U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-E-G-

DATE: OCT. 31, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a political editor and journalist, seeks classification as an individual of exceptional ability. *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 normally attached to this immigrant classification. *See* § 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). 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, Texas Service Center, denied the petition. The Director found that the Petitioner did not qualify for classification as an individual of exceptional ability, and that he had not established that a waiver of a job offer would be in the national interest.

The matter is now before us on appeal. In his appeal, the Petitioner provides additional documentation and lists six evidentiary criteria he contends he has met. The listed criteria correspond to the requirements for eligibility an individual of extraordinary ability under 8 C.F.R § 204.5(h)(3), which is a different classification. The Petitioner's appeal does not mention the regulatory criteria for individuals of exceptional ability set forth at 8 C.F.R. § 204.5(k)(3)(ii), or the national interest waiver requirements. Additionally, the Petitioner indicates that he is "willing to appear in person to plead [his] case," but we decline his request for oral argument. *See* 8 C.F.R. 103.3(b).

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 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences arts or business. Because this classification normally 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 states, in pertinent part:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
>
> > (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[1] 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.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an individual must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (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;
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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 remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or

[1] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Only those who demonstrate "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as individuals of exceptional ability. 8 C.F.R. § 204.5(k)(2). Furthermore, with regard to eligibility for the national interest wavier, neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Matter of New York State Department of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must demonstrate that he or she seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he or she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

II. ANALYSIS

In Part 2 of the Form I-140, Immigrant Petition for Alien Worker, the Petitioner checked box "1.i.," indicating that he seeks classification as an individual "applying for a National Interest Waiver (who is a member of the professions holding an advanced degree or an alien of exceptional ability)." As supporting evidence, the Petitioner provided his [redacted] profile listing his filmography work as a sound mixer, boom operator, and audio assistant; an online news article he wrote for [redacted] a webpage printed from [redacted] and three video images of himself appearing on various news programs. As the Petitioner did not indicate or demonstrate that he qualified as a member of the professions holding an advanced degree, the Director issued a request for evidence (RFE) asking the Petitioner to submit documentation that meets at least three of the regulatory criteria for exceptional ability set forth at 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner's response included his Bachelor of Arts degree in sociology from [redacted] a copy of his previously submitted [redacted] profile, a June 2013 job placement confirmation from [redacted] reflecting his assignment to [redacted] film credits for [redacted] identifying the Petitioner as a "sound recordist," and another webpage printed from [redacted] describing an event at the [redacted]

The Director determined that the Petitioner's documents did not meet any of the regulatory categories of evidence for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Although the Petitioner had checked box "1.i." under Part 2 of the Form I-140 petition requesting a national interest waiver as an advanced degree professional or an individual of exceptional ability, the Petitioner contends on

appeal that he meets the regulatory criteria for extraordinary ability at 8 C.F.R § 204.5(h)(3)(iii), (v), (vi), (vii), (viii), and (ix). The Petitioner, however, has not stated that he seeks classification as an individual of extraordinary ability at any time throughout these proceedings. Regardless, there is no statute, regulation, or case law that permits a petitioner to change the classification of a petition on appeal. In addition, the Ninth Circuit has determined that once USCIS concludes that an individual is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether he is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, 286 Fed. Appx. 963 (9th Cir. July 10, 2008).

Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 covered the cost of the Director's adjudication of the I-140 petition under section 203(b)(1)(A) of the Act. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.[2] If the Petitioner seeks classification under a different immigrant visa classification, then he must file a separate Form I-140 petition, with the accompanying fee, requesting the new classification.

The Petitioner's appeal does not specifically challenge any of the Director's findings pertaining to the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). The appellate submission includes a July 2016 mortgage statement and loan information from video images of himself appearing on the and television networks as an spokesman; a June 2015 job offer letter from two emails from the an email from the and a May 2016 utility bill.

A. Evidentiary Criteria for Exceptional Ability

As discussed below, a review of the record indicates that the Petitioner does not meet at least three of the relevant evidentiary criteria.

> *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)

While the Petitioner submitted his Bachelor of Arts degree in sociology, he did not provide his official academic record from showing that the degree relates to journalism. Accordingly, the Petitioner has not established that he meets this regulatory criterion.

[2] *See* http://www.whitehouse.gov/omb/circulars/a025/a025.html.

> *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 Petitioner provided a job placement confirmation from reflecting his assignment to beginning June 28, 2013. In addition, the Petitioner submitted a June 2015 letter from offering him an unspecified position with the company. The letter stated that "[t]his offer will expire June 22, 2015, unless accepted [ ] prior to such date." As the Petitioner signed and dated both the job offer and its appendix on July 23, 2016, the offer would appear to have expired. Regardless, the letters do not reflect 10 years of experience and there is no documentary evidence indicating that the preceding jobs were for a journalist or political editor. Furthermore, both jobs commenced after the Petitioner filed the Form I-140 on March 19, 2013. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). We cannot consider any occupational experience gained after the date the petition was filed as evidence to establish the Petitioner's eligibility at the time of filing. Therefore, the Petitioner has not established that he meets this regulatory 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 contends that he is a but did not provide evidence of his credentials. In addition, the and the emails were sent in 2015 and 2016, and thus do not establish the Petitioner's eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Furthermore, the emails do not mention the Petitioner by name, or constitute a license or professional certification. Accordingly, the Petitioner has not established that he meets this regulatory 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)

In addition to his work as a journalist and political editor, the Petitioner states that he works "as an Analyst on commanding a salary in excess of [$]130,000 for that role due to [his] expertise in the financial field." As previously mentioned, the Petitioner submitted a June 2015 letter from offering him an unspecified position paying "$130,000 in gross base salary per year." The Petitioner received this salary offer after he filed the Form I-140 on March 19, 2013. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. We cannot consider salary or remuneration received after the date the petition was filed as evidence to establish the Petitioner's eligibility at the time of filing. Regardless, the salary offered to the Petitioner does not relate to his work as a journalist or political editor. Furthermore, the Petitioner offers no bases for comparison to show that his salary demonstrates exceptional ability. For the reasons outlined above, the Petitioner has not established that he meets this regulatory criterion.

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

The Petitioner maintains that he is a [redacted] As noted previously, he did not provide evidence of his [redacted] credentials, the submitted [redacted] and the [redacted] emails do not mention the Petitioner's name, and the emails were sent after the petition's filing date. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Furthermore, the emails do not constitute documentation of his membership in a professional association. Accordingly, the Petitioner has not established that he meets this regulatory 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)

The Petitioner did not provide evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. Therefore, the Petitioner has not established that he meets this regulatory criterion.

Summary

The record supports the Director's finding that the Petitioner did not meet at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(iii) allows for the submission of "comparable evidence" if the above standards "do not readily apply to the beneficiary's occupation." In this case, the Petitioner has not demonstrated that the standards at 8 C.F.R. § 204.5(k)(3)(ii) are not readily applicable to his occupation, or that any of his documentation is "comparable" to the specific objective evidence required at 8 C.F.R. § 204.5(k)(3)(ii)(A) – (F).

The Petitioner in this matter has not established eligibility as an individual of exceptional ability under section 203(b)(2)(A) of the Act. As previously outlined, the Petitioner must show that he is either an advanced degree professional or possesses exceptional ability before we reach the question of the national interest waiver. The Petitioner does not claim that he is an advanced degree professional, and as previously discussed, has not shown that he meets regulatory criteria for classification as an individual of exceptional ability.

B. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest according to the three-pronged analysis set forth in *NYSDOT*. As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot. The waiver is available only to foreign workers who otherwise qualify for classification under section 203(b)(2)(A) of the Act. However, because the Director addressed the issue in his decision, we will review the national interest waiver analyis under *NYSDOT*.

As a journalist, political editor, and commentator, the Petitioner informs the public about current news events. The Petitioner offered evidence indicating that his news reports and commentaries are disseminated to the public online and through national media outlets such as the and television networks. As there is value in providing news coverage to a widespread audience, we find that the Petitioner's work is in an area of substantial intrinsic merit, and the Director's determination on this issue is withdrawn. Furthermore, the record supports the Director's finding that the Petitioner meets the second prong of the *NYSDOT* national interest analysis.

It remains, then, to determine whether the Petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. The Director determined that the Petitioner's impact and influence on his field did not satisfy the third prong of the *NYSDOT* national interest analysis.

On appeal, the Petitioner does not specifically contest any of the Director's findings under the third prong of *NYSDOT*. The Petitioner states:

> I'm a and for a global news website, in addition to freelancing in my role as a for several other outlets both national and international including as well as
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> In this capacity, I have appeared on and and and been quoted on new media both nationally and globally including as well as various radio shows. I have an page showcasing my contribution to film and TV.

The Petitioner mentions his various media roles and filmography work, but he does not submit any letters of support or other documentary evidence indicating that his work as a journalist, political editor, commentator, or correspondent has influenced the field as a whole. *See NYSDOT*, 22 I&N Dec. at 219, n.6. While the Petitioner has documented some of his activities in the field, there is no evidence showing that his news coverage or political commentaries have affected the field of journalism. In this matter, the Petitioner has not established by a preponderance of the evidence that he has a past record of demonstrable achievement with some degree of influence on the field as a whole or that he will otherwise serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. Accordingly, we uphold the Director's finding that Petitioner has not met the third prong of the *NYSDOT* national interest analysis.

III. CONCLUSION

The Petitioner has not demonstrated that he qualifies for classification as an individual of exceptional ability under section 203(b)(2)(A) of the Act. In addition, he has not shown that a waiver of the job

offer requirement will be in the national interest of the United States. Accordingly, he has not established eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The appeal is dismissed.

Cite as *Matter of K-E-G-*, ID# 87725 (AAO Oct. 31, 2016)