U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9946087

Date: FEB. 26, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

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

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not qualify for classification as an individual of exceptional ability.

On appeal, the Petitioner submits additional documentation and a brief asserting that he is eligible for exceptional ability classification and a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. 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. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
>
> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will

> substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of job offer –
>
> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 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).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

A. Exceptional Ability

The Petitioner contends that he meets at least three of the regulatory criteria for classification as an individual of exceptional ability. In denying the petition, the Director determined that the Petitioner fulfilled only the membership in professional associations criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E) and the recognition for achievements and significant contributions criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

In the appeal brief, the Petitioner maintains that he also meets the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), which requires "[e]vidence in the form of letter(s) from current or former

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).
[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).
[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

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."

As evidence of his ten years of full-time experience as an entrepreneur in the logistics industry, the Petitioner initially presented a November 2018 letter from [redacted] stating that he served as company president from "October 2007 to July 2009" and listing his entrepreneurial duties. In addition, he submitted an October 2018 "Employment Certificate" from [redacted] indicating that he has been working as chairman of the board for the company "since 2010" and listing his responsibilities, projects, and accomplishments. The Petitioner also provided a November 2018 "Employment Certificate" from [redacted] stating that he has been serving as chairman of the board "since 2013" and that he is "responsible for control of strategic direction and decision-making of major operating projects of the company."

The Director issued a request for evidence (RFE) informing the Petitioner of the requirements set forth in regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) and advising him that the letters he presented from current and/or former employers did not meet the requirements of this criterion. The Director's RFE stated:

> To meet this criterion, experience letters must demonstrate ten years of full-time experience in the occupation being sought by the petitioner. After reviewing the letters in the record, USCIS finds that they do not contain the required information; i.e., the letters contain a month and year OR a year, rather than full dates (mm/dd/yy) of the Petitioner's employment with the companies and whether the employment is/was full or part time. In addition, USCIS notes that the Petitioner's employment with [redacted] and [redacted] overlap. Please explain this overlap, ensuring that documentary evidence is provided which substantiates any claims made.

In response, the Petitioner submitted an August 2019 letter from [redacted] stating that he "was a full-time employee" and served as company president from "October 15, 2007 to July 1, 2009." Additionally, he offered a July 2019 "Employment Certificate" from [redacted] indicating that he "has been serving as the chairman of the board of the company since June 4, 2010." The Petitioner also presented a July 2019 "Employment Certificate" from [redacted] stating that he has been serving as chairman of the board since "November 1, 2013."

In the decision denying the petition, the Director determined that the Petitioner had not met the requirements of the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B). With regard to the Petitioner's work experience, the Director noted that the letters from [redacted] and [redacted] did "not state that his position is full-time." The Director's decision further stated:

> Although counsel for the Petitioner states in his supporting letter that "[b]y the nature of such position (Chairman of the Board) and considering that [the Petitioner] is the owner of the two companies, his job in these two companies are [*sic*] in full-time manner" and that "as an entrepreneur, it is normal for him to simultaneously run two companies," as

stipulated in the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B), only employers can attest to an alien's ten years of full time employment.

On appeal, the Petitioner provides letters from [redacted] and [redacted] (both dated November 2019) stating that he has been working for them "full-time." As noted, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).[4]

In the present matter, the record supports the Director's determination that the Petitioner did not meet the requirements of the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B). Accordingly, the Petitioner has not shown that he 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.

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. As previously outlined, in order to qualify for a national interest waiver, the Petitioner must first show that he qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. The Petitioner does not claim that he is an advanced degree professional and, as discussed above, has not shown that he meets the regulatory criteria for classification as an individual of exceptional ability. As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot.

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as a as an individual of exceptional ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[4] Here, the Petitioner was put on notice of the full-time experience requirement set forth in regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) and was given a reasonable opportunity to provide the evidence in response to the Director's RFE.