U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20640898

Date: SEP. 13, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, a drill operator, 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 record did not establish that the Petitioner qualifies as an individual of exceptional ability. The Director further concluded that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. 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. –
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> (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. . . . the 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.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability:

(A) 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;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) 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).

In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

As noted above, the Director concluded that the record did not establish that the Petitioner qualified for classification as an individual of exceptional ability. Specifically, although the Petitioner asserted that he satisfied the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(A)-(B), (E)-(F), the Director concluded that the Petitioner satisfied none of them. On appeal, the Petitioner reasserts that he satisfies the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(A)-(B), (E)-(F). The Petitioner does not assert, and the record does not support the conclusion, that he satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(C)-(D), or that the standards at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation, such that comparable evidence may establish eligibility. The Petitioner also does not assert, and the record does not support the conclusion, that the Petitioner may qualify as a member of the professions holding an advanced degree. For the reasons discussed below, the record does not establish that the Petitioner has satisfied at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii).

A. Degree or Similar Award from an Institution of Learning

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) requires "[a]n official academic record showing that the [noncitizen] 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." In a request for evidence (RFE), the Director acknowledged that the record contains English translations of two training certificates, written in a language other than English, given to the Petitioner by [redacted] however, the Director informed the Petitioner that [redacted] is not a college, university, school, or other institution of learning as contemplated by the regulation. In response to the RFE, the Petitioner asserted that a certificate-issuing institution need only be "an institution relating to the field of exceptional ability," not necessarily an institution of learning. In the decision, the Director found that [redacted] a manufacturer of industrial and agricultural equipment, is not an institution of learning as contemplated by the regulation; therefore, the certificates the Petitioner received from [redacted] do not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

On appeal, the Petitioner asserts that "[redacted] is both a company engaged in the manufacture and support of high-quality industrial and agricultural equipment (including that for [horizontal directional drilling (HDD)], as well as an institution of learning." In support of that assertion, the Petitioner submits an undated copy of an article self-published by [redacted] announcing that it has partnered

with the [redacted] Area Community College to host a two-week HDD operator training program to become certified as an HDD operator.

The Petitioner's reliance on [redacted] self-published article is misplaced. Rather than establishing that [redacted] is the type of institution of learning contemplated by the regulation, the article specifically quotes [redacted] vice president of underground products as saying, "While other training programs may provide a certificate of completion, each student who successfully completes the [redacted] HDD Circuit training program will be certified as an HDD operator from an accredited college." Therefore, it appears that the [redacted] Area Community College, not [redacted] is the institution of learning that would issue the certificate of completion for the HDD operator training program. We note that the Petitioner's certificates were for training held from January 13 through 18, 2013, and for training held on March 7, 2015. Neither training was the two-week training program through [redacted] partnership with the [redacted] Area Community College. Neither certificate references the [redacted] Community College, or any other institution of learning. Moreover, neither certificate is supplemented by an official academic record, as required by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A). Based on the information in the record from [redacted] the Petitioner's certificates for one-week and one-day training programs appear to be the mere "certificate[s] of completion," described by its vice president of underground products, not certifications from an accredited college or other institution of learning. The record does not otherwise contain an official academic record showing that the Petitioner 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; therefore, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

B. Letters from Employers Showing at Least 10 Years of Full-Time Experience in the Occupation

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires "[e]vidence in the form of letter(s) from current or former employer(s) showing that the [noncitizen] has at least ten years of full-time experience in the occupation for which he or she is being sought." The record contains letters from former employers of the Petitioner, stating his dates of employment, job titles, and job duties. The letters indicate that the Petitioner's employment experience is as follows:

- January 2007 to May 2012 (approximately five years, five months): horizontal directional drilling machine operator for [redacted]
- September 2013 to December 2015 (approximately two years, four months): drilling sanitation operator for [redacted];
- February 2018 to August 2018 (approximately seven months): unspecified job title for [redacted]; and
- November 2018 to May 2019 (approximately seven months): drilling safety operator for [redacted]

Based on the letters from the Petitioner's prior employers, as of the petition filing date, the Petitioner had approximately eight years and 11 months of experience in the occupation for which he is being sought. In response to the Director's RFE, the Petitioner submitted documents that purport to be English translations of contracts for the Petitioner's work; however, the Director noted that the Petitioner did not submit copies of the underlying original language documents. The Petitioner also submitted a letter from his current employer in response to the RFE; however, the Director noted that

it may not establish eligibility because it addresses experience that occurred after the filing date. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978) (a visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998) (a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services requirements). The Director concluded that the record did not establish that the Petitioner had at least 10 years of full-time experience in the occupation for which he is being sought.

On appeal, the Petitioner clarifies that the documents submitted in response to the RFE are translations of documents issued by the Brazilian Department of Labor, reflecting contracts between the Petitioner and his respective employers, listed above. Moreover, the Petitioner asserts that the documents establish nine such contracts, totaling 121 months of experience.

The Petitioner's reliance on the translation of the Brazilian Department of Labor records of contracts between him and prior employers is misplaced. The regulation requires "[e]vidence *in the form of letter(s) from current or former employer(s)* showing that the [noncitizen] 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) (emphasis added). The letters from the Petitioner's prior employers show that he has approximately eight years and 11 months of experience in the occupation for which he is being sought, not at least 10 years of experience. Moreover, the record does not clarify why several of the Petitioner's prior employers omitted periods of employment that he asserted in response to the RFE. The letter from [redacted] dated July 2020, omitted that it employed the Petitioner again from June 2013 to August 2013, as the Petitioner asserted in response to the RFE. Likewise, the letter from [redacted] dated August 2020, omitted that it employed the Petitioner again from August 2018 to November 2018, as the Petitioner asserted in response to the RFE. The letter from [redacted] dated July 2020, omitted that it employed the Petitioner again from October 2019 to February 2020, as the Petitioner asserted in response to the RFE. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* The Petitioner also does not clarify why the record does not contain a letter from [redacted] confirming his employment there from September 2012 to April 2013, or a letter from [redacted] confirming his employment there from August 2016 to November 2016, as the Petitioner asserted in response to the RFE.

In addition to the unresolved inconsistent information regarding the actual duration of the Petitioner's employment at any particular prior employer, we also note that none of the letters indicate that the Petitioner worked on a full-time basis for any of the employers. The Petitioner bears the burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the Petitioner has not met that burden regarding his periods of prior employment. In summation, the record does not contain evidence in the form of letters from current or former employers, showing that, as of the petition filing date, the Petitioner had at least 10 years of full-time experience in the position for which he is being sought; therefore, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B). *See* 8 C.F.R. § 103.2(b)(1).

C. Evidence of Recognition for Achievements and Significant Contributions to the Industry

The regulation 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." The Director acknowledged that the record contains an English translation of an undated merit certificate from [redacted] originally written in a language other than English, recognizing the Petitioner's "excellent work, responsibility, competence, and commitment to the [s]afety, [h]ealth, [e]nvironmental and [q]uality objectives of the company." However, the Director noted that the record does not establish how the certificate for the Petitioner's work for that company is evidence of recognition for achievements and significant contributions to the industry or field of horizontal drilling. The Director also acknowledged that letters in the record from four of the Petitioner's prior employers, discussed above, focused on his achievements and contributions to each specific employer; however, the Director noted that the letters "did not elaborate regarding the [P]etitioner's recognition for achievements and significant contributions to the industry of field as a whole." The Director also acknowledged that a letter from [redacted] indicated that it intended to hire the Petitioner and that he is well suited for the position but, like the prior employers' letters, the prospective employer's letter did not "elaborate regarding the [P]etitioner's recognition for achievements and significant contributions to the industry or field as a whole."

In response to the Director's RFE, the Petitioner resubmitted prior letters, and he submitted a new letter from [redacted] addressing the Petitioner's work beginning in October 2020, after the petition filing date. However, as discussed above the Director explained in the decision that the new letter from [redacted] could not establish eligibility because it addresses experience that occurred after the filing date. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249; *Matter of Izummi*, 22 I&N Dec. at 176. The Petitioner also submitted a letter from [redacted] an associate professor of biomedical industrial and systems engineering at [redacted] University, in response to the RFE. The Director acknowledged that [redacted] letter summarized the Petitioner's career; however, the Director found that the letter "does not provide any specific examples of how the [Petitioner] has been recognized for achievements and significant contributions to the industry or field of horizontal drilling outside of the direct benefit he provided to each of his employers." The Director then concluded that the record did not satisfy the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F).

On appeal, the Petitioner asserts that the letters addressed by the Director satisfy the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) under the preponderance of evidence standard. Under the preponderance of evidence standard, a petitioner must establish that a "claim is 'probably true,' where the determination of 'truth' is made based on the factual circumstances of each individual case." *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010) (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). Factors include evidence's relevance, probative value, and credibility. *Id.*

For this criterion, the Petitioner must establish that the claim that he has received recognition for achievements and significant contributions to the industry or field of horizontal drilling by peers, governmental entities, or professional or business organizations is probably true. *See id.* The certificate and letters from the Petitioner's prior and current employers are relevant to the issue because they are from business organizations. *See* 8 C.F.R. § 204.5(k)(3)(ii)(F); *see also Matter of Chawathe*, 25 I&N Dec. at 76. However, the Petitioner has not established that the letter from [redacted] an

associate professor working for a private academic institution, is from a peer of the Petitioner, a governmental entity, or a representative of a professional or business organization within the industry or field of horizontal drilling as required by 8 C.F.R. § 204.5(k)(3)(ii)(F). Moreover, [redacted] letter discusses whether the Petitioner satisfies the criteria set forth in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), not whether the Petitioner has received recognition for achievements and significant contributions to the industry or field of horizontal drilling.

Although the certificate from [redacted] as translated into English, is relevant, it bears minimal probative value. The extent of the undated certificate's remarks are: [redacted] congratulates [the Petitioner] for demonstrating excellent work, responsibility, competence, and commitment to the [s]afety, [h]ealth, [e]nvironmental and [q]uality objectives of the company." It did not recognize the Petitioners achievements or significant contributions to the industry or field of horizontal drilling beyond the "objectives of the company." Without more, achievements or significant contributions to a particular entity are not automatically achievements or significant contributions to a greater industry or field merely because the entity operates within a greater industry or field. Therefore, the probative value of the Petitioner's undated certificate from [redacted] is diminished.

Although the letters from the Petitioner's prior employers are relevant, they bear minimal probative value. As the Director observed, the letters identified drilling projects to which the Petitioner was assigned, and they summarized the duties he performed while assigned to those projects. They also comment on how the communities served by the drilling projects benefited from the completion of the projects. However, as the Director also observed, the letters did not address how the Petitioner's performance of assigned duties and the completion of particular projects to which he was assigned demonstrate that he received recognition for achievements and significant contributions to the industry or field of horizontal drilling. Again, without more, achievements or significant contributions to a particular entity are not automatically achievements or significant contributions to a greater industry or field merely because the entity operates within a greater industry or field. Therefore, the probative value of the letters from the Petitioner's prior employers is diminished.

Although the letters from the Petitioner's current employer are relevant, they also bear minimal probative value. As the Director observed, the first letter from the Petitioner's current employer indicated that it intended to hire the Petitioner, it summarized what his duties would be, and it asserted that the Petitioner is qualified for the position. However, as the Director also observed, it did not address whether the Petitioner has received recognition for achievements and significant contributions to the industry or field of horizontal drilling. In turn, although the Petitioner submitted a second letter from his current employer in response to the RFE, as the Director explained in the decision, the second letter may not establish eligibility to the extent that it addresses experience that occurred after the filing date. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249; *Matter of Izummi*, 22 I&N Dec. at 176. The letter does not otherwise address whether the Petitioner received recognition for achievements and significant contributions to the industry or field of horizontal drilling as of the petition filing date. *See id.* Therefore, the probative value of the letters from the Petitioner's current employer is diminished. Because the record does not contain evidence of recognition for achievements and significant contributions to the industry or field of horizontal drilling by peers, governmental entities, or professional or business organizations, it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

D. Evidence of Membership in Professional Associations

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations." The record contains a copy of a printout from the International Association of Directional Drilling (IADD), indicating that the held a basic membership with the IADD from July 14, 2020, through July 14, 2021. In the RFE, the Director informed the Petitioner that the record did not establish that the IADD is a professional association. In response to the RFE, the Petitioner submitted a copy of information printed from LinkedIn about the International Association of Diecutting and Diemaking, which is dissimilar to the International Association of Directional Drilling. The Petitioner also submitted a copy of basic membership information printed from IADD's website. The Director noted that the IADD information indicates that the only stated requirement for the Petitioner's basic membership is an annual $75 fee. Based on the information in the record, the Director concluded that "the evidence does not establish the [P]etitioner's membership in this professional association represents anything more than a paid membership fee" and not "a result of the [P]etitioner's exceptional ability."

On appeal, the Petitioner asserts that the IADD is the type of professional association contemplated by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E). The Petitioner further asserts that his membership, at the time of filing, with the IADD satisfies the regulation. In support of the assertions on appeal, the Petitioner submits a copy of information printed from the IADD's website, stating that the IADD is "a non-profit organization dedicated to expanding the directional drilling industry" and that its "members are industry professionals who share ideas and develop safety and performance standards that contribute to our knowledge base."

Because the record does not otherwise satisfy two of the criteria at 8 C.F.R. § 204.5(k)(3)(ii), of which at least three are required, we reserve our opinion regarding whether the IADD is the type of professional association contemplated by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E), or whether the regulation requires anything beyond a fee-based membership. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *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).

In summation, the record does not satisfy at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, the record does not establish that the Petitioner qualifies for second-preference classification as an individual of extraordinary ability. *See* section 203(b)(2)(A) of the Act. We reserve our opinion regarding whether the Petitioner satisfies any of the criteria set forth in *Matter of Dhanasar*, 26 I&N Dec. 884. *See INS v. Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an individual of extraordinary ability; therefore, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.