U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 23041578

Date: DEC. 12, 2022

Appeal of Texas Service Center Decision

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

The Petitioner seeks 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). 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 Texas Service Center denied the petition, concluding that the Petitioner had not established that he was an individual of exceptional ability or 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 the Director erred in his decision. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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. –
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> (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.
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> (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.

Exceptional ability in the sciences, arts, or business is defined in 8 C.F.R. § 204.5(k)(2) as a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. To qualify as an individual of exceptional ability, 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, of which an individual must meet at least three.

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, USCIS may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates that: (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.[2]

## II. ANALYSIS

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability. On appeal, the Petitioner does not assert nor does the record establish that he is eligible for the EB-2 classification as a member of the professions holding an advanced degree. Therefore, he must establish that he qualifies as an individual of exceptional ability.

The Petitioner alleges on appeal that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, and erroneously applied the law, to [his] detriment." Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing immigration benefit requests.[3] Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions.[4] While the Petitioner asserts on appeal that he has provided evidence sufficient to demonstrate his eligibility for the immigration

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[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*).

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[3] *See Matter of Chawathe*, 25 I&N Dec. at 375 (AAO 2010); *see also Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965).

[4] *See generally 1 USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-manual.

benefits sought in this petition, he does not further explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

A. Substantive Nature of Occupation and Proposed Endeavor

We first conclude that the Petitioner has presented insufficient and inconsistent evidence regarding the nature of the occupation in which he is seeks employment in the petition, and the proposed endeavor that he intends to pursue. This is important because to qualify for the EB-2 classification as an individual of exceptional ability, the Petitioner must submit evidence within the context of his profession or occupation to show that he satisfies at least three of six regulatory criteria to meet the initial evidence requirement, and ultimately to demonstrate that he has a degree of expertise significantly above that ordinarily encountered in his field. Section 203(b)(2) of the Act, and 8 C.F.R. § 204.5(k).

Further, in order to demonstrate that the Petitioner is eligible for a national interest waiver he must, among other things, provide evidence sufficient to show that his specific proposed endeavor (1) has both substantial merit and national importance and (2) he is well positioned to advance it under the *Dhanasar* analysis.[5]

The Petitioner indicated his prospective job title is "security management specialist," in part 6 of the petition, noting that in that position he would "conduct security assessments for organizations, and design security systems and processes." He also submitted a letter describing his prospective employment, as follows:

> My career plan [] is to work as a [s]ecurity [m]anagement [s]pecialist. . . . in the areas of security operations, counterintelligence, communications, air transport control, logistics, personnel management, weapons, marksmanship and firefighting. [I] will be an asset to organizations in the U.S., as I will be able to maximize the strategic and tactical actions of military, private and public law enforcement officials by providing integral security management solutions to companies and agencies alike.

The Director determined that the record did not sufficiently detail the substantive nature of his prospective employment as a security management specialist. He issued a request for evidence (RFE) asking for a detailed description of the Petitioner's proposed employment, supporting with documentary evidence. However, the Petitioner did not sufficiently address this aspect. In the RFE response, he contends he will be "supporting small, medium, and large sized U.S. schools, individuals and companies with security services in the mentioned markets." But he did not provide a detailed description explaining *how* he will be engaged in providing security services, supported by documentary evidence as requested by the Director in the RFE. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

Further, while the Petitioner presented a high-level listing of diverse areas of concern that an individual *might* focus on when employed in a security-related occupation (e.g., counterintelligence, communications, air transport control, logistics, weapons, marksmanship and firefighting), he does not

[5] *See generally* 5 *USCIS Policy Manual* F.5, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

sufficiently describe his own occupation or proposed endeavor to demonstrate the security-related concern(s) that he will actually attend to during his day-to-day work activities. The Petitioner must resolve these inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the Petitioner asserts that "[he] will work in his field, specifically through his role as a security professional and manager through his company in the U.S., which is focused on providing services to any company that needs better management and development," but he does not identify the specific services that his company will provide. *Id.* Notably, the Petitioner's initial description of his proposed employment in the United States did not include plans to create and manage his own company. Here, the Petitioner's plans to establish a new company and perform services as its manager presented after the filing date cannot retroactively establish eligibility. On appeal, the Petitioner cannot materially change aspects of the proposed position including the occupation in which he will be employed, and the nature of the proposed endeavor that he intends to pursue. The Petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1).

We determine the Petitioner's appeal brief presents a new set of facts regarding his proposed employment, which is material to eligibility for the EB-2 classification and for a national interest waiver. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), (which requires that petitioners seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.)

We therefore conclude that the Petitioner has not provided sufficient and consistent evidence to establish what his prospective occupational field will be, in order to demonstrate that he is an individual of exceptional ability who possesses "a degree of expertise significantly above that ordinarily encountered" within that occupation. Section 203(b)(2) of the Act, and 8 C.F.R. § 204.5(k).[6] Nor has he sufficiently demonstrated the specific nature of his proposed endeavor to show that (1) it has both substantial merit and national importance and (2) he is well positioned to advance it under the *Dhanasar* analysis. *Dhanasar* at 889. For these reasons, the petition may not be approved.

B. Exceptional Ability

In denying the petition, the Director determined that the Petitioner did not fulfill any of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). On appeal, the Petitioner asserts that he meets five of the criteria. We reviewed the evidence in the record and conclude that it does not support a finding that the Petitioner meets the requirements of at least three criteria.[7] In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. at 376.

[6] We incorporate our concerns about the lack of evidence in the record to substantiate the substantive nature of the Petitioner's proposed occupation in our evaluation of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii).

[7] While we may not discuss every document submitted, we have reviewed and considered each one.

*Evidence in the form of letter(s) from current or former employer(s) showing that the [individual] 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 the Petitioner did not meet this criterion because though the record shows that the Petitioner has at least ten years of experience as a soldier in the Brazilian military, the evidence does not establish the duties he performed in the military were in a security-related occupation. The Director noted that for roughly ten years of his military career the Petitioner was tasked with performing and overseeing the installation and maintenance of communication equipment, concluding that these duties were not akin to those performed by security management specialists.

On appeal, the Petitioner contends that the Director "did not give due regard" to [e]vidence of [his] work in the field, which demonstrates that he has at least 10 years of full-time experience. . . ." However, the Petitioner does not identify the specific evidence that he believes the Director disregarded. He also does not discuss the specific evidence, if any, in the record that should be considered as part of this criteria determination in his appeal brief. When dismissing an appeal, we generally do not address issues that are not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be "waived."[8] Since the Petitioner did not address this issue with specificity on appeal, we deem the issue waived and conclude the Petitioner has not met 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)

As evidence of his license to practice his profession or occupation, the Petitioner presented a copy of his Brazilian military identification card. The Director found this evidence insufficient to meet this criterion. While we agree with the Director's determination in this regard, we also conclude that the Petitioner has not established that his occupation or profession *requires* a license to practice.

On appeal, the Petitioner indicates that the Director "did not give due regard" to the Petitioner's "proof that he is licensed to practice [his occupation]," but he does not identify or discuss the specific evidence, if any, in the record that should be considered as part of this criteria determination in his appeal brief. Therefore, for these reasons we deem the issue waived and conclude the Petitioner has not met this criterion.[9]

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

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations." The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "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."

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[8] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). The courts' view of issue waiver varies from circuit to circuit. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (finding that an issue referred to in an affected party's statement of the case but not discussed in the body of the brief is deemed waived); *but see Hoxha v. Holder*, 559 F.3d 157, 163 (3d Cir. 2009) (issue raised in notice of appeal form is not waived, despite failure to address in the brief).

[9] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

The Director determined the Petitioner did not meet this criterion, acknowledging that the Petitioner had submitted a membership card and a copy of a membership application, but that he provided no explanation regarding how this evidence shows membership in a professional association. Specifically, in response to the Director's RFE, the Petitioner provided evidence suggesting that as of August 2020 he became a member of an association of "retired and pension holders" of the Brazilian armed forces.[10] The Petitioner did not provide documentation to establish the membership requirements for this organization to show the association is professional in nature, and the basis used by the organization to admit the Petitioner as a member. Thus, the Petitioner did not establish that he belongs to an organization that qualifies as a professional association.

On appeal, the Petitioner indicates that the Director "did not give due regard" to the Petitioner's "proof of membership in a professional organization," but he does not identify or discuss the specific evidence, if any, in the record that should be considered as part of this criteria determination in his appeal brief. Therefore, for these reasons we deem the issue waived, and conclude the Petitioner has not met this criterion.[11]

Although the Petitioner asserts eligibility for two other criteria on appeal, the record does not currently establish that he has fulfilled the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we will not address the additional criteria. 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). Therefore, we need not and will not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for the exceptional ability aspect of the EB-2 classification.

C. National Interest Waiver

The Petitioner has not established that he is eligible for the EB-2 classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding the remaining issues, including whether he is eligible for a national interest waiver. *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 M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

## III. CONCLUSION

The Petitioner has not demonstrated that he qualifies as an individual of exceptional ability under section 203(b)(2)(A) of the Act. 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.

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[10] The Petitioner appears to have obtained membership in this association 9 months after the date of filing. The Petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1).

[11] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (finding that an issue referred to in an affected party's statement of the case but not discussed in the body of the brief is deemed waived).