



**U.S. Citizenship
and Immigration
Services**

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

In Re: 26349806

Date: APR. 18, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an eyeglass manufacturer, seeks classification for the Beneficiary, an eyeglass quality control inspector, as a member of the professions holding an advanced degree or an individual of exceptional ability. 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. 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 record did not establish either the Beneficiary's qualification for the EB-2 immigrant classification or that a waiver of the classification's job offer requirement would be in the national interest. 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 immigrant classification (their own in the case of a self-petition; the beneficiary's in the case of a job offer), as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, the petitioner 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. While neither statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national

interest waiver petitions. *Dhanasar* states that USCIS may, as a matter of discretion,¹ grant a national 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.

II. ANALYSIS

The Director found that the Petitioner did not establish that the Beneficiary qualifies for the EB-2 immigrant classification, either as an advanced degree professional or an individual of exceptional ability, and further that the Petitioner did not establish that the Beneficiary is eligible for a waiver of the classification's job offer requirement.

A. Qualification for EB-2 Classification

As discussed above, to qualify for the underlying EB-2 classification, an individual must establish eligibility as either a member of the professions holding an advanced degree, or as an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act. The Director determined that the record did not establish the Beneficiary's qualification under either basis.

On appeal, the Petitioner does not address or attempt to overcome this finding. Rather, the Petitioner submitted a brief statement claiming that it would be "impractical for another person to do the job," that the United States will benefit from the Beneficiary's contributions, and that the endeavor may lead to the creation of jobs.

Upon review of the record, we agree with the Director that the record does not demonstrate that the Beneficiary qualifies for the EB-2 immigrant classification under either basis. Because the Petitioner did not state whether the Beneficiary seeks EB-2 classification as an advanced degree professional or as an individual of exceptional ability, we will address each in turn.

1. Member of the Professions Holding an Advanced Degree

To qualify as an advanced degree professional, an individual must be a member of the professions, with "profession" defined as either an occupation listed in section 101(a)(32) of the Act or one that requires a bachelor's degree for entry into the occupation.² See 8 C.F.R. § 204.5(k)(2). To qualify as holding an advanced degree, an individual must either possess an academic or professional degree above that of a bachelor's degree or possess at least five years of progressive experience in the specialty following their receipt of a bachelor's degree or the foreign equivalent. *Id.*

¹ See also *Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

² Section 101(a)(32) of the Act states that the term "profession" includes but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

The Petitioner did not submit an academic degree, transcripts, or other official academic records that would establish that the Beneficiary has obtained the equivalent of a U.S. bachelor's degree or a higher degree. 8 C.F.R. § 204.5(k)(3)(i)(A)-(B). Additionally, nothing in the record reflects that the Beneficiary has any formal academic education at the baccalaureate level. Finally, the Petitioner did not submit evidence to establish that the Beneficiary's occupation is a "profession" within the meaning of 8 C.F.R. § 204.5(k)(2).³ As such, the Petitioner does not qualify as an advanced degree professional.

2. Individual of Exceptional Ability

"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). An individual must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.⁴ If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. We evaluate each of the regulatory criteria in turn.

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).

The Petitioner submitted evidence that the Beneficiary has received certificates from the [REDACTED] [REDACTED] for participation in the Third Dominican Congress of Optometry, which took place on July 3 and 4, 1999, and the Fourth Dominican Congress of Optometry, which took place on August 18, 2001. Each certificate states that it has an "academic value of six credits." The Petitioner also submitted a third certificate in recognition of the Beneficiary's "tireless work and high responsibility," which may relate to optometry. However, the Petitioner did not submit any documentation to establish that the [REDACTED] is a "college, university, school, or other institution of learning." Moreover, the Petitioner did not submit other evidence related to this organization or the events attended that would establish that this is an academic record. The certificates appear to represent only one or two days of training or conference attendance per certificate, and the record does not establish the significance of the "credits" received and how they would have academic value. As such, the Petitioner has not established the Beneficiary's eligibility under this criterion.

³ The Petitioner states that the Beneficiary's occupation is "quality control inspector" in eyeglass manufacturing. This occupation is not listed at section 101(a)(32) of the Act. Additionally, the Bureau of Labor Statistics's Occupational Outlook Handbook (OOH) states that the educational requirement for a quality control inspector is typically a high school diploma. Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Quality Control Inspectors (Sept. 8, 2022), <https://www.bls.gov/ooh/production/quality-control-inspectors.htm>. As such, it does not appear that a quality control inspector would be considered a member of the professions within the meaning of 8 C.F.R. § 204.5(k)(2).

⁴ USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. See generally 6 USCIS Policy Manual F.5(B)(2), <https://www.uscis.gov/policy-manual>.

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 submitted an employment letter on behalf of the Beneficiary, stating that he has been employed with the Petitioner since December of 2015. However, the letter does not state that the Beneficiary has been employed full-time. Moreover, this would represent just over five years of employment in the occupation as of the date of filing the Form I-140 Immigrant Petition in January of 2021.⁵ The Petitioner did not submit any additional evidence of the Beneficiary's experience in the occupation. Therefore, the Petitioner has not established that the Beneficiary has at least ten years of full-time experience in the occupation. As such, the Petitioner has not established the Beneficiary's eligibility under 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 stated above, the Petitioner submitted evidence that the Beneficiary has received two certificates of participation and a certificate of recognition that may relate to optometry. However, the record does not establish that these certificates represent a license to practice an occupation or a certification for an occupation. As such, the Petitioner has not established the Beneficiary's eligibility under this 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).

The Petitioner submitted a copy of the Beneficiary's federal income tax returns from 2016 through 2019 and Forms W-2 from 2016, 2017, and 2019. The evidence shows that the Beneficiary has earned between \$30,000 and \$45,000 each year from 2016 to 2019. However, the Petitioner did not submit evidence to establish the typical salary for the Beneficiary's occupation and thus whether this amount demonstrates that the Beneficiary has commanded a salary is sufficient to demonstrate exceptional ability.⁶ As such, the Petitioner has not established the Beneficiary's eligibility under this criterion.

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

Although the Petitioner submitted certificates from the [REDACTED] the certificates do not state whether the Beneficiary is a member of this association, and the Petitioner has not submitted other evidence relating to this requirement. As such, the Petitioner has not established the Beneficiary's eligibility under this criterion.

⁵ A petitioner must establish eligibility for the benefit sought at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). We will not consider experience gained after the filing of the I-140 Petition. A visa petition may not be approved when a beneficiary, initially ineligible at the time of filing, becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

⁶ The OOH states that the median annual wage for quality control engineers was \$38,580 in May 2021. Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Quality Control Inspectors (Sept. 8, 2022), <https://www.bls.gov/ooh/production/quality-control-inspectors.htm>. As such, the Beneficiary's wage does not appear to be significantly above the median.

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 submit evidence relating to this criterion. As such, the Petitioner has not established the Beneficiary's eligibility under this criterion.

Therefore, the Petitioner has not established that the Beneficiary satisfies any of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Because the Beneficiary does not satisfy at least three of the criteria, we need not conduct a final merits determination to evaluate whether the Beneficiary has achieved the degree of expertise required for exceptional ability classification. As such, the Beneficiary does not qualify as an individual of exceptional ability.

Having determined that the Beneficiary does not qualify as either an advanced degree professional or as an individual of exceptional ability, we conclude that the Petitioner has not demonstrated the Beneficiary's eligibility for the underlying EB-2 classification.

B. Eligibility for a National Interest Waiver

The next issue is whether the Petitioner has established that a waiver of the classification's job offer requirement is in the national interest. Because the Petitioner has not established that the Beneficiary meets the threshold requirement of eligibility for the underlying EB-2 classification, we need not address whether he is eligible for, and merits as a matter of discretion, a waiver of that classification's job offer requirement. *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 alternate issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not established that the Beneficiary satisfies the regulatory requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. 8 C.F.R. § 204.5(k)(2), (k)(3). Because the Petitioner has not established eligibility for the underlying EB-2 immigrant classification, we conclude that the Petitioner has not established that the Beneficiary is eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies any of the three prongs of the *Dhanasar* analytical framework.

ORDER: The appeal is dismissed.