U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27465888

Date: JUN. 13, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an operations manager and automotive repair mechanic, seeks classification as an individual 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 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 the underlying EB-2 immigrant classification. 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.

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 immigrant 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 if a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, can they be considered for a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither 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 a matter of discretion,[1] 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.

[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).

As stated above, the Director found that the Petitioner did not establish that he is an individual of exceptional ability and, as such, did not establish qualification for EB-2 classification.[2] "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). To establish eligibility, an individual 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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[3] If a petitioner does satisfy three of the criteria, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

The Director determined that although the Petitioner met three of the six regulatory criteria needed to conduct a final merits determination of exceptional ability, the evidence in its totality did not show that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. Rather, the Director found that the evidence showed that the Petitioner possesses the education and experience needed to perform the occupation, but the Petitioner had not shown that his expertise was uncommon nor that he had set himself apart from others in the field sufficiently to demonstrate exceptional ability. Because the Director found that the Petitioner did not qualify for the underlying EB-2 classification, the Director did not reach the question of whether the Petitioner established eligibility for a national interest waiver under the *Dhanasar* analytical framework.

On appeal, the Petitioner submits a brief statement in which he discusses his proposed endeavor—to continue to own and operate his automotive repair shop—and asserts that he has established his eligibility for a national interest waiver under each of the three prongs of the *Dhanasar* framework. However, the Petitioner does not address or attempt to overcome the Director's finding that the Petitioner does not qualify for EB-2 classification.

Because the Petitioner does not appeal the Director's finding that the Petitioner does not qualify for EB-2 classification under exceptional ability, nor claim to qualify as an advanced degree professional, we will consider that claim to be waived. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that

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[2] Although the Petitioner's initial filing was unclear, it appears that he may have been asserting that he also qualifies for EB-2 classification as an advanced degree professional. But the Petitioner did not submit an academic degree, transcripts, or other official academic records that would establish that he has obtained the equivalent of a U.S. bachelor's degree, followed by five years of progressive experience in the specialty, or a higher degree. 8 C.F.R. § 204.5(k)(3)(i)(A)-(B). Additionally, nothing in the record reflects that the Petitioner has any formal academic education at the baccalaureate level. Instead, the Petitioner submitted evidence that he attended high school, completed trainings related to automotive repair, and has work experience in the field. To qualify as an advanced degree professional, an individual must possess a U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. 8 C.F.R. § 204.5(k)(2). Alternatively, an individual may possess a U.S. bachelor's degree, or the foreign equivalent, followed by at least five years of progressive experience in the specialty. *Id.* Moreover, the Petitioner did not further assert that he is an advanced degree professional in response to the Director's request for evidence and he does not do so on appeal. As such, the Petitioner does not qualify as an advanced degree professional.

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

issue is waived). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998).

Moreover, upon de novo review of the record, we agree with the Director that the record does not demonstrate that the Petitioner qualifies as an individual of exceptional ability. Regardless of whether the Petitioner established at least three of the six regulatory criteria, the evidence in its totality does not show that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[4] The Petitioner submitted high school transcripts, certificates related to auto mechanic training, evidence of his work experience, recommendation letters, and six customer service awards for the automotive repair shop that the Petitioner operated in Brazil. Although this evidence helps establish that the Petitioner has worked as an automotive mechanic and operated a repair shop, this is not sufficient to establish exceptional ability in the field.[5] Possessing the training needed to perform an occupation and having experience in the occupation are not sufficient to establish possession of a degree of expertise significantly above that ordinarily encountered in the field. Even operating a business that has been recognized for its customer service is not sufficient, by itself, to demonstrate the Petitioner's exceptional ability because the Petitioner has not explained nor documented the process by which these customer service awards were determined nor shown that they were received due to the Petitioner's expertise in the field.

As noted above, the Petitioner's brief statement in support of his appeal merely repeats previously asserted claims that the Petitioner qualifies for a national interest waiver without addressing the Petitioner's qualification for the underlying EB-2 classification nor establishing error in the Director's conclusions. Because the Petitioner has not established that he meets the threshold requirement of eligibility for EB-2 classification, we need not address whether he is eligible for, and merits as a matter of discretion, a waiver of that classification's job offer requirement. We acknowledge the Petitioner's arguments on appeal as to the three prongs of the *Dhanasar* analytical framework but, having found that the Petitioner does not qualify for EB-2 classification, we will not address those arguments here, and reserve our opinion regarding whether the Petitioner has satisfied any of the three prongs of *Dhanasar* analytical framework. *See INS v. Bagamasbad*, 429 U.S. at 25.

ORDER: The appeal is dismissed.

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[4] Because we agree with the Director's ultimate conclusion that the evidence in its totality does not establish the Petitioner's exceptional ability in the field and because the Petitioner does not appeal this finding, we need not address each of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) individually to determine whether the Petitioner has established at least three, and we reserve our opinion as to which, if any, of the six regulatory criteria the Petitioner has established. *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").

[5] *See Matter of Chawathe*, 25 I&N Dec. at 376 ("[T]ruth is to be determined not by the quantity of evidence alone but by its quality. Therefore, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine 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."). *See Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. 2010). USCIS has interpreted *Kazarian* as applicable to exceptional ability petitions.