U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21920205

Date: AUG. 23, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, seeks second preference immigrant classification as either an advanced degree professional or 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 Texas Service Center denied the petition, concluding that the Petitioner did not qualify for classification as either a member of the professions holding an advanced degree or an individual of exceptional ability, nor had he established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that he meets the requirements of the requested classification.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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. –
>
> (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. . . . [T]he 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.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
>
> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
>
> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS)

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

A. Advanced Degree Professional

As noted above, the regulation at 8 C.F.R. § 204.5(k)(2) indicates that "[a] United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires a petitioner to provide "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and *evidence in the form of letters from current or former employer(s)* (emphasis added) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

The Director determined that the Petitioner holds the foreign equivalent of a bachelor's degree in Business Administration and we agree. However, as explained by the Director, the Petitioner did not submit letters from "current or former employer(s)" as required. Therefore, without such letters, we cannot conlcude that the submitted evidence, including the evaluation, accountant letters, expert opinion letter, and documentation related to his businesses, demonstrate that he meets the requirements of the regulation to establish that he is an advanced degree professional. *Id.*[3]

B. Individual of Exceptional Ability

In denying the petition, the Director determined that the Petitioner met the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A),(C), and (E), but had not established that he was an individual of exceptional ability in the final merits determination.[4] While we agree with the Director that the Petitioner meets the plain language of the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (C), for the reasons discussed below, we withdraw the Director's conclusion regarding the remaining criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

---

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[3] For example, although the evaluator provided a conclusion regarding the combination of the Petitioner's education and professional experience, he does not claim to have reviewed any employment letters to establish the Petitioner's work history or experience, as required by 8 C.F.R. § 204.5(k)(3)(i)(B). In fact, he specifically states that he relied on the diplomas, transcripts, and resume provided by the Petitioner. We would also note that the basis for his statement that the Petitioner "served in positions of increasing professional responsibility and sophistication, together with peers, under the supervision of managers, at a level of employment commensurate with Master's level- training" has not been established.

[4] If a petitioner meets at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F), we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Matter of Chawathe*, 25 I&N Dec. at 376 (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality"). *See also Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination).

Evidence of membership in professional associations.

The Petitioner relies on a copy of his "Professional ID Card" issued by the Federal Republic of Brazil, Federal Administration Council [redacted] along with a "Certificate of Current Professional Status" from the Regional Administration Council [redacted] He did not, however, provide any supporting evidence, such as the membership requirements and/or by-laws, which establishes that either the Federal or Regional Administration Council [redacted] is a professional association, as opposed to a government agency for example. As explained above, profession is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation." 8 C.F.R. § 204.5(k)(2). Without more, we cannot conclude that the Petitioner meets this criterion.

In the initial filing, the Petitioner also claimed to have met the criteria at 8 C.F.R. § 204.5(k)(3)(ii) (B),(D) and (F), and comparable evidence. After concluding that the evidence was insufficient, the Director issued a request for evidence explaining the deficiencies in the documentation. The Petitioner did not address any of the remaining criteria in its response. Upon review, we agree with the Director's initial conclusions.

> *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 plain language of the regulation requires letter(s) which 1) are from current or former employer(s) and 2) establish ten years of *full-time experience in the occupation* (emphasis added). As explained by the Director and in our advanced degree professional section above, none of the evidence submitted in support of this criterion is from "current or former employers" and it lacks pertinent information, such as the number of hours worked and the job duties, to establish that the Petitioner "has at least ten years of full-time experience" as an entrepreneur.

> *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 Petitioner submitted a letter from his accountant attesting that his remuneration in 2015 was equivalent to $37,236.22 USD, along with a printout regarding salary information for an "entrepreneur" in Brazil for the period from December 17, 2017, until December 17, 2018.[5] To satisfy this criterion, however, the evidence must show that he has commanded a salary or remuneration for services that *is indicative of his claimed exceptional ability* (emphasis added). Without additional documentation, the Petitioner has not established that he meets this criterion.

[5] We note that the Petitioner did not explain why he relied on his 2015 salary and submitted general salary information for a different year.

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 provided three letters of support as evidence. While the letters are complimentary of the Petitioner, the plain language of the criterion requires recognition for achievements and significant contributions to the industry or field. As the record does not contain objective information regarding his specific achievements and significant contributions, the Petitioner has not established that he meets this criterion.

As comparable evidence, the Petitioner submitted a copy of an application for assignment of a patent from the inventor to his company. However, for comparable evidence to be considered, a petitioner must explain why a particular evidentiary criterion listed in the regulations is not readily applicable to his or her occupation and establish that the submitted evidence is "comparable" to that criterion. 8 C.F.R. § 204.5(k)(3)(iii). The Petitioner has not done so here.

For the reasons set forth above, the evidence does not establish that the Petitioner 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. As the Petitioner has not met the threshold requirement for this classification, further analysis of his eligibility for a national interest waiver would serve no meaningful purpose.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.