U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26928622

Date: JUN. 15, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a fitness specialist, seeks employment-based second preference (EB-2) immigrant classification as 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner is eligible as an individual of exceptional ability. In addition, the Director determined that the Petitioner is not eligible for, and does not merit as a matter of discretion, a national interest waiver. 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 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. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[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

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their 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 aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish that they merit 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[3], 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. INDIVIDUAL OF EXCEPTIONAL ABILITY

A. Evidentiary Criteria

The Director determined that while the Petitioner met the evidentiary criteria under 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (C) and (D), the evidence did not establish that he has a degree of expertise significantly above that ordinarily encountered in his field. On appeal, the Petitioner points out several errors in the Director's decision, and asserts that the Director did not consider the totality of the evidence when conducting his final merits determination. After review of the record, we conclude that the Petitioner does not meet the requisite three criteria, and agree that he has not shown that he has a level of expertise in his field sufficient to meet the standards of the requested classification.

Regarding the errors in the Director's decision, the Petitioner notes that he is referred to by the incorrect pronoun in several places in the decision, and that the final merits determination states that he has a pilot's license. Although these errors are regrettable and reflect insufficient editing of the written decision, we do not find that they are material to the Director's conclusions about the Petitioner's eligibility. The Director repeatedly refers to the Petitioner's correct field and proposed endeavor as a fitness specialist, and analyzes his certifications as a health coach and personal trainer in the corresponding evidentiary criterion.

> *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 concluded that the Petitioner met this criterion, but did not provide an analysis in his decision. In responding to the Director's request for evidence (RFE), the Petitioner based his claim to this criterion on certificates he received from three organizations: the National Personal Training

[3] *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).

Association (NPTA), the International Federation of Body Builders (IFBB), and the American Sports and Fitness Association (ASFA). However, as these recognize the completion of certification exams relating to the Petitioner's occupation and proposed endeavor, they are properly considered under the evidentiary criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C), which specifically calls for evidence of this type. The Director concluded that the Petitioner meets that criterion based upon this evidence, and we concur. But as discussed below, we do not agree that the same evidence meets the requirements of this criterion.

In its response to the Director's RFE, the Petitioner referred to a definition of the term "institution of higher learning" at 38 U.S.C. § 3452(f). We first note that Title 38 relates to veterans' benefits, and the Petitioner has not shown that this statutory definition is applicable to the requested classification or immigration benefits in general. In addition, the Petitioner focused on a portion of this definition:

> When there is no State law to authorize the granting of a degree, the school may be recognized as an institution of higher learning if it is accredited for degree programs by a recognized accrediting agency... Such term shall also include an educational institution which is not located in a State, which offers a course leading to a standard college degree, or the equivalent, and which is recognized as such by the secretary of education (or comparable official) of the country or other jurisdiction in which the institution is located.

The Petitioner argued that as state legislation does not exist for the accreditation of personal trainers such as the Petitioner, other accredited organizations, including the organizations from which he received certificates, can meet the definition of "institution of higher learning." However, even if the above definition was applicable, it specifically refers to "degree programs" and institutions which offer "a course leading to a standard college degree," and the record does not show that any of these organizations offer degree programs or college degrees, and thus would not qualify as institutions of higher learning under this definition.

The phrase "institution of learning" appears elsewhere in the immigration regulations at 8 C.F.R. § 245a.3(b)(5)(i)(A) in the context of study programs to meet the requirements for an application to adjust to permanent resident status, and that section indicates that such programs may be conducted by "an established public or private institution of learning recognized as such by a qualified state certifying agency." While the Petitioner asserts that the NPTA is accredited by the National Commission for Certifying Agencies (NCCA), the record does not demonstrate that the NCCA accredits institutions of learning as opposed to occupational certification programs.[4] Further, we note that the Petitioner did not submit documentary evidence of the NPTA's certification, and the NCCA website cited in the Petitioner's RFE response does not include the NPTA in its list of accredited programs.

The Petitioner made similar arguments with respect to the IFBB and ASFA, and included a letter from the IFBB and a list of topics covered in the "Advanced Nutrition Specialist" certification course.

[4] The NCCA website, cited in the Petitioner's RFE response, states that the programs it accredits "certify individuals in a wide range of professions and occupations." www.credentialingexcellence.org/Accreditation/Earn-Accreditation/NCCA, accessed on June 14, 2023.

However, as with NPTA, this evidence does not establish that these organizations are institutions of learning comparable to colleges, universities, and schools as opposed to occupational certification programs. Accordingly, we withdraw the Director's favorable conclusion and conclude that the Petitioner does not meet 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)

As noted above, we agree with the Director's determination that the Petitioner's certificates from NPTA, IFBB, and ASFA show his certification for his proposed endeavor as a fitness specialist, and that he meets this criterion.

> *Evidence of membership in professional associations*; 8 C.F.R. § 204.5(k)(3)(ii)(D)

The Director determined that the Petitioner met this criterion based upon the evidence of his membership in the National Physique Committee (NPC), the National Wellness Institute (NWI), and the International Association of Coaching (IAC). While the record includes evidence that the Petitioner is or was a member of these associations, we disagree with the Director's conclusion that they qualify as professional associations.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation having a minimum requirement of a United States bachelor's degree or foreign equivalent degree for entry into the occupation. However, the record does not show that the Petitioner possesses a bachelor's degree, or that any of the entities of which he is a member require their members to be professionals as defined in the regulations. In his RFE response, the Petitioner referred to a definition of "professional organization" obtained from a website, noting that they typically organize conferences or workshops, have online learning resources available, publish newsletters or journals, and provide their members resources to earn continuing education units in order to maintain their license or certification. While many professional associations have these features, this definition does not address the membership requirements of those associations or the definition of "profession" in the regulation.

In addition, none of the materials submitted by the Petitioner show the minimum requirements for membership. Pages from the website of the NWI states that it is "the leader in providing professional development and engagement opportunities that support individuals from a variety of disciplines in promoting whole-person wellness." The same type of information from the IAC indicates that it "provide(s) a highly accountable professional development model for aspiring and experienced coaches, as well as professionals in other fields, so their mastery of coaching is valued and contributes to evolving human potential worldwide."[5] While both use the term "professional" and describe educational and development programs, neither discusses membership requirements or suggest that members must hold a bachelor's degree or equivalent credentials.

[5] The record does not include documentary evidence relating to the NPC, but only references links to websites in the Petitioner's RFE response.

Because the evidence does not demonstrate that these entities require their members to be professionals as defined in the regulations, they do not qualify as professional associations. We therefore disagree with the Director and conclude that the Petitioner does not meet this criterion.

> *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)(F)

In his decision, the Director noted the reference letters submitted by the Petitioner in support of this criterion, but concluded that they showed only that he has benefitted his clients in terms of fitness and diet, and did not show recognition for achievements and significant contributions to the field. On appeal, the Petitioner asserts that the letters did show the impact of his work on the fitness industry, and that evidence of a media article about him and his role as a brand ambassador also should have been considered to be recognition for his achievements.

Regarding the reference letters, we agree with the Director that they describe how the Petitioner was able to help the writers meet their fitness goals, but do not identify achievements and significant contributions to the field of fitness or personal training. For example, a letter from [redacted] who works as a model, states that she followed the Petitioner's '[redacted]' and was able to lose weight and gain muscle. Another letter was written by the owner of gym that employs the Petitioner as a personal trainer. He states that the Petitioner gives lectures and creates nutritional plans for his students, and encloses a document titled '[redacted]' which is a meal plan created by the Petitioner. In addition, a martial arts trainer writes that he refers his clients to the Petitioner for the creation of meal and supplement plans, and notes the Petitioner's use of body scanning machines, mobile software applications, and widely available genetic tests. As noted by the Director, these reference letters and the others submitted do not recognize achievements and significant contributions to the fitness industry or field, but are limited to the personal fitness and wellness results of the writers or their students. While some vaguely describe what the Petitioner calls the '[redacted]' there is no indication in the letters or the balance of the record that this method is recognized as a significant contribution to the fitness and personal training field. Further, we note that formal certificates and other documentation that is issued contemporaneously with a petitioner's claimed contributions and achievements generally carry more weight than letters prepared for the petition. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), www.uscis.gov/policy-manual.

The Petitioner also highlights other evidence on appeal, including his '[redacted]' mobile application. Although this evidence includes a single screenshot the availability of the app for download, the record does not include evidence showing that it is recognized as an achievement and significant contribution. The reference letter from the martial arts trainer mentioned above indicates that some of his students use it, but this is insufficient to show recognition for the type of industry-wide contribution required under this criterion.

Also highlighted on appeal is the brief article about the Petitioner and his work which appeared on the website of *Brickell Magazine* on [redacted] 2019. The article describes his business and use of a [redacted] in his work. However, it does not mention an achievement or contribution he has made to the fitness or wellness field, and the record lacks sufficient evidence about the intended audience

and volume of readership of this magazine/website to show that the article is itself recognition in the Petitioner's field.

Other evidence submitted by the Petitioner shows that he was a brand ambassador for two nutritional supplement businesses, helping to promote their products, and has nearly 40,000 followers on social media. However, this evidence does not identify any achievement and significant contribution to the fitness industry by the Petitioner that is being recognized by the businesses or the social media followers, as required by the plain language of this criterion.

For all of the reasons discussed above, we agree with the Director and conclude that the Petitioner does not meet this criterion.

B. Final Merits Determination

Because the Director concluded in his decision that the Petitioner met the requisite three of the six evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii), he conducted a final merits analysis to determine whether the Petitioner had established that he possesses expertise significantly above that ordinarily encountered in his field. While we have concluded that the Petitioner does not meet three of the criteria, thus making a final merits determination unnecessary, we will briefly address this issue.

In his analysis, the Director acknowledged the Petitioner's receipt of the certificates from the NPTA, IFBB, and ASFA, but noted that these types of qualifications are routine for individuals in many fields and inherent to the Petitioner's occupation. On appeal, the Petitioner questions why the criterion relating to degrees, diplomas and certificates is part of the initial evidence requirements if possession of these credentials is dismissed. As noted above, meeting at least three of the evidentiary criteria satisfies the initial evidence requirement for this classification, but a petitioner must still establish that the possess expertise significantly above that ordinarily encountered in their field, which requires an analysis of the quality of the evidence. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), www.uscis.gov/policy-manual. As such, earning credentials that are considered to be the minimum requirement for entry into a field, or are commonly held by those in the field, does not meet the overall standard for this classification. The Petitioner has not established that his certifications place him significantly above the average fitness specialist.

Regarding other evidence in the record, the reference letters indicate that several of the Petitioner's clients are pleased with this services as a fitness and nutrition coach, and his selection to promote the products of two businesses in his industry shows that he has garnered some level of attention in his field. However, the minimal evidence regarding these roles is insufficient to demonstrate that he has significantly grater expertise than other fitness specialists. For example, there is nothing to suggest that he was the only brand ambassador for these brands, nor was evidence submitted regarding the prestige of the brands he represented. Similarly, it is common for individuals and business to build a social media presence to promote themselves and their products and services, but the record lacks evidence to show how the Petitioner's social media following and influence compares to that of others in his field.

The Petitioner has not shown that he meets the initial evidence requirements for this classification, and he also has not established that he has the level of expertise required for an individual of

exceptional ability. As he does not claim to be a member of the professions holding an advanced degree, and the record does not indicate that he is eligible as such, we conclude that he has not established his eligibility for the EB-2 classification.

III. CONCLUSION

The Petitioner has not established his eligibility for the EB-2 classification, and he is therefore not eligible for a national interest waiver. We therefore reserve our evaluation of his eligibility under the *Dhanasar* analytical framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); *see also Matter of D-L-S-*, 28 I&N Dec. 568, 576–77 n.10 (BIA 2022) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.