U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30233684

Date: APR. 16, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner is an art teacher who seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability or a member of the professions holding an advanced degree, 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 as an individual of exceptional ability or as a member of the professions holding an advanced degree. 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. The matter is now before us on appeal pursuant to 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 because the Petitioner did not establish that he meets the statutory criteria of the EB-2 immigrant classification. Because the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve any appellate arguments regarding whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. *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).[1]

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

[1] The Director determined that the Petitioner did not meet the criteria of a national interest waiver. On appeal, we note that the evidence of record does not appear to show that the Petitioner could overcome that adverse conclusion, but we have reserved further discussion of the issues pertaining to the national interest waiver.

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.

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. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[2]

(A) An official academic record showing the noncitizen's possession of 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) Letters from current or former employers showing that the noncitizen has at least 10 years of full-time experience in the proposed occupation;
(C) A license to practice the profession or certification for the profession or occupation;
(D) Evidence of the noncitizen's receipt of a salary or other remuneration demonstrating exceptional ability;
(E) Proof 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.

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[3] If a petitioner does so, a final merits determination is conducted 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.

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[4], grant a national interest waiver if the petitioner demonstrates that:

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[2] 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).
[3] 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.
[4] *See also Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver are discretionary in nature).

- 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. ELIGIBILITY FOR EB-2 CLASSIFICATION

The issue to be addressed in this matter is whether the Petitioner has established eligibility for the EB-2 classification as either an individual of exceptional ability or as an advanced degree professional.

A. Advanced Degree Professional

Fist, we will address the Petitioner's claim that he is eligible for the EB-2 classification as an advanced degree professional. In the first of two requests for evidence (RFE), issued in May 2021, the Director determined that the Petitioner demonstrated that he has a bachelor's degree and at least five years of progressive experience in the specialty as required by the regulation at 8 C.F.R. § 204.5(k)(2). The Director therefore did not pursue the Petitioner's EB-2 eligibility at that time. However, in the second RFE, issued in August 2022, the Director noted a lack of sufficient evidence demonstrating the Petitioner's EB-2 eligibility and asked that further evidence be submitted to address the evidentiary deficiency. The Director stated that although the Petitioner provided the required degree certificate and corresponding transcripts showing that he was awarded a bachelor's degree in printmaking by the [redacted], the record lacked sufficient evidence in the form of letters from current or former employers verifying that the Petitioner's employment history and showing that he attained at least five years of progressive post-baccalaureate experience in the specialty.

In a response statement, the Petitioner explained that letters from past employers were not available due to "mergers of schools and elapse of time." The Petitioner therefore provided two documents, each titled "Letter of Certificate," from the [redacted] and from a claimed coworker, respectively. The former refers to the Petitioner by name and identification number, states that he is "a retiree under the social management of the [redacted] and lists the dates and names of three middle schools where the Petitioner is claimed to have been employed as an art teacher between 1990 and 2007. The second letter is from an individual who states that he and the Petitioner worked together from 1994 to 2007 at two schools that were also listed in the Petitioner's uncertified Form ETA 750.

In denying the petition, the Director recognized that the Petitioner provided the required degree certificate and corresponding transcripts showing his bachelor's degree in printmaking. However, the Director concluded that the evidence the Petitioner submitted is not sufficient to establish that he has at least five years of progressive experience in the specialty pursuant to 8 C.F.R. § 204.5(k)(2).

On appeal, the Petitioner disputes the Director's conclusion, stating that he "has been engaged in full-time artist career for some 30 years," starting with 17 years as a high school and middle school art teacher and subsequently working as a freelance artist. That said, the Petitioner relies on his claimed 17 years as an art teacher as the basis for claiming eligibility for the EB-2 classification and argues that "it would be arbitrary to deny the credibility of a certificate from a *government agency*, together with testimonials from *the applicant himself* and the testimonial from his prior colleague." (Emphasis added in the original document).

As in prior submissions, the Petitioner maintains that primary evidence of his claimed employment as a teacher was unavailable "due to lapse of time and the merger of the schools." However, the Petitioner does not provide evidence of the claimed school mergers to support this explanation and thus he does not establish that primary evidence, such as employment letters from the schools where the Petitioner is claimed to have worked as an art teacher, was unavailable or could not be obtained.[5] We further note that the "Letter of Certificate" from the [redacted] does not state how the employment information was obtained.

Moreover, according to the U.S. Department of State's Bureau of Consular Affairs, most records from China can be obtained from one of China's Notarial Offices (Gong Zheng Chu) in the form of notarial certificates. With written authorization, notarial offices may issue notarial certificates to relatives or friends in the People's Republic of China (PRC) on behalf of someone now living abroad. *See* U.S. Dep't of State, Bureau of Consular Affairs, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/China.html (last accessed April 16, 2024).

With respect to notarial work experience certificates, the Bureau of Consular Affairs states:

> Notarial Work Experience Certificates (NWECS) briefly describe an applicant's work experience in the PRC. They should be required of all employment-based preference immigrant applicants who claim work experience in China. *Employer's letters or sworn statements from persons claiming person's knowledge should not be accepted in lieu of NWECS. The inability of an applicant to obtain a NWEC should be regarded as prima facie evidence the applicant does not possess the claimed experience.*

(Emphasis added).

Here, the Petitioner attempts to establish his claimed employment experience by relying only on testimonial evidence from the Beneficiary's former coworker and from a "Service Center" that does not identify the source of the employment information.

Accordingly, the referenced letters are insufficient to document at least five years of progressive experience in the specialty as required.[6] 8 C.F.R. § 204.5(k)(2).

In addition, the Petitioner provides a work permit to support his claim, stating that this document was previously unavailable. However, while the permit contains the Petitioner's name, age, school,

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[5] If a required document is unavailable, a petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. If secondary evidence is also unavailable, the petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence and submit two or more affidavits from persons who have direct personal knowledge of the circumstances. *See* 8 C.F.R. § 103.2(b)(2)(i).

[6] The Petitioner also provided several documents addressing his career as an artist. Such documents include: a "Certificate of Collection" regarding an oil painting he created in 2008; letters from a senior art curator and from a senior artist, respectively; a "Patron Contract" documenting the Petitioner's obligation to submit one painting yearly for three years in exchange for use of an art studio; an "Exhibition Contract" for an art exhibition in October 2008; and an annual exhibition and agency contract between the Petitioner and an agent company for the "2018-2020" period. As noted, however, the Petitioner relied on his claimed employment as an art teacher as the basis for claiming that he has at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2).

position title, and shows a date of issue in 1996, it does not list the Petitioner's dates and length of tenure with the listed school.

In light of the evidentiary deficiencies described above, the Petitioner has not demonstrated qualification for the underlying EB-2 visa classification either as an advanced degree professional.

B. Exceptional Ability

Next, we will address whether the Petitioner qualifies for the EB-2 classification as an individual of exceptional ability. At the time of filing the Petitioner did not claim to be an individual of exceptional ability and maintained that he is eligible for the EB-2 classification as an advanced degree professional. Nevertheless, the August 2022 RFE informed the Petitioner that he did not meet any of the six requirements listed at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). The Petitioner was then given an opportunity to provide evidence showing that he met at least three of the six requirements.

In response, the Petitioner continued to claim eligibility for the EB-2 classification as an advanced degree professional and, as discussed above, submitted evidence addressing the education and employment requirements regarding that claim. The Petitioner did not list any of the criteria listed at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F), nor did he claim that he meets at least three of the six criteria, as required to establish eligibility for the EB-2 classification as an individual of exceptional ability.

On appeal, however, the Petitioner states that "[a]ssuming arguendo, [he] does not hold a master's (equivalent) degree" he would then seek "an alternative" avenue for the EB-2 classification based on his claimed qualifications "as an artist of exceptional ability." Accordingly, the Petitioner now claims that he qualifies for three of the six criteria based on his bachelor's degree in fine arts, his license to teach art in middle school, and his claimed "[r]ecognition by peers, association [sic] and experts." Regarding the latter criterion, the Petitioner did not correctly restate the regulatory requirements or cite to the relevant regulatory section, although it appears that he seeks to establish that he meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), which requires: "Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations."

Here, despite claiming that he provided evidence in the form of "international art exhibitions, media reports, award-winning achievements and testimonials from experts" to show recognition by "peers, association [sic] and experts," the Petitioner does not specify the "achievements and significant contributions to the industry or field" for which he was purportedly recognized. Nor does he specifically discuss his prior submissions to explain how they demonstrate that he meets the requirements of the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). As such, the Petitioner has not established that he meets the listed criterion.

In sum, the Petitioner focused on three criteria as the basis for claiming eligibility under the exceptional ability classification. In light of the evidentiary deficiencies described above regarding one of those criterion, the Petitioner has not established that he satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification.

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an advanced degree professional or as an individual of exceptional 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.