a partner in their business, copies of leases for equipment executed by the Petitioner's business entity with other entities, a letter from the Petitioner's accountant listing their business income from 2005 to 2020, the Petitioner's Annual Income Tax Return for 2019, a salary survey corresponding to a business administrator occupation, and evidence of the receipt of recognition and awards.

We agree with the Director's ultimate decision that the Petitioner is not of exceptional ability and therefore categorically ineligible for the EB-2 classification. The Director concluded that the Petitioner met one of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). Specifically, the Director concluded that the Petitioner demonstrated they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(F) but did not meet any of the remaining criteria.[1] Upon de novo review, we conclude that the Petitioner has not demonstrated that they met any of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) for the reasons set forth below.

> *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;* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Petitioner provided a copy of their certification in Advanced Bakery Technical Training from [redacted] For the Petitioner's certification to meet the criteria, it would have to be issued from a college, university, school, or other institution of learning. According to the website address the Petitioner submitted into the record, [redacted] and [redacted] is a food equipment corporation. So [redacted] is not a college, university, school, or other institution of learning and we cannot conclude that the Petitioner's certificate reflects they have earned a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning related to the area of exceptional ability corresponding to their proposed endeavor.[2]

[1] The Petitioner did not submit evidence of a license to practice the profession or certification for a particular profession or occupation to meet the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(C).

[2] We acknowledge the record reflects the Petitioner has given a lecture on bakery management at or under the auspices of an institution of higher education. This is not applicable or relevant to the Petitioner's possession of an official academic record showing that they have a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

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 a proof of status and registration for their business [redacted] on Brazil's National Register of Legal Entities, a screenshot of a webpage from a database of the National Register of Legal Entities identifying the Petitioner as a partner in their business, copies of leases for equipment executed by the Petitioner's business entity with other entities, and a letter from their foreign accountant as evidence of their possession of 10 years of full-time experience as an entrepreneur.

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.

The Petitioner did not submit evidence in the form of letters(s) from current or former employer(s) to evidence they had at least 10 years of full-time experience as an entrepreneur.[3] The letter from their foreign accountant is not sufficient evidence of employment from current or former employers because the accountant was not the Petitioner's current or former employer. And the remaining evidence submitted by the Petitioner does not sufficiently describe the duties the Petitioner performed as an entrepreneur. Whilst other evidence in the record, such as letters of recommendation, does indicate that the Petitioner had some general managerial, administrative, or operational control over their business, the evidence does not adequately describe with enough detail if the activities were full time and a duration greater than 10 years. So the Petitioner's evidence did not meet the minimum requirements of the regulation to reliably document the 10 years of full-time experience as an entrepreneur.

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 financial analyst. So the Petitioner did not and cannot satisfy the regulatory requirements to meet this criterion to demonstrate their exceptional ability.

[3] The Petitioner's resume contains an entry describing their function as a commercial director at the [redacted] from 2010 to present but the entry is not supported in the record by a corresponding letter or other documentation evidencing employment.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

The Petitioner contended that they have commanded a salary, or other remuneration for services, which demonstrates exceptional ability. In support, they submitted their proof of income from their previous employment positions and documentation in the form of a survey reflecting the average salary of business administrators in Brazil. But the record does not reflect the salary or remuneration expected for individuals of exceptional ability performing duties comparable to those the Petitioner intends to undertake as an entrepreneur. There is no evidence in the record which would permit us to evaluate the duties an entrepreneur of exceptional ability would perform for the salary and their remuneration as a point of comparison. And the broad job descriptions and job titles of business administrators contained in the materials the Petitioner submitted did not readily correspond to the description of services and duties the Petitioner had described for their proposed endeavor. Moreover, the income figure the Petitioner's accountant reported in their letter for 2019 was not contained or could not be identified in the 2019 Brazilian tax return the Petitioner submitted into the record. So we agree with the Director that the Petitioner has not met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) because we cannot evaluate from information in the record whether the Petitioner's salary or remuneration demonstrated their exceptional ability.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Petitioner's membership in the Associação dos Indústria de Panificação e Confeitaria de [redacted] [redacted](Association of Bakery and Confectionery Industries of [redacted] is not sufficient evidence of membership in a professional association. The Associação dos Indústria de Panificação e Confeitaria de [redacted] (Association of Bakery and Confectionery Industries of [redacted]) is not a professional association. It is a trade union. A trade union is typically an organized association of workers in a trade, group of trades, or profession, formed to protect and further their rights and interests. The record does not sufficiently describe the composition of the union and whether it is composed of professionals or employees at all levels of employment at bakery and confectionery companies. Consequently, the record does not convincingly describe the Petitioner's trade union as a professional association as that term is contemplated in the regulations, and we conclude the Petitioner has not met this criterion.

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).

We disagree with the Director that the Petitioner met this criterion and hereby withdraw it. The Petitioner submitted several support letters/letters of recommendation and award certificates to document the recognition of their achievements and significant contributions to their field.[4]

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

[4] While we may not discuss every document submitted, we have reviewed and considered each one.

with the regulatory definition of exceptional ability, the evidence of recognition of achievement or significant contributions should show expertise significantly above that ordinarily encountered in the field.

The Petitioner submitted evidence of receipt of a certificate from the Brazilian Society of Education and Integration reflecting that the products their business sold were permitted to display a "Quality Seal." The Petitioner elaborates about the award and its criteria in their response to the Directors' request for evidence (RFE). These assertions are unsupported in the record. The unsupported assertions of the Petitioner are not evidence. *See Matter of Fermin Mariscal-Hernandez*, 28 I&N Dec. 666 (BIA 2022)(Unsupported assertions and speculation have no evidentiary value). The record does not contain any material, relevant, or probative documentation to establish how display of the "Quality Seal" is emblematic of a achievement or significant contribution in their field of entrepreneurship. Moreover, it is unclear from the record how the "socioeconomic development, valuing the national product" the Petitioner and their business were recognized for relates to the field of entrepreneurship and could be a significant contribution or achievement in that field.

The Petitioner's letters of recommendation contain complimentary statements about the Petitioner's performance of their duties 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 recognizes the Petitioner for their provision of "relevant services and constant support with the entity's objectives, such as, food donations, space for training and professional training focused on the bakery area." But it is not clear in the record how the Petitioner's acts of charity are an achievement or significant contribution in the field of entrepreneurship.

And in another letter, the Petitioner's "harmonious and progressive relationship" with the letter writer formulates the basis for their "good references" that the Petitioner has innate "innovative and technical characteristics" resulting in "automation implemented in the factory that allowed the production of differentiated breads." But the record does not sufficiently demonstrate or adequately explain how baking differentiated breads utilizing automation is indicative of exceptional expertise or a significant achievement or contribution to the field.

And another letter writer described the Petitioner's "great job as an entrepreneur" in the development of new strategies utilizing management reports on an ABC sales curve. Whilst the letter writer testified that this increased their revenues, it is not clear in the record how the competent and successful execution of their duties is a significant contribution or achievement in the field demonstrating the Petitioner's expertise significantly above that ordinarily encountered in the field of entrepreneurship.

Whilst it can be concluded from an overall evaluation of the letters that the Petitioner submitted that they are a seasoned professional whose competence and reliability as an employee is valued and appreciated, the letters did not evidence the Petitioner's achievement or significant contributions and expertise significantly above that ordinarily encountered in the field required to demonstrate the Petitioner's exceptional ability.

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.