U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27440173

Date: AUG. 24, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a human resources specialist, seeks classification as a member of the professions holding an advanced degree or 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 employment based second preference (EB-2) classification. See section 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. *See 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).

The Director of the Texas Service Center denied the petition, concluding the record did not establish that the Petitioner qualified for classification as an individual of exceptional ability and a discretionary waiver of the job offer requirement, and thus a labor certification, was not required upon application of the analytical framework we first explicated in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). 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 petition 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, but only if a petitioner categorically establishes eligibility in the EB-2 classification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." To demonstrate exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

(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 remuneration 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.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

But meeting at least three criteria does not, in and of itself, establish eligibility for this classification. We will then conduct a final merits determination to decide whether the evidence in its totality shows that a petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

If we conclude a petitioner has an advanced degree or is of exceptional ability such that they have established their eligibility for classification as an immigrant in the EB-2 classification, we evaluate the national interest in waiving the requirement of a job offer and thus a labor certification.

Whilst 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*, *see supra*. *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen 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.

II. ANALYSIS

The Petitioner is a human resources specialist seeking to demonstrate eligibility in the EB-2 classification based on their exceptional ability. A Petitioner must demonstrate expertise significantly above that ordinarily encountered to show that they are of exceptional ability. In support, the Petitioner submitted an official academic record showing that they had earned a three-year bachelor's degree in administration from a Brazilian institution of higher education, letters purporting to demonstrate more than 10 years of full-time work experience as a human resources specialist with significant contributions to and achievements in the human resources field, evidence purporting to be the Petitioner's licensure or certification to practice as a human resources specialist, evidence of the Petitioner's salary striving to demonstrate their exceptional ability, and evidence of membership in professional organizations.

We agree with the Director's ultimate decision that the Petitioner is not of exceptional ability and therefore categorically ineligible for the EB-2 classification. The Director concluded that the Petitioner met four of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) but did not specifically identify which of the criteria the Petitioner had ostensibly met. Upon de novo review, we disagree with the Director and conclude that the Petitioner demonstrated that they met two, not four, of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner has demonstrated with evidence in the record that they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (E). But they have not demonstrated that they meet at least one of the remaining criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(B), (C), (D) or (F) for the reasons set forth below.

> *Evidence 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.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

The Petitioner submitted employment verification letters that demonstrated they had over 10 years of full-time experience in the general and operations manager occupation.

But the Petitioner's evidence did not meet the minimum requirements of the regulation to reliably document the 10 years of claimed full-time experience as a human resources specialist. The Petitioner provided five letters spanning the following time periods: (1) April 2008 to October 2009 as a young apprentice at [redacted] (2) February 2010 to November 2010 as a receptionist at [redacted] (3) November 2010 to June 2012 as an administrative assistant at [redacted] (4) November 2012 to October 2012 as an intern at [redacted] and (5) June 2014 to September 2019 as junior human resources analyst at [redacted] The total elapsed time of approximately 122 months described by these letters exceeds the regulatory minimum of 10 years. But the portion of the Petitioner's work experience in an occupation the same or similar to that of a human resources specialist falls short of the regulatorily required 10 years.

The Petitioner's experience as a young apprentice at [redacted] appears correspondent to a general administrative position because they were required to "assist in the routine activities of the sector," "assist in service," "print, type, scan and archive documents," and "assist in reporting and controls." These job duties do not correspond with the job duties of a human resources specialist. So the Petitioner's experience does not satisfy the regulatory requirements.

Similarly, the Petitioner's experience as a receptionist at [redacted] is not correspondent with the duties of a human resources specialist either. Whilst the duties do reflect that the Petitioner's receptionist duties were influenced by an overarching human resources function, the performance of "telephone and candidate assistance at the reception, in-person registration of resumes in the system" and "contacting candidates to schedule interviews" are not same or similar to the duties a human resources specialist would be anticipated to perform. So the Petitioner's experience at [redacted] does not satisfy the regulatory requirements, either.

And the Petitioner's experience as an administrative assistant at [redacted] continues the trend. Responsibility for "accounting routines," "purchases," and "ensuring the organization, tidying and cleaning" of workstations bears no resemblance to job duties same or similar to that of a human resources specialist.

Whilst the Petitioner's work experience as an intern at [redacted] and junior human resources analyst at [redacted] appears the same as or similar to that of a human resources specialist, that experience comprises a total of approximately 76 months. 76 months falls short of the 120 months, or 10 years, of full-time work experience required by the regulation in the occupation for which the Petitioner is seeking permanent immigrant classification. Whilst we held in *Chawathe* that the standard of proof in immigration proceedings is the preponderance of the evidence, the burden of proof is always on the petitioner. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *see also* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). A petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits. When, as here, a petitioner has not met the burden of persuasion by a preponderance of the evidence because their evidence is not material, relevant, or probative it follows that they have not demonstrated eligibility for the benefit that they seek. For all the preceding reasons, we conclude that the Petitioner has not demonstrated that they have at least 10 years of full-time experience in the occupation of human resources specialist. So the Petitioner did not and cannot satisfy the regulatory requirements to meet this criterion to demonstrate their exceptional ability.

> *Evidence of a license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

In support of their argument that they possess licensure or certification to perform the duties of a human resources specialist, the Petitioner submitted a copy of their "Certificate of Registration and Good Standing" and "Professional Identity Card" issued by the Regional Administration Council of [redacted] Business Administration Council respectively. But these documents are not persuasive to demonstrate the Petitioner's human resources specialist license or certification.

The licensure or certification submitted by the Petitioner appears to apply to a different profession or occupation than the one the Petitioner intends to undertake in the United States. The record reflects that the Petitioner's registration and professional identity are classified by the respective regulatory bodies as an "administrator." But the Petitioner intends to perform the duties of a human resources

specialist. Although the field of administration is vast, the Petitioner's evidence does not adequately demonstrate that their licensure or certification as an "administrator" corresponds to their human resources specialist occupation. And the record does not sufficiently establish that license or certification is a prerequisite to serve as a human resources specialist in the United States or in Brazil. Accordingly, we cannot conclude that the Petitioner has a license to practice the profession or certification for the particular profession or occupation of human resources specialist.

> *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 contended that they have commanded a salary, or other remuneration for services, which demonstrates exceptional ability. In support, they submitted their proof of income from their previous employment positions and documentation reflecting the average salary of same or similar positions in human resources in Brazil. But the record does not reflect the salary or remuneration expected for individuals of exceptional ability performing duties comparable to those the Petitioner intends to undertake. There is no evidence in the record which would permit us to evaluate the duties a human resources specialist of exceptional ability would perform for the salary and their remuneration as a point of comparison. And the broad job description contained in the materials the Petitioner submitted did not readily correspond to the description of services and duties the Petitioner had described for their proposed endeavor. So the Petitioner has not met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) because we cannot evaluate from information in the record whether the Petitioner's salary or remuneration demonstrated their exceptional ability.

> *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 submitted three support letters/letter of recommendation, certificates, a media article, and pictures to document the recognition of their achievements and significant contributions to their field.

The evidence the Petitioner submits does not meet the standard of proof because it does not satisfy the basic standards of the regulations. *See Matter of Chawathe*, 25 I&N Dec. at 374 n.7. The regulation requires evidence of recognition of achievements and significant contributions. When read together with the regulatory definition of exceptional ability, the evidence of recognition of achievement or significant contributions should show expertise significantly above that ordinarily encountered in the field.

The Petitioner's letters of recommendation contain complimentary statements about the Petitioner's performance of their duties that the Petitioner would like us to conclude are recognition of achievements and significant contributions. But these statements are not supported by any evidence in the record which reflects that these are noteworthy as achievements and significant contributions. For example, a letter in the record credits the Petitioner with coordinating the management of a group of over 1000 employees and 30 managers. But the record does not sufficiently characterize how this demonstrates that the Petitioner's expertise is above that ordinarily encountered in their field.

In another letter, the author effusively described the Petitioner's "selection, integration and development of new employees," "author[ing] of training methods and produc[tion] of quarterly feedbacks [addressing] expectations and performance," and utilization of "competency interview, group dynamics, technical tests and profile analysis based on the quantum method." But the record does not contain evidence which would adequately explain how utilization of tools based on the quantum method by human resources specialists is indicative of exceptional expertise or a significant achievement or contribution to the field.

And another letter writer described the competent way the Petitioner performed the recruitment function for their employer. But it is not clear in the record how the competent completion of assigned job duties is a significant contribution or achievement in the field demonstrating the Petitioner's expertise significantly above that ordinarily encountered in the field of human resources.

Whilst it can be concluded that the Petitioner is a seasoned professional whose competence and reliability as an employee is valued and appreciated, the letters did not demonstrate achievement or significant contributions reflecting expertise significantly above that ordinarily encountered in the field required to demonstrate the Petitioner's exceptional ability.

And the Petitioner's certificates, largely issued by their previous employers in recognition of continuing professional education, workplace safety, or language development are not evidence of the Petitioner's exceptional ability. Although they demonstrate the Petitioner's dedication to their professional development the record does not adequately describe how the certificates are reflective of an expertise above that ordinarily encountered in the field of human resources. Nor does the record sufficiently demonstrate that the certificates are evidence of significant contributions to the field or achievements in the field of human resources.

And the inclusion of the Petitioner's quote in an article about shared services does not reflect the Petitioner's exceptional ability. It is unclear from the quote and not clearly explained in the record how the Petitioner's quote is a significant achievement in the field of human resources or a contribution to the field. And it is not demonstrated in the quote how the Petitioner's expertise rose to a level significantly above that ordinarily encountered in their field.

Finally, it is not clear how the numerous photos of the Petitioner submitted in the record with professional groups or on professional field visits for their employer highlight achievements in, and significant contributions to, the field of human resources. The record does not convincingly demonstrate that the occasions described in the photos submitted by the Petitioner reflect achievements or significantly contributions to the Petitioner's field above those ordinarily encountered. So we cannot conclude that the Petitioner meets this ground of eligibility.

III. CONCLUSION

The Petitioner has established eligibility in only two of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). So they cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). And we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. In addition we need not reach a decision on whether, as a matter of discretion, the Petitioner is eligible for or otherwise

merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve these issues. *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). The appeal is dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.