U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18403942

Date: SEP. 16, 2021

Appeal of Nebraska Service Center Decision

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

The Petitioner, a journeyman power lineman, 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 Nebraska Service Center denied the petition, concluding that the Petitioner had not established his eligibility as an individual of exceptional ability and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that he is eligible for exceptional ability classification and for 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 definitions:

> *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.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or

[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).

similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate 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. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate 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

Because he has not indicated or established that he qualifies as a member of the professions holding an advanced degree, the Petitioner must meet at least three of the regulatory criteria for classification as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). In denying the petition, the Director determined that the Petitioner did not fulfill any of the regulatory criteria. On appeal, the Petitioner maintains that he satisfies five criteria. After reviewing the evidence, we conclude that the record does not support a finding of his eligibility for at least three criteria.

> *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 Director determined:

> The plain language of this criterion has been met. However, while the evidence may show the petitioner is a capable Journeyman Line Worker in Canada, the certificates/transcripts do not demonstrate the petitioner has a degree of expertise significantly above that ordinarily encountered in his field.
>
> As such, this criterion has not been met.

The issue for this criterion is whether an individual provided "[a]n 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" as required by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A).[4] The issue of whether an indvidual has achieved the required level of expertise required for the exceptional ability classification, however, is conducted in a final merits determination if

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.
[4] *See also* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual.

the individual satisfies at least three criteria.[5] We will review the record to determine whether the Petitioner's evidence complies with the plain language of this regulatory criterion.

The record reflects that the Petitioner claimed eligibility based on:

- A "Journeyman Certificate" stating that he "has completed an [redacted] Apprenticeship Program and having achieved the standards established under the [redacted], is hereby authorized to work in the trades as a journeyman to use the title certified journeyman"
- A card from [redacted] certifying that the Petitioner successfully completed "Advanced Boom Truck Safety"
- A "Statement of Recognition" from [redacted] College of Applied Arts and Technology reflecting that the Petitioner successfully completed the "Excavator/Backhoe Operator Course"
- A "Certificate of Completion" from [redacted] certifying that the Petitioner completed "Basic Chainsaw Safety & Maintenance"
- A "Certificate of Achievement" from [redacted] College recognizing the Petitioner's participation and training on "Excavator & Backhoe/Loader"
- A "Certificate of Achievement" from [redacted] for "Live Line Techniques (25 kV and Below)"

The Petitioner also submitted a "Lesson Outline" for the National Electrical Course for Apprentice Linemen and "Live Line Trainee" learning guides for levels 1 and 2.

As indicated above, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) requires "[a]n official academic record."[6] The Petitioner, however, did not establish that the presented doumentation, such as a certificate, represents "official academic record[s]" consistent with this regulatory criterion. Here, the Petitioner did not show that he provided official academic records from the organizations. In addition, the Petitioner did not demonstrate that the entities qualify as "a college, university, school, or other institution of learning" pursuant to this regulatory criterion; he did not support the record with background information or other evidence reflecting their status as a college, university, school, or other institution of learning.

Without evidence of official academic records from a college, university, school, or other institution of learning, the Petitioner has not sufficiently shown that he meets 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 Director referenced several of the documents discussed above and concluded that "there is no evidence the profession itself requires them," and "the evidence does not demonstrate the Journeyman license demonstrates a degree of expertise significantly above that ordinarily encounter[ed] in his field." The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C), however, only requires "[a] license to practice the

[5] *Id.*

[6] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

profession or certification for a particular profession or occupation"[7] rather than "evidence the profession itself requires them." Here, the Petitioner's submission of his "Journeyman Certificate," showing his authorization to work in the trades as a journeyman, meets the plain language of this regulation. Moreover, the significance of his licenses or certificates is analyzed in a final merits determination if the individual satisfies at least three criteria.[8]

Accordingly, the Petitioner established that he meets 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).

At initial filing, the Petitioner provided copies of his paystubs from [redacted] located in [redacted] Canada; salary information for line installers and repairers in the United States from bls.gov, glassdoor.com, indeed.com, chron.com, payscale.com, and salary.com; and job postings of various journeyman positions in the United States from indeed.com. The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires "[e]vidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability."[9] The Petitioner compared his salary to non-journeyman positions in the United States rather than to the salaries of other journeyman power linemen in the [redacted] Canada area. Thus, the Petitioner did not show that he commanded a salary commensurate with exceptional ability.

In response to the Director's request for evidence (RFE), the Petitioner submitted a job letter from [redacted] confirming his salary and employment as a "Journeyman Power Linemen"; copies of additional paystubs from [redacted] a salary survey for several powerline technician positions in Canada from redsealrecruiting.com, and a screenshot reflecting the average powerline technician salary in Canada from payscale.com. Again, the comparative evidence indicates the average salaries for powerline technicians rather than the salary range for journeyman power linemen, the Petitioner's specific occupation.

On appeal, the Petitioner offers additional screenshots from payscale.com. However, as the Petitioner did not submit these documents before the Director, either at the time he filed the petition or in response to the Director's RFE, we will not consider this evidence in our adjudication of this appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "if the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose" and that "we will adjudicate the appeal based on the record of proceedings" before the Chief); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

For the reasons discussed above, the Petitioner did not show that he commanded a salary reflective of exceptional ability.

[7] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).
[8] *See* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).
[9] *See also* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

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

The Petitioner contends that his membership with the International Brotherhood of Electrical Workers (IBEW) meets this criterion. Specifically, the Petitioner argues that "[b]y definition, the IBEW is a professional labor association. It was established in 1891 and represents some 1 million electrical professionals. The IBEW states that it is a professional labor association." As evidence, the Petitioner submitted a confirmation letter of his membership from IBEW and screenshots from various websites describing ibew.org, for example, as "represent[ing] approximately 750,000 active members and retirees who work in a wide variety of fields, including utilities, construction, telecommunications, broadcasting, manufacturing, railroads and government," "a non-profit labor organization," and "[t]he IBEW exists solely to represent the interests of workers in the electrical industry."

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations."[10] However, the evidence submitted by the Petitioner does not show that IBEW 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 consistent with this regulatory criterion.[11]

Accordingly, the Petitioner did not demonstrate that he fulfills this criterion.

III. CONCLUSION

The Petitioner established eligibility for only one criterion discussed above. Although the Petitioner claims eligibility for an additional criterion on appeal, relating to recognition for achievements at 8 C.F.R. § 204.5(k)(3)(ii)(F), we need not reach this additional claim as he cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). Moreover, we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. In addition, we need not reach a decision on whether, as a matter of discretion, he is eligible for or otherwise merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve these issues.[12] 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.

[10] *See also* 6 *USCIS Policy Manual*, supra, at F.5(B).

[11] 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."

[12] *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, n.7 (declining to reach alternate issues on appeal where an applicant is otherwise ineligible).