U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28429375

Date: OCT. 13, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a waiter, 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. 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, concluding that the record did not establish that the Petitioner qualifies 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To qualify for a national interest waiver, a petitioner must first show eligibility 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.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2]

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

USCIS will then conduct a final merits determination to decide whether the evidence as a whole shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

Once a petitioner demonstrates EB-2 eligibility, 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,[3] 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 determined that the Petitioner had not shown that he meets the initial criteria for exceptional ability. Therefore, the Director did not proceed to a final merits determination and a discussion of the national interest waiver.

On appeal, the Petitioner asserts that the Director based substantial parts of the denial decision on information and evidence that does not relate to the materials the Petitioner submitted. We agree with the Petitioner, as explained below. Nevertheless, the petition cannot properly be approved in its present state.

To establish exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii), summarized below:

(A) An academic degree relating to the area of claimed exceptional ability;
(B) Ten years of full-time experience in the occupation;
(C) A license or certification for the profession or occupation;
(D) A salary or other remuneration that demonstrates exceptional ability;
(E) Membership in professional associations; and
(F) Recognition for achievements and significant contributions to the industry or field.

If an individual meets at least three of these criteria, we then consider the totality of the evidence in a final merits determination and assess whether the record shows a degree of expertise significantly above that ordinarily encountered in the individual's field. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination). *See also, generally,* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

The Petitioner claims to have submitted evidence to satisfy five of the six regulatory criteria. The Director concluded that the Petitioner had satisfied one of the claimed criteria, relating to membership

[3] *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).

in professional associations. The Director's discussion of three other criteria, however, rested on evidence that appears to relate to a separate, unrelated case.

> *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.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

In the denial notice, the Director cited "letters from [an] accountant . . . which attested to the petitioner's employment at various companies as a partner, owner, Construction Manager, and General Administrator." The Director discounted these letters because they were not from a current or former employer as required by 8 C.F.R. § 204.5(g)(1).

The Petitioner correctly states, on appeal, that he had not submitted any such letters or claimed any employment in the construction industry. Therefore, we will withdraw the Director's determination regarding this criterion.

At the same time, it is not evident that the Petitioner's evidence satisfies the regulatory requirements. The Petitioner submitted letters attesting to his employment as a waiter from October 2008 to November 2017, and since March 2019. During the gap from 2017 to 2019, the Petitioner indicated that he operated a restaurant in [redacted], Brazil. In a request for evidence, the Director indicated that the submitted letters did not meet all the requirements at 8 C.F.R. § 204.5(g)(1), but did not specify how the letters were deficient. As noted above, the denial notice did not address this issue, relying instead on erroneous references to employment in construction.

Beyond the issues raised by the Director, without further clarification, it is not evident that these letters attest to at least ten years of full-time experience in the occupation sought as of the petition's November 2021 filing date. Parts of the Petitioner's initial submission indicate that he seeks employment as a waiter, who would "[t]ake orders and serve food and beverages to patrons at tables in dining establishment." The letter from the Petitioner's most recent employer, dated September 2021, indicates that the Petitioner "is currently employed but not working or receiving compensation due to suspension of business operations related to global developments as a result of the COVID19 virus." Any period when the Petitioner was technically listed as employed, "but not working or receiving compensation," does not constitute "full-time experience" as the regulation requires.

Elsewhere in the record, the Petitioner indicated that he seeks to work not as a waiter, but as the owner of a company that will provide waitstaff services to other businesses. These two positions both relate to food service, but they are not the same occupation. If running such a business is the occupation in which the Petitioner intends to work, then he must establish at least ten years of full-time experience running such a business.

> *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).

In the denial notice, the Director stated that the Petitioner had submitted "statements from [an] accountant . . . which attested to the petitioner's income in 2018, 2019, and 2020" from a construction company. On

appeal, the Petitioner correctly asserts that he did not claim employment in construction or submit the evidence described.

The Petitioner has submitted copies of pay receipts, in U.S. dollars, from the cruise lines that employed him. Rather than submit evidence that compares his salary to those of others similarly employed, he sought to show that he earned a high salary compared to waiters in Brazil, because the Petitioner and his family reside there. But this does not appear to be an apt comparison. The amount of the salary should reflect exceptional ability, a factor that is not contingent on an individual's country of origin. The Petitioner did not provide a basis to compare his salary to those of others similarly employed, and to establish the extent to which differences in salary were related to exceptional ability.

> *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).

Under this criterion, the Director stated that the Petitioner had submitted a cover story about himself from "a magazine with macro-regional publication." The Director concluded that the Petitioner had not established the significance of the publication. On appeal, the Petitioner correctly asserts that he did not submit any such article.

The Petitioner's initial evidence under this criterion consists of several "letters from people who worked directly or indirectly with [the Petitioner] and who testify to the 10 years of experience throughout [his] professional career." Length of experience is covered by a separate criterion and is not, itself, an achievement or significant contribution to the industry or field. Letters must attest not only to an individual's value to their own employer, but to their achievements and significant contributions to the industry or field.

Also, letters prepared specifically to support the petition may have less weight than contemporaneous documentation of formal recognition in the form of certificates. *See, generally, 6 USCIS Policy Manual* F.5 (B)(2), *supra*.

The Petitioner has also submitted printouts of four articles that he wrote and posted on LinkedIn. The Petitioner does not explain how his own authorship of these articles amounts to recognition for achievements and significant contributions to the industry or field. He has not shown, for instance, that LinkedIn will only publish articles that are considered to be significant contributions. If the Petitioner contends that the articles *themselves* are significant contributions, then the Petitioner must objectively establish that the articles have been recognized as such. The articles are not evidence of their own significance.

Below, we will briefly discuss the remaining two claimed criteria.

> *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 claims no degree above a high school diploma. The Petitioner claims that this high school diploma satisfies the requirement, but the Petitioner has not shown that it relates to the area of claimed exceptional ability.

The Director noted the Petitioner's submission of "training certificates," but found them deficient. These certificates appear to demonstrate his completion of short-term vocational training courses. As such, the Petitioner has not shown them to be from "a college, university, school, or other institution of learning," or that they are "similar" to "a degree, diploma, or certificate" from such an institution.

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

The Director concluded that the Petitioner satisfies this criterion through his membership in the American Management Association. The Petitioner also documented his membership in the International Council on Hotel, Restaurant, and Institutional Education.

The record does not appear to contain any further evidence or information about these associations. The Petitioner has confirmed his membership but has not established that either organization is a professional association.

A "profession" is defined as of the occupations listed in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32),[4] as well as any occupation that requires at least a U.S. baccalaureate degree or its foreign equivalent for entry into the occupation. 8 C.F.R. § 204.5(k)(2). The Petitioner does not claim to hold a baccalaureate degree; he stated that he complete high school but did not complete university-level education. With no indication that the Petitioner is a professional, we disagree with the Director that the Petitioner has established membership in a professional association.

For the reasons described above, the evidence does not appear to establish that the Petitioner satisfies at least three of the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii). But the Director's discussion of those criteria relied largely on incorrect information, and therefore the Director must issue a new decision based on the correct record of proceeding.

The Director's decision focused solely on the question of exceptional ability, and did not address the issue of the national interest waiver. In the event that the Director's new decision addresses the national interest waiver, a significant issue requires attention.

A petition for an individual seeking a national interest waiver must provide specific information about the individual's proposed endeavor in the United States. *Matter of Dhanasar*, 26 I&N Dec. at 889.

In this case, however, the Petitioner has described two different proposed endeavors. On part 6 of Form I-140, "Basic Information About the Proposed Employment," the Petitioner stated his intended "Job Title" as "Waiters and Waitresses," with the following job description: "Take orders and serve food and beverages to patrons at tables in dining establishment." But the business plan submitted with the petition states that "there are two employability possibilities for" the Petitioner. The business plan

[4] The listed occupations are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.

indicates that the Petitioner's "primary intention . . . is setting up his own business . . . in the corporate and social event and party planning," providing waitstaff to "event planners and party houses." But the Petitioner also reserved the option of accepting employment as a waiter himself.

The Petitioner cannot establish eligibility by discussing the merits of multiple related but distinct proposed endeavors. He must describe one specific proposed endeavor and submit supporting evidence relating that endeavor. If the Petitioner claims exceptional ability as a waiter, but his proposed endeavor is not to work as a waiter himself, then the Director may take this discrepancy into account when weighing the evidence of record.

III. CONCLUSION

While there are deficiencies in the Petitioner's evidence concerning his claim of exceptional ability, the Director's decision contains several references to unrelated evidence. We cannot determine that the Director based the denial decision on the evidence and information in the record. The Director must issue a new decision, giving proper consideration to the evidence in the record.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.