U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26609754

Date: MAY 10, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneur who intends to work in the trucking industry, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner meets the initial evidentiary requirements for EB-2 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 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, under section 203(b)(2) 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] If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence

[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] U.S. Citizenship and Immigration Services (USCIS) has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

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[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 sole issue addressed by the Director is whether the Petitioner established his eligibility as an individual of exceptional ability.

At the time of filing, the Petitioner indicated his intent to work as an "entrepreneur" in the United States but offered no additional information regarding his proposed endeavor. In response to the Director's request for evidence (RFE), he provided evidence that he had established a Pennsylvania corporation for the purpose of operating a trucking and cargo transportation services business. The Petitioner states that he has 13 years of experience as a business owner in this industry in Russia.

A. Initial Evidentiary Criteria

The Petitioner previously asserted that he meets four of the six regulatory criteria for classification as an individual of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii). In denying the petition, the Director determined that the Petitioner did not submit evidence that satisfied any of the criteria and therefore did not establish his eligibility for the requested EB-2 classification.

In his appeal brief, the Petitioner maintains that he meets five of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii) and that the Director "erred in finding otherwise." After reviewing the evidence, we agree with the Director that the record does not support a finding that the Petitioner satisfies the requirements of at least three criteria.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the individual 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 states that he has been self-employed as the owner of a registered business in Russia since 2007. At the time of filing, he submitted evidence that he registered as an "Individual Entrepreneur" with

[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).

the Russian Federal Tax Authority in December 2007. The Petitioner also provided a letter from a Russian company, LLC "Training and Information Center for Taxation," whose director states that the Petitioner is an individual entrepreneur who has been a "partner" of this company since 2008, and consults with them for business, tax and insurance matters related to his business.

In response to the Director's RFE, the Petitioner submitted a letter from '[redacted]' signed by the Petitioner in his capacity as the owner and director of this business. The letter states that the Petitioner owned and operated this cargo transportation business between December 2007 and October 2021 and provides a list of his job duties.

The Director determined that the evidence was insufficient to satisfy this criterion. The Director acknowledged that the letter submitted in response to the RFE details the Petitioner's dates of employment, job title and duties. However, the Director emphasized that it was written and signed by the Petitioner himself, and that the record contained no additional independent evidence related to the Petitioner's claimed cargo transportation business or his employment history. Therefore, the Director concluded that the Petitioner did not meet his burden to provide evidence that he has at least ten years of full-time experience in the occupation in which he intends to be employed in the United States.

On appeal, the Petitioner maintains that he has the requisite ten years of experience in an occupation that is directly relevant to his proposed endeavor in the United States, where he intends to serve as the owner and director of a company engaged in trucking and cargo transportation services. To address the evidentiary deficiencies noted in the Director's decision, he indicates that he is submitting "tax returns as proof of conducting business for 10 years." He submits copies of his KND Form 1152016, "Tax Return on a single tax on estimated income for certain types of activities," submitted to the Russian Federal Tax Service, for the years 2008 to 2010 and 2017 to 2019.

While the record supports the Petitioner's claim that he registered, owned, and operated a business in Russia as an individual entrepreneur, he has not sufficiently corroborated his assertion that he has at least 10 years of full-time experience as the owner of a trucking or cargo transport business. We agree with the Director's determination that, based on the Petitioner's claim that he is self-employed, his letter alone is insufficient to meet his burden of proof.

The supporting evidence related to the Petitioner's business, such as the initial company registration and tax filings, does not identify the nature of its activities or the sector in which it operates, such that we can determine his that his experience has been "in the occupation for which he . . . is being sought." Further, the tax filings, which do not appear to include any financial information related to the company's activities, cover only a six year period and do not sufficiently document at least ten years of business activity or establish that the Petitioner was self-employed with this entity on a full-time basis for at least ten years. For all these reasons, the Petitioner has not established that he meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C)

The Petitioner did not submit evidence in support of this criterion when he filed the petition in March 2021. In response to the RFE, the Petitioner provided a copy of a Pennsylvania Non-Domiciled

Commercial Driver's License (CDL) issued to him in October 2022. The Director acknowledged this evidence but advised the Petitioner that it would not be considered because he obtained the license subsequent to the issuance of the RFE and well after the filing of the petition.

In his appellate brief, the Petitioner emphasizes that the CDL he previously submitted "is required in order to operate large, heavy, or placarded hazardous material vehicles in the United States commercially." He also indicates that he has been a licensed commercial driver in Russia since 1980 and has held a license to operate heavy trucks with trailers since 1988. The Petitioner maintains that he "has a license that pertains to the area of exceptional ability for his particular endeavor and USCIS erred in finding otherwise."

Upon review, the Director properly excluded the only documentary evidence submitted under this criterion. A petitioner must establish eligibility for the requested at the time of filing and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). The Petitioner's Pennsylvania CDL was issued to him more than 18 months after he filed the petition and cannot establish that he satisfied the requirements of the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) at the time of filing. While the Petitioner asserts that he possesses other relevant licenses and suggests that they would also satisfy this criterion, he has not corroborated this claim with evidence such as copies of the licenses. He cannot establish his possession of additional licenses with unsupported testimonial evidence alone. Accordingly, we agree with the Director's conclusion that the Petitioner does not meet this criterion.

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

The Director determined that the Petitioner submitted no evidence relating to this criterion. On appeal, he asserts that "[b]ased on the documentation in the record, the [petitioner] clearly stablished that this criterion has been met, and USCIS erred in finding otherwise." However, the record reflects that the Petitioner did not submit evidence in support of this criterion at the time of filing or in response to the RFE, nor did he previously state that he can satisfy this criterion. The record contains no evidence relating to his prior earnings or comparative salary data that would establish that his salary or other remuneration demonstrates exceptional ability. While the Petitioner has submitted copies of Russian tax filings on appeal, these documents do not reflect his salary or other remuneration in any given year. Accordingly, the Petitioner has not established that he meets this criterion.

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

The Petitioner did not submit evidence in support of this criterion at the time of filing. In response to the RFE, he submitted a copy of a membership card indicating that he has been a member of the Owner-Operator Independent Drivers Association (OOIDA) since October 24, 2022. Because the Petitioner became a member in this association more than 18 months after filing the petition, the Director advised that the evidence would not be evaluated and could not establish that he satisfied this criterion at the time of filing. On appeal, the Petitioner asserts that he is a member of OOIDA which he describes as "the international trade association representing the interests of independent owner-operators and professional drivers on all issues that affect truckers." He does not acknowledge or address the Director's determination that he did not provide evidence that he was a member of the OOIDA, or a member of any other association, as of the date of filing.

We agree with the Director's determination that the evidence of the Petitioner's membership in OOIDA does not establish that he meets this criterion. Again, a petitioner must establish eligibility for the requested benefit at the time of filing and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). Because the Petitioner did not establish that he was a member of OOIDA when the petition was filed, we need not address whether it is a "professional association" as required by 8 C.F.R. § 204.5(k)(3)(ii)(E). The Petitioner has not provided evidence that satisfies this criterion.

B. Final Merits Determination

Based on the foregoing analysis, the Petitioner has not established that he meets the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B), (C), (D), and (E). He claims on appeal to also meets the sixth criterion relating to recognition for achievements and significant contributions to his industry or field, under 8 C.F.R. § 204.5(k)(3)(ii)(F). However, because the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii), we need not reach this issue and will reserve it.[4] Further, we need not provide a final merits determination. Nevertheless, we advise that we have reviewed the record in the aggregate and conclude that it does not support a finding that the Petitioner possesses the degree of expertise required for classification as an individual of exceptional ability.

III. CONCLUSION

The Petitioner has not established that he meets the initial evidentiary requirements for the underlying EB-2 classification as an individual of exceptional ability. We acknowledge the Petitioner's claim on appeal that he is eligible for, and merits as a matter of discretion, a national interest waiver. However, to establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification under section 203(b)(2) of the Act. Here, the Director did not reach a determination on the Petitioner's eligibility for the requested national interest waiver and that issue is therefore not before us on appeal. The petition remains denied.

ORDER: The appeal is dismissed.

[4] *See INS v. Bagamasbad,* 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions 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).