U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29735381

Date: FEB. 12, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a trucking company entrepreneur, seeks classification as an individual of exceptional ability. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for the EB-2 immigrant classification. 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 immigrant 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.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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 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 USCIS may, as a matter of discretion,[1] grant a national interest waiver if the petitioner demonstrates that:

[1] *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).

- 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

The Petitioner proposes to work as a truck driver and trucking business owner, having established a trucking company based in Washington state. The Petitioner's business plan states that the company "aims to become a premier truck-load (TL) and less-than-truck-load (LTL) freight trucking company offering transportation of bulk commodities serving a myriad of sectors." The business plan states that the company will serve the construction, manufacturing, wholesaling, and retailing industries. The Director found that the Petitioner did not establish either that he is an advanced degree professional or that he is an individual of exceptional ability and, as such, did not establish qualification for the EB-2 classification. The Director denied the petition, concluding that, without being eligible for the underlying immigrant classification, the Petitioner was therefore not eligible for a national interest waiver. As such, the Director did not reach the question of whether the Petitioner established eligibility under any of the three prongs in the *Dhanasar* analytical framework.

On appeal, the Petitioner submits copies of evidence already in the record and a brief in which he asserts that he is an individual of exceptional ability and eligible for a national interest waiver.

A. Qualification for the EB-2 Classification

As discussed above, to qualify for the underlying EB-2 classification, an individual must establish eligibility as either a member of the professions holding an advanced degree, or as an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act. The Petitioner does not assert that he qualifies as an advanced degree professional and seeks qualification for the EB-2 classification only as an individual of exceptional ability.[2]

"Exceptional ability" means a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(k)(2). An individual 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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[3] If a petitioner does demonstrate meeting at least three criteria, USCIS then conducts a final merits determination to

[2] Although the Petitioner does not claim to qualify as an advanced degree professional, we do note that the record contains a copy of the Petitioner's "diploma of jurist" degree from Kyrgyzstan, an English translation of this diploma, and an academic credential evaluation regarding the U.S. equivalency of the Petitioner's diploma. The credential evaluation states both that the Petitioner's diploma "represents completion of an undergraduate program equivalent to a bachelor's degree" and that it is equivalent to a "first professional degree in law" in the United States. A first professional degree would be equivalent to an advanced degree in the United States. *See* 8 C.F.R. § 204.5(k)(2). However, because the credential evaluation is not sufficiently clear, and because the Petitioner does not claim to be an advanced degree professional, we conclude that the Petitioner has demonstrated that he qualifies for the EB-2 classification as an advanced degree professional.

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

decide whether the evidence in its totality shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

The Director determined that the Petitioner established only one of the six initial criteria, specifically 8 C.F.R. § 204.5(k)(3)(ii)(A), possessing an academic record relating to the area of exceptional ability. On appeal, the Petitioner asserts that he has demonstrated five of the six regulatory criteria and that he is an individual of exceptional ability. We examine each of the regulatory criteria in turn.

> *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).

In support of this criterion, the Petitioner submitted a copy of his degree in law and asserted that this degree is relevant to operating a trucking business because the industry is heavily regulated, deals with employees and employment law, uses contracts and agreements, requires insurance, and may require litigation and dispute resolution. The Director accepted this as evidence to meet this criterion.

As such, the Petitioner has established eligibility under this criterion.

> *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.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

The Director determined that the Petitioner's employment verification letters did not establish ten years of full-time experience in the occupation. The Petitioner does not address or claim to establish this criterion on appeal.

As such, the Petitioner has not established eligibility under 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).

The Petitioner submitted a copy of his Washington state commercial driver's license (CDL) in support of this criterion. However, the Director concluded that the Petitioner did not demonstrate that the occupation requires this license or certification, because the Petitioner seeks to work as an entrepreneur operating a trucking company, and not as a truck driver. The Director therefore concluded that this criterion was not met.

On appeal, the Petitioner asserts that the Director erred in this finding, because the Petitioner is an owner-operator of his trucking business and is "both a businessman and a truck driver himself." The Petitioner contends that the CDL is therefore required for his occupation and that this criterion is established. Based upon the plain language of the regulation, we agree with the Petitioner that the CDL constitutes a license for the occupation, and we withdraw the Director's finding to the contrary.

As such, the Petitioner has established eligibility under this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

The Director concluded that the Petitioner did not submit evidence in support of this criterion and therefore did not establish this criterion. On appeal, the Petitioner asserts that he did submit evidence in support of this criterion. Specifically, the Petitioner submitted a copy of his company's 2021 U.S. income tax return and information from the U.S. Bureau of Labor Statistics regarding the average wage of a truck driver. The Petitioner asserts that the evidence establishes this criterion, because the evidence shows that the average salary for a truck driver is $48,310 per year and the Petitioner earned $77,501 in 2021.

Although we acknowledge that the record contains the evidence to which the Petitioner refers, we conclude that it is insufficient to establish that the Petitioner has commanded a salary which demonstrates exceptional ability. As noted above, the Petitioner is operating his own trucking company. The Petitioner has not established that his salary, as an entrepreneur and business owner in the trucking industry, demonstrates exceptional ability as compared to others in that same field. Instead, the Petitioner seeks to compare his salary to that of the average truck driver. Moreover, the Petitioner did not submit evidence to support the claim that his salary was determined based upon his exceptional ability.

As such, the Petitioner has not established eligibility under this criterion.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

In support of this criterion, the Petitioner submitted a letter, dated February 20, 2023, from the [redacted]. The letter welcomes the Petitioner to the association and discusses the benefits of membership in the association. The Director noted that the letter is dated after the filing of the petition, and therefore does not establish the Petitioner's membership in this organization at the time of filing.[4] Because the evidence does not establish the Petitioner's eligibility at the time of filing, the Director concluded that this criterion was not met.

On appeal, the Petitioner acknowledges that the letter is dated after the filing of the petition, but states that "the letter does not state the date that [the Petitioner] joined the organization" and therefore the Director should have found this criterion to be established.

As noted by the Director, a petitioner must establish eligibility at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved when a beneficiary, initially ineligible at the time of filing, becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The Petitioner is correct that the letter does not provide the date that he joined this organization. But this is not sufficient to establish this criterion. If the Petitioner was in fact a member of this organization prior to the filing of the petition, this is the Petitioner's burden to establish. *See Matter of Chawathe*, 25 I&N Dec. at 375-76. The record does not establish that the Petitioner was a member of a professional organization at the time of filing the petition. Therefore, this criterion has not been met.

[4] The instant petition was filed on November 29, 2022.

As such, the Petitioner has not established eligibility under 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 support of this criterion, the Petitioner submitted letters of recommendation. The Director concluded that this criterion was not met, finding that the letters, although complimentary of the Petitioner, do not demonstrate achievements or significant contributions to the industry or field.

On appeal, the Petitioner asserts that the letters do establish this criterion. The Petitioner repeats some of the complimentary claims of the letter writers and concludes that the letters "demonstrate that [the Petitioner's] focus on safety and efficiency helps to optimize the trucking field and enables him to train other drivers, thus improving the quality of the workforce."

Upon de novo review, we agree with the Director that criterion has not been met. While the letters reflect the letter writers' positive experiences in working with the Petitioner, the letters do not describe achievements or significant contributions to the trucking field, nor describe the Petitioner receiving recognition for the same. We also note that two of the letters of recommendation contain very similar wording, including identical sentences and phrases. As a result, those letters possess diminished probative value.[5] In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe*, 25 I&N Dec. at 376 (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

As such, the Petitioner has not established eligibility under this criterion.

Therefore, the Petitioner has established that he satisfies only two of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Because the Petitioner does not satisfy at least three of the criteria, we need not conduct a final merits determination to evaluate whether he has achieved the degree of expertise required for exceptional ability classification. As such, the Petitioner does not qualify as an individual of exceptional ability. Having determined that the Petitioner does not qualify as an individual of exceptional ability, we conclude that the Petitioner has not demonstrated eligibility for the underlying EB-2 classification.

[5] As a general concept, when a petitioner has provided affidavits from different persons that contribute to the eligibility claim, but the language and structure contained within the affidavits is notably similar, the trier of fact may treat those similarities as a basis for questioning a petitioner's claims. *See Matter of R-K-K-*, 26 I&N Dec. 658, 665 (BIA 2015); *Singh v. Garland*, No. 19-60937, 2021 WL 5984797, at *2 (5th Cir. Dec. 17, 2021); *Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006); *Wang v. Lynch*, 824 F.3d 587, 592 (6th Cir. 2016); *Dehonzai v. Holder*, 650 F.3d 1, 8 (1st Cir. 2011); *Hamal v. U.S. Dep't of Homeland Security*, No. 19-2534, WL 2338316, at *4, n.3 (D.D.C. June 8, 2021). When affidavits contain such similarities, it is reasonable to infer that the petitioner who submitted the notably similar documents is the actual source from where the suspicious similarities derive. *Cf. Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007); *Wang v. Lynch*, 824 F.3d at 592.

B. Eligibility for a National Interest Waiver

The next issue is whether the Petitioner has established that a waiver of the classification's job offer requirement is in the national interest. Because the Petitioner has not established that he meets the threshold requirement of eligibility for the underlying EB-2 classification, we need not address whether he is eligible for, and merits as a matter of discretion, a waiver of that classification's job offer requirement. *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 alternate issues on appeal where the applicant did not otherwise meet their burden of proof).

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as an individual of exceptional ability. 8 C.F.R. § 204.5(k)(3). Because the Petitioner has not established eligibility for the underlying EB-2 immigrant classification, we conclude that the Petitioner has not established eligibility for a national interest waiver. We reserve our opinion regarding whether the Petitioner has satisfied any of the three prongs of the *Dhanasar* analytical framework.

ORDER: The appeal is dismissed.