U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28398751

Date: SEP. 11, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a computer systems analyst, 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 the Petitioner's eligibility as an individual of exceptional ability[1] and that he merited a national interest waiver as a matter of discretion. 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. ANALYSIS

The Director concluded that the Petitioner met only two of the requisite three evidentiary criteria under 8 C.F.R. § 204.5(h)(3), despite his claim to meeting five of them, and thus did not meet the initial evidence requirement as an individual of exceptional ability. The Director went on to discuss the Petitioner's eligibility for a national interest waiver, applying the three-prong framework set forth in *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016). Specifically, she made a thorough analysis of the Petitioner's proposed endeavor, to serve as a computer systems analyst providing SAP implementation services through his own consultancy to mid-size business in the United States, concluding that it was of substantial merit. But she determined that he did not meet any of the three prongs of the *Dhanasar* analytical framework. We adopt and affirm the Director's decision, with additional comments below. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming

[1] While the Director's decision did not include a definitive statement regarding the Petitioner's eligibility for the EB-2 classification, the Director's analysis stated that the Petitioner had not claimed eligibility as a member of the professions holding an advanced degree, and did not meet the initial evidence requirements as an individual of exceptional ability.

the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case.)

On appeal, the Petitioner first asserts that the Director erroneously denied his petition without providing him an opportunity to submit additional evidence. This is incorrect, as the Director issued a request for evidence (RFE) dated May 2, 2022, to which the Petitioner responded.[2]

He then asserts that the Director "imposed novel substantive and evidentiary requirements" that were contrary to U.S. Citizenship and Immigration Services policy, referring to the two-part adjudication approach set forth in policy memoranda. However, the Petitioner does not refer to specific instances of this in the Director's decision, and we note that since the Director concluded that the Petitioner did not meet at least three of the evidentiary criteria, she did not conduct a final merits determination. Accordingly, we need not further address either of these assertions. *Cf. Giday*, 113 F.3d at 234 (declining to address a "passing reference" to an argument in a brief that did not provide legal support).

The Petitioner also contends on appeal that he meets three additional evidentiary criteria under 8 C.F.R. § 204.5(h)(3)(ii) in addition to the two that the Director concluded he met. However, the Petitioner does not specifically challenge the Director's decision with regard to any of these criteria. Instead, he repeats his RFE response regarding these three criteria word for word, and submits copies of the same evidence on which he previously relied. As noted, the Director considered each of these arguments and provided a thorough analysis of the evidence submitted.

Finally, while the Director determined that the Petitioner's proposed endeavor is of substantial merit, because the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding his eligibility for a for a discretionary waiver under the *Dhanasar* analytical framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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.

[2] In addition, the premise that the Director would have been in error in not issuing an RFE is also incorrect. Although 8 C.F.R. § 103.2(b)(8)(iii) gives USCIS the discretion to issue an RFE, neither the Act nor the regulations compels us to do so.