U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21767923

Date: SEP. 1, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a transportation management entrepreneur,[1] seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 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. 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.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

[1] In response to the Director's request for evidence (RFE), the Petitioner submitted, in relevant part, a one-page excerpt of a Form I-140, Immigrant Petition for Alien Workers, purporting to modify his stated job title from "entrepreneur" to "transportation manager."

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability:

(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;

(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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;

(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).

In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or

occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

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 sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *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. 369, 376 (AAO 2010).

II. ANALYSIS

As noted above, the Director concluded that the record did not establish that the Petitioner qualified for classification as an individual of exceptional ability. Specifically, although the Petitioner asserted that he satisfied the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(A)-(D), the Director concluded that the Petitioner satisfied none of them. The Petitioner does not assert, and the record does not support the conclusion, that he satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(E)-(F), or that the standards at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation, such that comparable evidence may establish eligibility. The Petitioner also does not assert, and the record does not support the conclusion, that the Petitioner may qualify as a member of the professions holding an advanced degree. For the reasons discussed below, the record does not establish that the Petitioner has satisfied at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) requires "[a]n official academic record showing that the [noncitizen] 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." The record contains a copy of a bachelor's degree in engineering, with a specialty of "oil and gas works," awarded to the Beneficiary by the [redacted] [*sic*] Institute in 2011. The degree is bilingual, including a copy written in English. The Director acknowledged the degree; however, the Director noted that the record does not establish how the degree "relates to the area of exceptional ability in transportation management." The Director further noted that the record does not contain "any degree evaluation explaining the level of education the [Petitioner] possesses." Based on the lack of evidence, the Director concluded that the Petitioner did not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

On appeal, the Petitioner reasserts, verbatim, his assertion in response to the Director's RFE that the "degree is relevant to the [Petitioner's] proposed endeavor. The degree has supplied the [Petitioner] with the skills and knowledge that will be instrumental in implementing the proposed endeavor." The Petitioner further reasserts, verbatim, that his coursework "is substantially equivalent to the required course work leading to the same degree from an accredited institution of higher learning in the United States." However, the Petitioner does not submit any documentary evidence to support his assertions

on appeal. Instead, he reasserts that he satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) "[b]ased on the documentation in the record."

The Petitioner generally described the proposed endeavor as "seek[ing] employment in the field of trucking industry [*sic*], eventually owning and operating his own trucking company, which will be engaged in interstate transportation." As previously noted, he purported to change his job title from "entrepreneur" to "transportation manager" in response to the Director's RFE. However, the Petitioner did not specify what "transportation management" ability he seeks to be recognized as exceptional, such as loading and unloading a truck, driving a truck, owning and operating a trucking company, or any other ability. Because of these ambiguities, the record does not establish that a bachelor's degree in engineering, with a specialty in "oil and gas works," relates to a specific area of exceptional ability. Petitioners bear the burden to establish eligibility for the requested benefit. Section 291 of the Act. Even if the Petitioner's own assertions regarding the equivalency of his degree were sufficient to establish the nature of his foreign degree, which they are not,[2] his generalized statement that his coursework "supplied [him] with the skills and knowledge that will be instrumental in implementing the proposed endeavor" of generally working "in the field of trucking industry [*sic*]" and "eventually owning and operating his own trucking company" does not provide sufficient information regarding the skills and knowledge he gained while earning a his degree, or how that relates to a specified area of exceptional ability. Because the record does not establish how the Petitioner's foreign degree in engineering relates to the area of exceptional ability, or even what the area of exceptional ability is, the Petitioner has not satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). *See* section 291 of the Act.

Next, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires "[e]vidence in the form of letter(s) from current or former employer(s) showing that the [noncitizen] has at least ten years of full-time experience in the occupation for which he or she is being sought." The record contains letters from former employers of the Petitioner, stating his dates of employment and job titles. However, the Director noted that the letters do not describe the duties the Petitioner performed for his employers. The Director further noted that the record does not establish how the Petitioner's prior employment constitutes experience in the occupation for which he seeks. The Director concluded that, because the record does not establish that the Petitioner's prior employment experience is in the occupation he seeks, the record did not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

On appeal, the Petitioner reasserts his assertion in response to the Director's RFE that he "has the requisite 10 years of experience in the occupation that is directly relevant to his proposed endeavor." The Petitioner does not submit any documentary evidence to support his assertions on appeal. Instead, he reasserts that he satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) "[b]ased on the documentation in the record."

As discussed above, the Petitioner does not articulate the specific nature of the "employment in the field of trucking industry [*sic*]" he seeks, other than "eventually owning and operating his own trucking company." However, in response to the Director's RFE, the Petitioner submitted, in relevant part, a

[2] *See* 6 *USCIS Policy Manual* E.9, https://www.uscis.gov/policymanual (referring to "a credentials evaluation performed by an independent credentials evaluator who has provided a credible, logical, and well-documented case for such an equivalency determination that is based solely on the noncitizen's foreign degree(s)").

one-page excerpt of a Form I-140 purporting to modify his stated job title from "entrepreneur" to "transportation manager," whose duties entail "overseeing the logistics of the company's transportation-related activities." Although the record contains letters from two former employers, as the Director observed, none of the letters establish that the Petitioner has at least 10 years of full-time experience in the occupation of "transportation manager."

First, a letter from the piping department manager of [redacted], indicates that the Petitioner worked as a "piping engineer" from April 2014 to May 2015; however, it does not elaborate on the duties the Petitioner performed during that 14-month period, whether the Petitioner worked on a full-time basis, and how the occupation of a "piping engineer" is in the occupation of a "transportation manager." Next, an undated, one-sentence letter from the director of [redacted] states that the Petitioner "has been working at the [redacted] Air Base [redacted] through [redacted] company as a [t]rusted [a]gent since January 2004 till present." The letter omits any indication of how long the Petitioner worked for [redacted] beyond January 2004. Further, like the letter from [redacted], the letter from [redacted] does not elaborate on the duties the Petitioner performed during that unspecified period, whether the Petitioner worked on a full-time basis, and how the position of a "trusted agent" is in the occupation of a "transportation manager." The Petitioner asserted on a DOL Form ETA 750 Part B, Application for Alien Employment Certification, in the record that he worked 40 hours per week as a "driver" for [redacted] in Uzbekistan from "1 2016" until "5 2018." However, as the Director observed, the record does not contain a letter from [redacted] indicating that he may have accrued full-time experience during that 19-month period in the occupation of "transportation manager." Because the record does not contain evidence in the form of letters from current or former employers showing that the Petitioner has at least 10 years of full-time experience in the occupation of "transportation manager," the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

Next, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C) requires "[a] license to practice the profession or certification for a particular profession or occupation." The record contains a copy of a commercial driver license (CDL) issued by the state of New York to the Petitioner on "01/22/2021." The Director concluded that the CDL did not satisfy the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C) because the record does not establish whether "possession of a CDL is needed or required for transportation management."

On appeal, the Petitioner reasserts that his CDL "is directly relevant to his proposed endeavor. Therefore, the [Petitioner] has established that he has a license that pertains to the area of exceptional ability for his particular endeavor."

As noted above, the state of New York issued the CDL to the Petitioner in 2021, after the 2020 petition filing date. 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)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Because the Petitioner's CDL is dated after the petition filing date, it presents a new set of facts that may not establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec.

at 249; *Matter of Izummi*, 22 I&N Dec. at 176. Moreover, even if the record established that the Petitioner had been issued a CDL as of the petition filing date, which it does not, it does not establish that a CDL is required to practice the profession of "transportation manager." Because the record does not establish that the Petitioner had a license to practice, or a certification for, the profession of "transportation manager," it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

Next, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires "[e]vidence that the alien has commanded a salary, or other renumeration [*sic*] for services, which demonstrates exceptional ability." In the RFE, the Director advised the Petitioner that the record did not establish that he "commands a salary or other remuneration for services which demonstrates exceptional ability." The extent of the Petitioner's response to the RFE regarding this criterion was "[b]ased on the documentation previously submitted and/or attached hereto, the [Petitioner] clearly established that this criterion has been met," without identifying any particular documentation relevant to the issue. The Director concluded that, without evidence, the Petitioner had not satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

On appeal, the extent of the Petitioner's assertions regarding the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(D) is: "Based on the documentation in the record, the [Petitioner] clearly established that this criterion has been met, and USCIS erred in finding otherwise," again not identifying any particular documentation relevant to the issue.

On the Form I-140, the Petitioner omitted the wages for the proposed employment. However, in the one-page excerpt of a Form I-140 submitted in response to the Director's RFE, purporting to modify the Petitioner's stated job title from "entrepreneur" to "transportation manager," the Petitioner asserted that his wages would be $80,000 per year.[3] As noted above, the Petitioner did not specify what his "transportation management" exceptional ability is, such as loading and unloading a truck, driving a truck, owning and operating a trucking company, or any other ability. Given this ambiguity and the lack of supporting evidence, the record does not establish how an income of $80,000 may demonstrate exceptional ability. Accordingly, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

In summation, the record does not satisfy at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, the record does not establish that the Petitioner qualifies for second-preference classification as an individual of extraordinary ability. *See* section 203(b)(2)(A) of the Act. We reserve our opinion regarding whether the Petitioner satisfies any of the criteria set forth in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). *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).

[3] We note that the Petitioner also submitted a copy of his 2020 IRS Form 1040, U.S. Individual Income Tax Return, in response to the RFE, indicating that his total income was $9,552.

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an individual of extraordinary 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.