U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28580435

Date: SEP. 20, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a chief executive in the field of transportation, 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, 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.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that he qualifies as an individual of exceptional ability or that he merited a national interest waiver as a matter of discretion. 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 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 in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of 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). However, meeting the minimum requirements by providing at least three types of initial evidence does not, in itself, establish that the individual meets the requirements for exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. *Id*. The officer must determine whether the

petitioner, by a preponderance of the evidence, has demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then demonstrate they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that USCIS may, as matter of discretion,[1] grant a national interest waiver if the petitioner shows:

- 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.

The Director determined that although the Petitioner met at least three out of six criteria under 8 C.F.R. § 204.5(h)(3)(ii), the record lacked evidence that the Petitioner's professional achievements demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. The Director went on to discuss the Petitioner's eligibility for a national interest waiver, applying the three-prong framework set forth in *Dhanasar*, and concluded that although the Petitioner established that his endeavor has substantial merit and that he is well positioned to advance his endeavor, he had not established that his endeavor has national importance, or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. We adopt and affirm the Director's decision, with additional comments below. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

On appeal, the Petitioner first asserts that USCIS "did not apply the proper standard of proof in this case" and "erroneously applied the law to the detriment of the Appellant." The Petitioner, however, does not identify any unusual requirements imposed, nor does the Petitioner specify how the Director erred or what factors in the decision were erroneous.[2] The Petitioner also contends, without further explanation, that the Director applied a stricter standard of proof than that of preponderance of the evidence and "did not give due regard" to the evidence submitted. Accordingly, we need not further address either of these assertions. *Cf. Giday*, 113 F.3d at 234 (declining to address a "passing reference" to an argument in a brief that did not provide legal support).

The Petitioner further asserts that by satisfying five of the six criteria that are required to demonstrate exceptional ability, he met the preponderance of the evidence standard and thus qualifies for the underlying EB-2 classification. It appears, however, that the Petitioner focuses entirely on his ability to meet at least three of six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii) as the basis for claiming that he is an individual of exceptional ability. We disagree. As noted above, and as previously stated both in the Director's request for evidence and in the denial, meeting the minimum requirements by providing

[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).

[2] An appeal must specifically identify any erroneous conclusion of law or statement of fact in the unfavorable decision. *See* 8 C.F.R. § 103.3(a)(1)(v).

at least three types of initial evidence is not sufficient to establish that the Petitioner is an individual of exceptional ability, but instead is only the first step. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2). Here, the second step of the process is based on a comprehensive qualitative analysis of the evidence. In a final merits determination, the Director acknowledged the Petitioner's experience, including his acquisition of certifications in financial mathematics and factoring that prepared him to work in an executive capacity in the transportation industry, but concluded that the Petitioner did not establish by a preponderance of the evidence that he has achieved a degree of expertise that is significantly above that ordinarily encountered in the sciences, arts, or business. *See id.* Although the Petitioner reemphasizes his career successes, skills, and professional relationships on appeal, he does not address the Director's final merits determination analysis and instead continues to focus exclusively on the fact that the minimum evidentiary requirements were satisfied.

Finally, while the Director determined that the Petitioner's proposed endeavor has substantial merit and that he is well positioned to advance his endeavor, the Director explained how specific evidence within the record, such as the Petitioner's business plan, industry reports, and letters of support, did not establish that the Petitioner's proposed endeavor to continue his work as a chief executive in the transportation industry has national importance or that it would be beneficial to the United States to waive the requirements of a job offer and, thus, of a labor certification. As the Petitioner has not established the threshold requirement of eligibility for the EB-2 classification, further analysis of his eligibility for a national interest waiver under the *Dhanasar* framework is unnecessary.

Because the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding his eligibility for a for a discretionary waiver under the *Dhanasar* analytical framework. *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 alternative issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.