U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28446324

Date: SEP. 21, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a general and operations manager and entrepreneur, 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.

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. 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.

II. ANALYSIS

As a preliminary matter, the Petitioner alleges through counsel on appeal that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, and erroneously applied the law, to [his] detriment." Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing immigration benefit requests. *See Matter of Chawathe*, 25 I&N Dec. at 375; *see also Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions. *See generally* 1 *USCIS Policy Manual*, *supra*, at E.4(B). While counsel contends on appeal that the Petitioner has provided evidence sufficient to demonstrate his eligibility for the EB-2 classification and a national interest waiver, counsel does not further explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

A. Exceptional Ability

The Director concluded that the record does not satisfy at least three of the six exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii). More specifically, the Director found that the Petitioner fulfilled only the experience criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), and we agree with that determination. On appeal, the Petitioner asserts that the Director's decision was erroneous, and maintains that he also meets the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(E) and (F) pertaining to membership in professional associations and recognition for achievements and significant contributions. The Petitioner does not reference on appeal any of the other criteria at 8 C.F.R. § 204.5(k)(3)(ii), nor does he assert that the standards at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply in this matter. *See* 8 C.F.R. § 204.5(k)(3)(iii).

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations." In support of this criterion, the Petitioner provided a certificate evidencing his membership in the North American Spine Society (NASS) through December 31, 2021. In

[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).

determining that the Petitioner's evidence did not satisfy this criterion, the Director noted that Petitioner had not provided documentation to demonstrate that he maintained his membership from the time of filing and continuing through the petition's adjudication.

On appeal, the Petitioner asserts that the Director "failed to consider and weigh the totality of the evidence presented, including strong evidence certifying the [P]etitioner's current membership as can be seen in TAB 6.1 of the [request for evidence (RFE)] Binder." Upon review, however, the documentation referred to in the RFE response is the same membership certificate referenced above, which expired on December 31, 2021. On appeal, the Petitioner provides no new evidence demonstrating that he maintained his membership from the time of filing through adjudication of the petition in March 2023. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1).

Moreover, while not raised by the Director, the limited evidence presented is not sufficient to demonstrate that NASS has a membership body comprised of individuals who have earned a U.S. baccalaureate degree, or its foreign equivalent, or that the organization otherwise constitutes a professional association.[2] The evidence includes a Wikipedia entry regarding NASS, which states that it is a medical society for healthcare professionals but provides no information about the association's membership requirements. Moreover, we note that Wikipedia is an online open-source collaborative encyclopedia that explicitly states it cannot guarantee the validity of its content.[3] The evidence submitted does not establish the criteria or requirements for membership in NASS. Finally, although he states his intent to engage in the sale and marketing of medical devices, the Petitioner does not indicate that he intends to work as a healthcare professional in the United States, so it is unclear how this claimed membership is relevant to the proposed endeavor.

For the reasons discussed, the Petitioner has not established that he meets this criterion.

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." Although the Petitioner describes himself as "an [e]ntrepreneur in the field of sales and marketing with exceptional ability," the record does not elaborate on what the Petitioner may be exceptionally able to do or, as specifically contemplated by 8 C.F.R. § 204.5(k)(3)(ii)(F), the industry or field in which the Petitioner is exceptionally able to do so.

The Director acknowledged that the record contains numerous letters of recommendation; however, the Director found that while the letters "[praise] the [P]etitioner for doing the job for which he was hired" and that his work probably increased the authors' sales and revenues, they were not sufficient to show recognition of significant contributions within a profession or business organization as opposed to individual employers. The Director further noted that many of the initial letters submitted were from friends and business partners, and thereby were insufficient to demonstrate that the

[2] The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation."

[3] *See* General Disclaimer, Wikipedia, https://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (last visited Sep. 21, 2023); *see also Badasa v. Mukasey*, 540 F.3d 909 (8th Cir. 2008).

Petitioner had been recognized by peers, governmental entities, or professional or business organizations for achievements and significant contributions to the industry or field. On appeal, the Petitioner asserts that the Director failed to properly evaluate the evidence presented and contends that the Director applied a heightened standard by declining to afford weight to the letters of support because they were not from independent sources. Upon review, we concur with the Director's determination.

The letters of recommendation do not satisfy the requirements at 8 C.F.R. § 204.5(k)(3)(ii)(F). We first note that none of the letters are from governmental entities, or professional or business organizations; rather, they are from individuals writing in their individual capacity. Although the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) contemplates individuals writing in their individual capacity, it does so in the context of "peers" as noted by the Director. Here, most of the writers are former clients or business associates of the Petitioner, not his peers. We further note that many of the letters of recommendation discuss projects that benefitted the Petitioner's clients and their individual project requirements, and are not "[e]vidence of recognition for achievements and significant contributions to the industry or field," as required by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) (emphasis added).[4] Moreover, while some of the letters discuss the Petitioner's academic credentials, professional skills, and job experience, this evidence does not show that his work has been recognized beyond his clients and their specific projects at a level indicative of "achievements and significant contributions to the industry or field." We therefore agree with the Director that the Petitioner has not established that he fulfills the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

For the reasons set forth above, the evidence does not establish that the Petitioner satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification. The Petitioner, therefore, is not eligible for classification as an individual of exceptional ability in the sciences, art, or business .

B. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. The Director determined that although the Petitioner's proposed endeavor has substantial merit, the record did not establish that the Petitioner's proposed endeavor has national importance, that he is well positioned to advance his endeavor, 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 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

[4] Although we do not individually address every letter of recommendation in the record, we have reviewed the record in its entirety.

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).

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an individual of exceptional ability; therefore, we conclude that the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.