U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28511595

Date: DEC. 8, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a truck driver and owner, seeks employment-based second preference (EB-2) immigrant classification as either a member of the professions holding an advanced degree or an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this 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 for the underlying visa classification or merits a discretionary waiver of the job offer requirement "in the national interest." 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.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).[1]

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[3]

Once a petitioner demonstrates eligibility for the underlying classification, the petitioner must then establish eligibility for a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar,* 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[4], grant a national interest waiver if the petitioner demonstrates that:

- 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

A. Member of Professions Holding an Advanced Degree

With respect to the underlying EB-2 classification, the Petitioner did not establish that he is an advanced degree professional. The Petitioner has provided sufficient evidence to establish he holds the equivalent of a U.S. bachelor's degree. However, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires, in pertinent part, "evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

On appeal, the Petitioner argues that the Director erred by not considering his work experience from 2009 to 2011 as a logistician at [redacted] in Kazakhstan, and from 2012 to 2014 as a driver forwarding specialist for [redacted] in Kazakhstan. Additionally, he asserts that "[i]n both the initial application and the [] RFE Response," he attested to his work at these two companies. However, the record reflects that he first attested to his employment at these two companies in his RFE response and not in his initial application. Moreover, he did not list these positions on his U.S. Labor Department's Employment and Training Administration (ETA), Application for Alien Employment

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[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https: //www.uscis.gov/policy-manual.

[3] *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); *see generally* 6 *USCIS Policy Manual, supra* at F.5(B)(2).

[4] *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).

Certification, Form 750[5] (or even on his resume) or provide letters from these two employers as required by 8 C.F.R. § 204.5(k)(3)(i)(B).[6] While we acknowledge the Petitioner's statement that he is unable to obtain letters from these employers as they have gone out of business, it remains his burden to establish that he qualifies as an advanced degree professional. *See Matter of Chawathe*, 25 I&N Dec. at 375-76 (AAO 2010). Without evidence that he has five years of progressive experience in the specialty, we cannot conclude that he is an advanced degree professional. 8 C.F.R. § 204.5(k)(2).

We also note that profession is defined as any 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.[7] 8 C.F.R. § 204.5(k)(3). The Petitioner has not established that his stated occupations of truck driver and/or owner satisfies the regulatory definition of profession.

For all of the above reasons, the evidence is insufficient to conclude the Petitioner is an advanced degree professional.

B. Individual of Exceptional Ability

The Director concluded that the Petitioner met three criteria, 8 C.F.R. § 204.5(k)(3)(ii)(A), (C), and (D),[8] but did not establish that he possesses a degree of expertise significantly above that ordinarily encountered in the field. While we affirm the Director's determination for the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (C), we withdraw the Director's conclusion as it relates to 8 C.F.R. § 204.5(k)(3)(ii)(D) regarding salary or other remuneration for services which demonstrates exceptional ability. We also note that, on appeal, the Petitioner limits his arguments to the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D) and (F) and does not address the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) or (E). As such, we consider these issues waived and will not address them further.[9]

On appeal, the Petitioner asserts that because his "earnings are several magnitudes greater than the earnings of the average worker in his field," he "clearly meets th[e] criterion" at 8 C.F.R. § 204.5(k)(3)(ii)(D). To satisfy this criterion, the evidence must show that the Petitioner has commanded a salary or remuneration for services that is indicative of his claimed exceptional ability relative to others working in the field. *See generally*, 5 USCIS Policy Manual B.2, https://www.uscis.gov/policymanual. In support, the Petitioner relies on the 2021 U.S. Bureau of Labor Statistics median salary for heavy and tractor-trailer truck drivers (which is $48,130 per year), the 2021 gross income of $106,635 from his sole proprietorship and his 2022 non-employee compensation.

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[5] The Form ETA 750 has been discontinued. *See*, https://www.dol.gov/agencies/eta/foreign-labor/forms. However, the form's instructions in Item 15 required the Petitioner to "[l]ist all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the [foreign national] is seeking certification . . .."

[6] Unsubstantiated assertions do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

[7] Profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) of the Act.

[8] On appeal, the Petitioner incorrectly argues that the Director found he did not meet the criterion under 8 C.F.R. § 204.5(k)(3)(ii)(D), however this is not correct because the Director found he did meet this criterion. Regardless, we withdraw the Director's finding for the reasons noted in this decision.

[9] An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)).

As an initial matter, the Petitioner must establish eligibility at the time of filing, which in this matter was February 16, 2022. 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Therefore, we cannot consider his 2022 non-employee compensation. Further, a comparison of the gross profit of his sole proprietorship to the median salary for heavy and tractor-trailer truck drivers is not a proper one, as the former reflects the gross receipt or sales and total income of the business and the latter is limited to the median wages for the occupation. Without more, we cannot conclude that the Petitioner has established that his salary or other remuneration for services is indicative of his claimed exceptional ability relative to others working in the field and we withdraw the Director's determination to the contrary.

The Petitioner also asserts that he has provided sufficient evidence of his recognition for achievements and significant contributions to the industry or field by peers, government, and professional or business entities and contends that the Director mischaracterized the submitted recommendation letters. Specifically, the Petitioner cites to [redacted] letter to argue that he "made a significant contribution to the industry because '[h]is experience and work ethic have been invaluable in promoting the company as a safe and trusted carrier in the trucking and transportation business.'" He further states that "[h]elping a carrier become established is a significant contribution to the trucking industry as a whole." The Petitioner also claims that [redacted] letters support his significant contributions to the trucking industry because he "train[ed] new truck drivers on how to operate their vehicles safely and efficiently," which reduces "the severe shortage of truck drivers" and resulting supply chain issues.

While the letters demonstrate the authors' favorable opinions of him, they are insufficient to establish that he meets the plain language of this criterion. Here, the Petitioner has not sufficiently established recognition for achievements and significant contributions to the trucking industry, as required, rather than contributions to his employer(s). Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

C. Final Merits Determination

Per the analysis above, the Petitioner has not established that he meets at least three of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F). Since the Petitioner did not satisfy the initial evidence requirements, we need not conduct a final merits analysis to determine whether the evidence in its totality shows that he is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).

III. CONCLUSION

For the foregoing reasons, the Petitioner has not established that he meets the evidentiary requirements for the underlying EB-2 classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the remaining appellate arguments as to whether he is eligible for, and merits as a matter of discretion, a national interest waiver. *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).

ORDER: The appeal is dismissed.