U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 35599677

Date: JAN. 15, 2025

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business. See 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, 8 U.S.C. § 1153(b)(2)(B)(i).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate his eligibility for the underlying EB-2 immigrant classification, or the requested 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. 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. 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.

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:

> (A) 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;
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> (B) 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;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;
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> (E) Evidence 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.

8 C.F.R. § 204.5(k)(3)(ii).[1]

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. See Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); see also Visinscaia v. Beers, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); Rijal v. USCIS, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." Matter of Chawathe, 25 I&N Dec. at 376.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they 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. Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. Dhanasar states that USCIS may, as matter of discretion,[2] grant a national

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

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. Id. at 889.

II. ANALYSIS

The Petitioner proposes to establish an event production and set design company in the United States for which he would serve as chief executive officer and a set and exhibit designer. The Director found that the Petitioner did not establish eligibility for the underlying EB-2 classification as an individual of exceptional ability, or that he merited a discretionary waiver of the job offer requirement in the national interest.

With respect to the underlying EB-2 classification, the Petitioner submitted evidence to meet all six criteria for exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii). The Director concluded that the Petitioner only met two of the regulatory criteria, license or certification for the profession or occupation at 8 C.F.R. § 204.5(k)(3)(ii)(C) and salary or renumeration for services demonstrating exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(D). On appeal, the Petitioner reasserts being an individual of exceptional ability by satisfying the remaining four criteria. After reviewing the evidence in the record, the Petitioner has not demonstrated satisfying at least three of the six initial evidentiary criteria for being an individual of exceptional ability and is not otherwise eligible for the requested benefit.[3]

1. The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Petitioner has not established he meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). To meet the criterion, he submitted his high school diploma and transcript, and certificates indicating he completed training courses. On appeal, the Petitioner explains how his course certificates enhance his professional qualifications and provide a foundation for his technical proficiency for being a set and exhibit designer.

The Petitioner's high school diploma does not relate to his area of exceptional ability, set and exhibit design. In addition, the training course certificates are not accompanied with official academic records or evidence showing that the issuing organizations are colleges, universities, or other institutions of learning. As such, the certificates do not meet the plain language of the criterion. Therefore, the Petitioner has not established that he meets the criterion.

2. The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

This criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) focuses on evidence of experience in the occupation that a petitioner intends to pursue in the United States, which in this case would be the Petitioner's employment experience as a set and exhibit designer. Although the Petitioner emphasizes that he has more than ten years of work experience, he has not demonstrated that he has at least ten years of full-time experience in the relevant occupation.

[3] While we do not discuss each piece of evidence in the record individually, we have reviewed and considered each one.

In the petition, the Petitioner states he intends to have the job title of set and exhibit designer, with the proposed standard occupation classification (SOC) code[4] 27-1027, and the nontechnical job description, "responsible for creating visual communication projects, thus this professional creates logos, brand." According to SOC code 27-1027, tasks associated with set and exhibit designers include developing set designs based on scripts, budgets, research, and location; preparing set drawings and exhibit renderings, including construction, layout, and material specifications for special effects and lighting; attending rehearsals and reading scripts to plan set location and design requirements; selecting props and set materials; designing and building scale models of set designs; coordinating outside contractors to construct exhibit structures; coordinating removal of sets; and estimating set costs. See U.S. Bureau of Labor Statistics, "Standard Occupational Classification," https://www.bls.gov/soc/.

The Petitioner relies on his experience with [redacted] in Brazil to meet this criterion. The employment letter from [redacted] indicates the Petitioner worked as a cinema and video machinist with job responsibilities that include, "setting up the sets and operating the platform lift," "carrying out electrical and electrotechnical work," "work safety," and "basic notions of civil fire." While the letter indicates the Petitioner has more than ten years of full-time work experience, his work experience responsibilities are not in his relevant occupation being sought, a set and exhibit designer, as required under the regulation.

Because the record lacks evidence that the Petitioner has at least ten years of full-time employment in the occupation in which he seeks to provide his services in the United States, he has not satisfied that he meets this criterion.

3. The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

The Director found that the Petitioner met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) by showing he is "a licensed and registered [e]ngineer in Brazil" and that "his specialty requires a license in order for an individual to work in that position or occupation in Brazil." We disagree with the Director.

In support of this criterion, the Petitioner submitted his course certificates, his work identification badge and his union card, both issued by Union of Radialists of the State of Rio de Janeiro; and statutes relating to the broadcasting profession. Contrary to the Director's finding, the work badge and union card do not show that the Petitioner is "a licensed and registered [e]ngineer in Brazil." Instead, the work badge and union card indicate the Petitioner has been registered with the union since 2011, and his function is as an engineer working with [redacted] As such, the work badge and union card do not show that the Petitioner has a license or certification for his intended occupation of set and exhibit design.

With respect to the course certificates, they show the Petitioner completed training courses, but they do not show he has a certification for his intended occupation of set and exhibit designer. Moreover, in his request for evidence reply, the Petitioner states that his course completions provide him with the technical skills and safety qualifications to perform his work, but further notes, "there is no specific legislation in Brazil that requires an additional license for performing these duties, making [him] fully

[4] An SOC code is a statistical standard that federal agencies use to classify workers into job-related categories. See U.S. Bureau of Labor Statistics, "Standard Occupational Classification," https://www.bls.gov/soc/.

qualified for these roles." The statues included in the record do not indicate the occupation of set and exhibit designer requires a license or certification. Therefore, the evidence does not show the Petitioner has a license or certification for his intended occupation.

As the Petitioner has not demonstrated meeting this criterion, we withdraw the Director's finding to the contrary.

4. The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

Contrary to the Director's finding, the evidence does not show that the Petitioner has commanded a salary, or other renumeration for services, which demonstrates his exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(D). To meet this criterion, the Petitioner submitted an employment verification letter from [redacted] stating he worked as a film and video machinist earning R$3,658 per month, together with a printout from salario.com indicating that the average salary for an event set designer in Brazil is R$2,499.20 per month. However, the Petitioner's salary is not based on his indicated area of exceptional ability, set and exhibit designer, and instead, is based on his work as a film and video machinist. For this reason, the Petitioner has not shown that he meets this criterion. We withdraw the Director's finding to the contrary.

5. The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

We agree with the Director that the Petitioner did not establish he meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E). As pointed out by the Director, this criterion requires evidence of membership in a professional association. The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation having a minimum requirement of a U.S. bachelor's degree or foreign equivalent for entry into the occupation.

To meet this criterion, the Petitioner submitted a declaration dated July 4, 2024, indicating his individual membership with the Brazilian Association for Raising Awareness of the Dangers of Electricity (ABRACOPEL) until December 31, 2024, together with a printout of membership information for ABRACOPEL. The Director found that the evidence did not demonstrate that membership with ABRACOPEL comprised professional individuals with a minimum requirement of a U.S. bachelor's degree or its foreign equivalent. The Petitioner argues that ABRACOPEL is a "key organization for raising awareness of electrical hazards in Brazil" and "provides resources, guidelines, and training on electrical safety, which is critical for [his] field."

While the Petitioner's membership with ABRACOPEL may provide him with safety guidelines and resources for his field, he has not demonstrated ABRACOPEL has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association. Moreover, the declaration of the Petitioner's membership with ABRACOPEL is dated July 4, 2024, and does not indicate that the Petitioner had membership at the time of filing the petition in 2023. A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(l). Evidence of membership in a professional association after the filing of the petition cannot be used to establish eligibility for the criterion. As such, the Petitioner has not demonstrated his membership in a professional association under the criterion.

6. The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

In support of the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), the Petitioner submitted recommendation letters from his colleagues and an opinion letter from the owner and president of a media consulting firm and an adjunct professor of journalism at [redacted] The Petitioner contends that together, the recommendation letters and opinion letter highlight his professional career and his contributions to the field of set design and event production.

The Petitioner has not established he has been recognized for his achievements and significant contributions to his industry or field. The recommendation letters are from the Petitioner's former colleagues who generally attest to him being a committed and knowledgeable co-worker who has construction and electrical skills to assemble and disassemble structures for scenography sets. The letters also reference the Petitioner having completed work related training courses and being a dedicated employee to his employer. While the letters show that the Petitioner has carpentry and electrical skills, is a committed employee, and his former colleagues value his work and his dedication to his work, they do not identify, and thus demonstrate that the Petitioner has been recognized for achievements and significant contributions to his industry or field, as required under the criterion.

In addition, the opinion letter does not address the Petitioner being recognized for achievements and significant contributions to his field, but instead focuses on the three prongs of the Dhanasar analytical framework for adjudicating national interest waiver petitions. When discussing the Petitioner being well-positioned to advance his proposed endeavor under the second Dhanasar prong, the opinion letter lists documents reviewed, including the Petitioner's resume, his academic records, his employment records, a business plan, the above-mentioned recommendation letters, and the request for evidence letter. The opinion letter details the Petitioner's work experience and knowledge in his field, including the Petitioner's skills in set assembly as explained in the recommendation letters from his previous work colleagues. While the opinion letter states that the Petitioner has the "potential to make significant contributions to the television production and event management industries," it does not show that he has been recognized for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Based on the above, the Petitioner has not demonstrated he meets this criterion.

Because the Petitioner has not established that he meets at least three of the initial evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F), 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). Nevertheless, we advise that we have reviewed the record in the aggregate and conclude that it does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability.

III. CONCLUSION

The Petitioner has not established his qualification for the EB-2 classification as an individual of exceptional ability in the sciences, arts, or business, and is therefore ineligible for a national interest

waiver. While the Petitioner asserts on appeal that he meets all three of the prongs under the Dhanasar analytical framework and is otherwise eligible for the national interest waiver, we reserve our opinion regarding these issues. See INS v. Bagamasbad, 429 U.S. 24, 25-26 (1976) (per curiam) (holding that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision).

The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.