U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28650277

Date: DEC. 12, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or as individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding the record did not establish the Petitioner's eligibility for the EB-2 classification or for a national interest waiver under the *Dhanasar* analytical framework, as a matter of discretion. 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 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business, under section 203(b)(2)(B)(i) of the Act.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

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). A petitioner 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. We will then conduct a final merits determination to determine whether the evidence in its totality shows

that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field. *See Matter of Chawathe*, 25 I&N Dec. at 369 (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality"). USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. *See generally*, 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

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). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] 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.

II. ANALYSIS

As a preliminary matter, we conclude that the Petitioner has submitted insufficient and inconsistent evidence regarding the substantive nature of his proposed endeavor, and the occupation in which he intends to be employed. The Petitioner initially stated that he is a computer programmer who will:

> [C]ontinue working in [g]eneral and IT [o]perations management to advise American companies on how to properly plan, direct and coordinate the operations of public or private sector organizations. I [will use] my extensive experience and knowledge in the areas of business administration, business operations and management to provide specialized business services to U.S. companies and corporations.

The Petitioner also provided a business plan for a Florida company that he started in 2017, (T-), through which he claims he will provide software development and implementation services to U.S. companies. The plan discusses aspects of software products that he asserts to have developed and marketed to businesses abroad. He intends to market these products to U.S. companies to address "management and control of restaurant operations, manage[ment] and control[] of the sales and cashier front of the restaurant, [for] small to large establishments, with product reports, customer service, closings, cash control and the best management practices in the market."

The Director concluded that the Petitioner did not establish that he qualified for the requested EB-2 classification either as an advanced degree professional or as an individual of exceptional ability. He also determined that the Petitioner had not established that he merits a national interest waiver, as a matter of discretion, determining that while his proposed endeavor has substantial merit and he is well-positioned to advance it, he did not demonstrate its national importance, or that a waiver of the job offer and thus a labor certification was in the national interest.

[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).

On appeal, the Petitioner references his previously submitted business plan for T- contending it "shows how [he will work] in the IT field." However, Florida governmental records indicate that T- was administratively dissolved in September 2020 for lack of filing its state-required annual report – prior to filing this petition on March 18, 2021. *See generally* https://search.sunbiz.org/Inquiry/CorporationSearch/ByName. The Petitioner has not provided supporting evidence about T-'s business operations for any time period after 2018. While he provided copies of payroll statements reflecting his employment with other organizations located in Florida since 2018, the record does not substantiate that he prospectively intends to offer IT-related business services through T-. Here, the Petitioner has not adequately explained why he provided T-'s business plan with the petition in March 2021 - indicating that through this business he will offer information technology services, even though the business was administratively dissolved by Florida in September 2020. 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).

Other insufficient and inconsistent evidence in the record raises additional important questions regarding the nature of the work the Petitioner will perform should this petition be approved. For instance, the Petitioner also initially stated that he would perform services for U.S. companies as a general manager – by providing services such as "facilitating cross-border projects and commercial operations between the U.S. and Latin American markets, including Brazil." He noted that "[b]y formulating policies, managing daily operations and planning the use of materials and human resources, I can guarantee the success of any company that employs me." However, he does not further explain his prospective plans to seek a general manager position with a U.S. employer.

We conclude that the Petitioner has not submitted plans or explanations that adequately address the means through which he will provide services to U.S. companies, and the types of services he actually intends to offer as a general manager or as a computer programmer entrepreneur. 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. 369, 376 (AAO 2010). Importantly, it is not apparent what specific occupation or specialty he will be employed in - which is critical to establishing his eligibility for the EB-2 classification and that he merits a national interest waiver, as a matter of discretion. For efficiency's sake, we incorporate the above discussion and analysis regarding this insufficient and inconsistent information into each of the bases in this decision for dismissing the appeal.

A. Member of the Professions Holding an Advanced Degree

In order to establish whether the Petitioner qualifies for the EB-2 classification as an advanced degree professional, he must provide evidence to demonstrate the professional specialty that he will be engaged in. 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." As discussed above, it is not apparent from the evidence provided whether he intends to be employed as a computer programmer entrepreneur or as a general manager working for U.S. companies, and whether his occupation qualifies as a *profession* as defined by section 101(a)(32) of the Act. *Matter of Ho*, 19 I&N Dec. at 582.

To show that a petitioner holds a qualifying advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign

equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, a petitioner may present "[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) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Petitioner initially asserted he was eligible for the EB-2 classification as a member of the professions holding an advanced degree "because he is a very experienced [c]omputer programmer and entrepreneur, with many courses in the area." He further explained:

> I have an incomplete Higher Education in Bachelor of Computer Engineering from [redacted], Brazil. Despite not having completed my graduation, I believe that a diploma is a milestone in life and means a victory after years of extreme work and dedication. However, at the same time, I believe that a diploma does not define someone's ability. We can see this every day seeing many successful entrepreneurs build great legacies without needing a diploma to do so.

The Petitioner also submitted a copy of his resume reflecting an "Incomplete degree – Attended for 3 years" as part of his academic history. The Director denied the petition, concluding in part that the Petitioner did not provide evidence that he holds an advanced degree, or a foreign equivalent degree as required by 8 C.F.R. § 204.5(k)(3)(i)(A), or in the alternative that he possesses a U.S bachelor's degree or a foreign equivalent degree and five years of post-baccalaureate progressive work experience.

On appeal, the Petitioner references the definition of *advanced degree* at 8 C.F.R. § 204.5(k)(2) asserting it provides that "any United States academic or professional degree or foreign equivalent [degree]" may qualify as an advanced degree for EB-2 purposes. However, the Petitioner misquotes the regulation. The definition at 8 C.F.R. § 204.5(k)(2) defines *advanced degree* as requiring at least a U.S. bachelor's degree or foreign equivalent degree, in pertinent part, as follows:

> [A]ny 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.

The Petitioner also alludes to "previous [unpublished] decisions by USCIS where a 2-year undergraduate degree has been accepted as equivalent to a U.S. bachelor's degree for [EB-2] purposes." Decisions not published as precedents do not bind USCIS officers in future adjudications. 8 C.F.R. § 103.3(c). Even so, we note that the Petitioner does not provide specific identifying information about these cases. Even if such information were provided, we would conclude the Petitioner's suggestion that we review unpublished decisions and possibly request and review case files relevant to those decisions, while being impractical and inefficient, would also be a shift in the evidentiary burden in these proceedings from the Petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

The Petitioner observes that the Act "does not define 'bachelor's degree' for [EB-2] purposes," and contends that the statute "defers to the Department of Labor's Occupational Outlook Handbook (OOH) for guidance educational requirements." But the Petitioner does not cite to relevant law or regulation to illustrate his proposition that the Act defers to the OOH. Importantly, the Joint Explanatory Statement of the Committee of Conference, made at the time Congress adopted the Immigration Act of 1990, stated that the equivalent of an advanced degree is a bachelor's degree plus at least 5 years progressive experience in the professions. *See* 60 FR 29771. USCIS incorporated this standard with respect to establishing equivalency to an advanced degree at 8 CFR 204.5(k)(3)(i)(B).

The Petitioner further alleges:

> While a two-year degree is generally considered lower in educational attainment compared to a four-year U.S. bachelor's degree, USCIS may still recognize it as equivalent if the [petitioner] can provide substantial evidence to demonstrate that their education, achievements, and experience compensate for the shorter duration of the degree.

The Petitioner has not provided evidence that he holds a U.S. two-year degree or its foreign equivalent from a qualifying institution of higher learning, rendering this argument moot in the instant matter. However, we take note that the Petitioner is inappropriately asking us to ignore the evidentiary requirements at 8 C.F.R. § 204.5(k)(3)(i). We lack the authority to waive or disregard any of the Act's requirements, as implemented by regulation. *See United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as this regulation is extant it has the force of law."). Immigration regulations carry the force and effect of law. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954).

To qualify as an advanced degree professional, a petitioner relying on foreign education must have a single, foreign degree that equates to at least a U.S. baccalaureate degree. The regulations do not allow baccalaureate equivalents based on combinations of lesser educational credentials or of education and experience. *See Employment-Based Immigrant Petitions*, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (stating that "both the Act and its legislative history make clear that, in order to . . . . have experience equating to an advanced degree under the second [preference category], a [noncitizen] must have *at least* a bachelor's degree") (emphasis added). On appeal, the Petitioner does not assert nor the does record show that he possesses a U.S. advanced degree or bachelor's degree, or foreign degrees determined to be equivalent to such degrees. 8 C.F.R. § 204.5(k)(3)(i). The Petitioner repeatedly acknowledged as much in statements offered at various times throughout this proceeding. Therefore, the Petitioner has not established that he qualifies as a member of the professions holding an advanced degree pursuant to section 203(b)(2)(A) of the Act and 8 C.F.R. § 204.5(k)(2). Furthermore, as he did not receive such a degree, the Petitioner has not demonstrated that he has at least five years of progressive post-baccalaureate experience in the form of employer letters consistent with 8 C.F.R. §§ 204.5(k)(2) and (k)(3)(i)(B). The Petitioner has not established that he qualifies for the EB-2 classification as an advanced degree professional.

B. Individual of Exceptional Ability

In denying the petition, the Director determined the Petitioner did not meet any of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). On appeal, the Petitioner asserts that he met the four criteria at 8 C.F.R. §

204.5(k)(3)(ii)(A), (B), (C), and (F) at the time of filing the petition on March 18, 2021. He does not discuss the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D) and (E) on appeal, and the record does not establish his eligibility for them. Thus, we consider these issues waived on appeal. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012), (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). Based on our de novo review of the record, we agree with the Director that the Petitioner has not met at least three of the 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).

The Director determined that the Petitioner did not submit evidence sufficient to meet the plain language of this criterion. Before the Director and again on appeal, the Petitioner contends that by combining his high school certificate and his work experience, he possesses the requisite educational credentials to meet this criterion. He references an "education and work experience evaluation" letter authored by [redacted] who determined that the Petitioner obtained two years of undergraduate study in the information technology field by virtue of his "high school certificate" and his prior work experience. In this case, the Petitioner asserts without supporting evidence, that the general education he obtained in high school relates to his area(s) of exceptional ability. We agree with the Director that without more, this evidence is insufficient.

On appeal, the Petitioner also points to training certificates that he was given for taking various IT-related training courses offered by companies, such as NCR, Oracle Corporation, and Microsoft. The record does not include evidence that shows these training certificates are *official academic records*, or that any of the companies that issued these documents qualify as a *college, university, school, or other institution of learning. Id.* We conclude the Petitioner has not provided evidence that satisfies this criterion.

> *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 Director determined the Petitioner did not establish eligibility under this criterion. In our de novo review of the record we considered all of the evidence provided, including letters from former employers, colleagues, clients, and opinion authors as well as evidence about businesses that he has owned in the U.S. and abroad and conclude he has submitted insufficient and inconsistent evidence of his work history. *Matter of Ho*, 19 I&N Dec. at 582. For instance, in his initial letter he indicates that his "first [work] experience was in 2009 [with E-] where I was trained to work with networks, databases and support," and performed such duties as "following instructions, either written or in diagram format, in order to set up a system or fix a fault." He stated "[a]fter almost two years as an intern, I was promoted to be a systems analyst." He did not describe his duties as a systems analyst other than to note that he was involved in performing services related to "system development" and "WEB systems," among other things. His resume indicated that he was employed by E- from December 2008 – December 2009 as a "trainee technical support," then as a "systems analyst" from January 2010 to December 2012.

In contrast, he later provided an opinion letter from professor Q-, who indicates that as part of his analysis he reviewed evidence of the Petitioner's "experiential qualifications," but he did not identify the specific documents he considered to arrive at his opinions. Professor Q- discussed the Petitioner's employment with E- asserting "from 2009 to 2012, [the Petitioner] was General Director of [E-]. In this role, he was responsible for all creation and programming, including broad decision-making power in areas of technical management, service, administrative, strategic and products." Professor Q-'s description of the Petitioner's responsibilities as E-'s general director varies significantly from those described by the Beneficiary in statements about his employment with E- provided with the petition.

In this case, the Petitioner asserts that he gained at least ten years of work experience in the occupation(s) in which he intends to be employed between December 2008 – when he states he started his work career and March 2021 - when the petition was filed. On appeal, he quotes from professor Q-'s opinion letter reasserting that he was employed as a general director for E-, but he does not provide probative contemporaneous evidence to substantiate the nature of his employment with E- from 2008 to 2012. As the Petitioner has not provided evidence sufficient to demonstrate the specifics of his employment prior to December 2012, we conclude that he has not met this criterion. Doubt cast on any aspect of the Petitioner's [evidence] may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

Nonetheless, we observe the submitted letters discussing his employment do not meet the requirements of the regulation at 8 C.F.R. § 204.5(g)(1) which provides in pertinent part that "[e]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received."

Most letters were not authored by the Petitioner's current or former employers. They do not state whether the Petitioner worked full-time or part-time, and do not provide his specific job titles with employment start and end dates. Moreover, the letters do not provide sufficient details about the experience the Petitioner gained through his employment. For instance, some letters contain no indication of the Petitioner's duties while other letters list a few general duties. Other employment evidence reflects that the Petitioner has owned businesses, but this material does not constitute evidence of work experience in a particular occupation. It is not apparent from this evidence whether the Petitioner has the requisite experience *in the occupation(s)* in which he intends to work. For example, the Petitioner provided letters authored by his clients to demonstrate the work he performed within his own business. Although some of the client letters contain a description of the services the Petitioner performed, none demonstrate how the work experience the Petitioner gained was full-time. Rather, the experience gained while serving clients, such as [redacted], appear to be for services that were provided on a discrete project basis. While contracts with these clients may have been ongoing, the evidence does not suggest the actual work performed for these clients was full-time. Moreover, it is not apparent what work experience the Petitioner purports to have gained as a result of serving these clients. For the foregoing reasons, the Petitioner has not satisfied 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).

The Director determined that previously discussed training certificates given to the Petitioner by NCR, Oracle Corporation, and Microsoft did not meet this criterion. On appeal, the Petitioner asserts that these certificates "make [him] certified for the [IT] occupation." However, the record does not demonstrate that employment in his proposed occupations require a license, and the evidence in the record does not reflect he has licensure or a certification to practice for any particular profession or occupation. This criterion has not been met.

Per the analysis above, the Petitioner has not established that he meets any of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (E). The Petitioner also claims that he can satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), which requires evidence of recognition of his achievements and significant contributions to the industry or field. However, the record does not currently establish that he has fulfilled the initial evidentiary requirement of three out of six criteria under 8 C.F.R. § 204.5(k)(3)(ii). As he is ineligible for the EB-2 classification, we will not address the additional criteria.

Because the Petitioner did not satisfy the initial evidence requirements, we need not conduct a final merits analysis to determine whether the evidence in its totality shows that he is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). Nevertheless, we advise that we have reviewed the record in the aggregate and conclude that it does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability. Therefore, he has not established that he qualifies for the EB-2 classification through this avenue.

C. National Interest Waiver

As explained in the legal framework above, 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 the Petitioner has not established this threshold issue, the remainder of the Petitioner's arguments need not be addressed. It is unnecessary to analyze any remaining independent grounds when another is dispositive of the appeal. Therefore, we decline to reach whether he meets the three prong *Dhanasar* framework, as a matter of discretion. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as an advanced degree professional or as an individual of exceptional ability. 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.