U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28181945

Date: SEP. 14, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneur, 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 Nebraska 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.

I. LAW

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.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, the petitioner must then establish eligibility 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:

[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).

- 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 Petitioner proposes to work as an entrepreneur establishing and operating his own heating, ventilation, and air conditioning (HVAC) company. The Director found that the Petitioner did not establish that he is either an advanced degree professional or that he is an individual of exceptional ability and, as such, did not establish qualification for the EB-2 classification. The Director denied the petition, concluding that, without being eligible for the underlying immigrant classification, the Petitioner was therefore not eligible for a national interest waiver. As such, the Director did not reach the question of whether the Petitioner established eligibility under any of the three prongs in the *Dhanasar* analytical framework.

On appeal, the Petitioner first discusses the preponderance of the evidence standard in general, and states that the Director should not "alter the regulations or impose [a] stricter standard of proof." However, if the Petitioner believes that the Director improperly imposed a stricter standard of proof than a preponderance of the evidence, the Petitioner does not support this assertion with specificity as to any evidence in the record or how it was incorrectly considered by the Director. Similarly, the Petitioner does not identify any specific regulation that he claims the Director misapplied or "altered."

The Petitioner next makes a procedural argument, asserting that it was erroneous of the Director to deny the petition based only upon the finding that the Petitioner does not qualify for the EB-2 classification and without providing an analysis of the record as to the *Dhanasar* prongs. The Petitioner claims that this is "a violation of USCIS policy, the United States Constitution, and international treaties." However, the Petitioner does identify a specific policy, treaty, or constitutional provision that the Petitioner claims was violated. The Petitioner also makes the general assertion that the decision on this single basis "deprived [the Petitioner] of due process rights and fair treatment." But the Petitioner does not provide legal support for his assertion that the Director's decision violated his due process rights, such as identifying the due process right at issue and the legal standard by which it is assessed.[2]

If the Petitioner's due process argument is grounded in a concern over the constitutionality of the Act or the regulations, we cannot address arguments on the constitutionality of laws enacted by Congress or on regulations. *See, e.g., Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992) (holding that the Immigration Judge and Board of Immigration Appeals lacked jurisdiction to rule upon the constitutionality of the Act and its implementing regulations); *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 339 (BIA 1991) ("It is well settled that it is not within the province of this Board to pass on the validity of the statutes and regulations we administer.") (citations omitted). But if the

[2] *See Lang v. Payne*, 476 U.S. 926, 942 (1986) (stating that "[w]e have never held that applicants for benefits . . . have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."); *see also Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990) (explaining that the Fifth Amendment protects against deprivation without due process of property rights granted to noncitizens; however, petitioners do not have an inherent property right in an immigrant visa).

Petitioner's due process claim is based upon a concern that the Director did not comply with an applicable statute, regulation, or precedent decision, the Petitioner does not cite the specific statute, regulation, or decision at issue.

Moreover, we conclude that the Director's decision sufficiently explained the reasons for denying the petition and provided the Petitioner a fair opportunity for meaningful appellate review related to the basis of denial. *See* 8 C.F.R. § 103.3(a)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). We note that prior to issuing the denial, the Director first issued a detailed request for evidence (RFE), advising the Petitioner that the record was insufficient to establish qualification for the EB-2 classification, either as an individual of exceptional ability or an advanced degree professional, or eligibility for a national interest waiver under any of the three *Dhanasar* prongs. In the RFE, the Director advised the Petitioner of the specific deficiencies in the record and provided the Petitioner the opportunity to supplement the record and establish eligibility. Further, the decision provided a detailed and thorough analysis as to the evidence in the record and why the Director found it insufficient to establish the Petitioner's qualification for the EB-2 classification. A petitioner must be qualified for the underlying immigrant classification to be eligible for a national interest waiver. *See* section 203(b)(2)(B)(i) of the Act. Since the Petitioner did not establish qualification for the EB-2 classification, the Petitioner would not be able to establish eligibility for a national interest waiver.[3]

We turn now to the Petitioner's specific statements on appeal as to his eligibility for the EB-2 classification. As stated above, to qualify for the classification, an individual must establish eligibility either as a member of the professions holding an advanced degree or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act. Although the Director determined that the evidence in the record did not establish the Petitioner's qualification under either basis, we note that the Petitioner in his initial filing and in response to the RFE asserts qualification only as an individual of exceptional ability. Additionally, on appeal, the Petitioner asserts only that he qualifies for the EB-2 classification as an individual of exceptional ability. Accordingly, we consider any claim that the Petitioner qualifies as an advanced degree professional to be waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

"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 qualify, 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.[4] If a petitioner does meet at least three 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 their field.

[3] We do note that because the Director has not made detailed findings as to Petitioner's request for a national interest waiver under the *Dhanasar* framework, if the Petitioner, through any future motion filings, were to overcome the basis for the denial, we would remand the matter to the Director to make findings as to the *Dhanasar* framework in the first instance.
[4] 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.

As an initial matter, we note that while the Director analyzed the regulatory criteria as to whether the Petitioner established exceptional ability related to the field of HVAC, the Petitioner's initial filing and RFE response do not clearly state the field in which he claims exceptional ability. In his professional plan and statement, the Petitioner lists numerous, disparate areas of expertise, including business management, industrial mechanics, mechanical processes, quality control, CNC (computerized numerical control), strategic planning, occupational safety and prevention, project management, and people management, without stating a specific field in which he claims to possess exceptional ability. Counsel's initial filing brief and RFE response letter refer to the Petitioner as having "a degree of expertise significantly above that ordinarily encountered in HVAC"; and as having many years of experience in, and making significant contributions to the field of, "distance education focused on the field of HVAC"; but also as possessing exceptional ability in "administration and business management." On appeal, counsel makes a passing reference that the Petitioner has exceptional ability in "business management," but otherwise only refers to the Petitioner generally as having experience in the occupation he seeks, expertise in his field, or education relating to his area of exceptional ability.

This lack of clarity in the record as to the Petitioner's claimed area of exceptional ability impedes our analysis in determining whether the Petitioner has established the regulatory criteria. However, the Petitioner does not assert on appeal that the Director—in considering HVAC to be the Petitioner's claimed area of exceptional ability—misconstrued the Petitioner's claim. As such, we also review the regulatory criteria as to whether it establishes the Petitioner's exceptional ability in the field of HVAC, and we consider the claim that the Petitioner seeks to be classified as an individual of exceptional ability in a different field to be waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. at 336 n.5 (citing *Matter of R-A-M-*, 25 I&N Dec. at 658 n.2).

For the reasons discussed below, we conclude that the Petitioner has not overcome the Director's basis for denial and does not meet the initial evidentiary requirements for classification as an individual of exceptional ability. We evaluate each of the regulatory criteria in turn.

> *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 submitted a diploma and transcript with the course title: "Industry Area with Technical Qualification in Mechanics" from the *Centro Educacao Profissional* [redacted] in Brazil. Although the Petitioner's resume states that this is equivalent to an associate's degree in mechanics, the Petitioner did not provide an academic credential evaluation to establish the U.S. equivalency of this diploma as to the level of education it represents or the subject area. The Petitioner also submitted several certificates relating to such subjects as CNC machinery, forklift operation, millwork, and mechanics. The Director concluded that the Petitioner did not show that he has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to HVAC. The Director further noted that although counsel's RFE response letter claims that the Petitioner possesses a bachelor's degree in administration and business management from [redacted] College in 2005 and a master's of business administration post-graduate course in logistics from the

[redacted] in 2009, the record does not contain a diploma and transcript for these programs and even the Petitioner's resume does not claim that he possesses this education.

On appeal, counsel merely repeats the claim from the RFE response that the Petitioner possesses a bachelor's degree and a master's of business administration degree. Again, as the Director noted, the record does not contain evidence of these degrees. Additionally, the Petitioner does not attempt to overcome or even address the Director's finding that the Petitioner did not establish that the diploma and the certificates in the record relate to the field of HVAC.

As such, the Petitioner has not established eligibility under this criterion.

> *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).

The Petitioner submitted several employment letters to establish this requirement. In reviewing the letters, the Director found that they were insufficient to establish ten years of full-time experience relating to the occupation. The Director noted that they demonstrate the Petitioner's employment history from May 2, 2006 to February 18, 2016 in such jobs as "CNC Machine Operator," "CNC Milling Machine Operator," and "Retail Sales of Hardware and Tools Manager." This is a period of just under ten years, and the Petitioner did not explain how this experience relates to the HVAC occupation. The Director also acknowledged the Petitioner's claim that he has been an investor and partner in his company since July 2017, but stated that the evidence in the record, which includes evidence of a limited liability company established in 2017 and a letter from his spouse stating only that he is a "partner" and "investor" in the company, did not establish the job duties the Petitioner has performed with the company nor that the company was actively engaged in business with clients.

On appeal, the Petitioner merely asserts that he "has provided documentary evidence to corroborate his professional experience, full-time, for more than 10 years at various top-tier companies in Brazil and the United States of America." The Petitioner does not address the deficiencies identified by the Director in the decision and does not provide any further details as to how, specifically, the evidence in the record establishes at least ten years of full-time experience nor how it relates to the occupation.

As such, the Petitioner has not established eligibility under this criterion.

> *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 relating to this criterion or assert eligibility for this criterion. As such, the Petitioner has not established eligibility under this criterion.

> *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 did not submit evidence relating to this criterion or assert eligibility under this criterion. As such, the Petitioner has not established eligibility under this criterion.

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

The Petitioner did not submit evidence initially to establish this criterion. In response to the RFE, the Petitioner submitted a letter from the "Florida United Businesses Association," dated January 9, 2023, welcoming the Petitioner's company to membership in the association. The Petitioner also submitted information from the association's website, stating that it is a trade association representing small businesses in the state of Florida. The Director concluded that the Petitioner did not establish that he was a member of this association prior to the filing of the petition in March of 2021, and therefore did not establish eligibility for this criterion.

On appeal, the Petitioner states that he "included his certificate of membership from the ***Florida United Business Association*** confirming the [Petitioner's] membership of the professional association and that he was a member at the time of filing the petition. Therefore, he has provided clear and convincing evidence that he is a member of renowned and prominent professional associations." (emphasis in original).

However, the record does not contain a "certificate of membership" as the Petitioner claims and does not include evidence of a membership date prior to the filing of the petition. The Petitioner does not specify in his appeal what date he claims he became a member of this association. We agree with the Director's conclusion that the Petitioner did not provide evidence that he was a member of this association prior to filing the petition. As noted by the Director, a petitioner must establish eligibility at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved when a beneficiary, initially ineligible at the time of filing, becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

As such, the Petitioner has not established eligibility under 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).

The Petitioner submitted letters of recommendation in support of this criterion. The Director concluded that while the letters discuss various positions the Petitioner has held and projects on which the Petitioner has worked, the letters do not describe recognition for achievements and significant contributions to the industry or field. For example, the Director notes that one of the letters describes a project that the Petitioner and the letter writer worked on to use more effective sharpening tools to reduce maintenance needed on molds, but that the letter did not demonstrate that the project was implemented beyond the company or its clients or was otherwise a significant contribution to the field.[5]

[5] We also note that the record does not demonstrate that this project, nor the other positions and projects described in the other letters of recommendation, relates to the HVAC field.

On appeal, the Petitioner again simply asserts that he has established this criterion, without addressing or overcoming the Director's findings. The Petitioner states only, "we have included evidence in the form of documentary evidence that further proves recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." The Petitioner's conclusory statement, which does not reference specific evidence in the record and simply restates the regulatory language, is not sufficient to overcome the Director's findings or to establish this criterion.

As such, the Petitioner has not established eligibility under this final criterion.

Therefore, the Petitioner has not established that he satisfies any of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Because the Petitioner does not satisfy at least three of the criteria, we need not conduct a final merits determination to evaluate whether he has achieved the degree of expertise required for exceptional ability classification. As such, the Petitioner does not qualify as an individual of exceptional ability. Having determined that the Petitioner does not qualify as an individual of exceptional ability, we conclude that the Petitioner has not demonstrated eligibility for the underlying EB-2 classification.

The next issue is whether the Petitioner has established that a waiver of the classifications' job offer requirement is in the national interest. Because the Petitioner has not established that he meets the threshold requirement of eligibility for the underlying 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. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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 the applicant did not otherwise meet their burden of proof).

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as an individual of exceptional ability. 8 C.F.R. § 204.5(k)(3). Because the Petitioner has not established eligibility for the underlying EB-2 immigrant classification, we conclude that the Petitioner is not eligible for a national interest waiver. We reserve our opinion regarding whether the Petitioner has satisfied any of the three prongs of the *Dhanasar* analytical framework.

ORDER: The appeal is dismissed.