U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29137167

Date: DEC. 19, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a commercial development specialist in the real estate development field, 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 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, 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;
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> (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;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (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 they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

If we conclude that 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 commercial development specialist in the real estate development field 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.

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 one of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). Specifically, the Director concluded that the Petitioner demonstrated they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(B), (C), and (E) but, upon final examination of the record in totality, did not demonstrate a degree of expertise significantly above that ordinarily encountered in their field to merit a determination of exceptional ability.[1] Upon de novo review, we conclude that the Petitioner has not demonstrated that they met at least three of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) for the reasons set forth below.[2]

> *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 proof of their foreign salary as a real estate sales agent, invoices for their services, Canadian government salary data, and a table showing salary comparisons for the period 2015 to 2019. 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 as a commercial development specialist. There is no evidence in the record which would permit us to evaluate the duties a commercial development specialist of exceptional ability would perform for the salary and their remuneration as a point of comparison. 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 as a commercial development specialist. For example, the letter the Petitioner submitted from their current employer containing a list of their gross commission income since 2015. But this letter does not adequately explain why the Petitioner's gross commissions are reflective of a professional with ability considered significantly above that ordinarily encountered such that it is exceptional. The salary data from the Canadian government applies to real estate sales representatives and salespeople, not commercial development specialists. But even if the data did apply to commercial development specialists, we would still conclude it did not support a conclusion that the Petitioner's salary demonstrated exceptional ability because it is not clear in the record what data the Canadian government evaluated to establish its "low," "median," and "high" level salaries and whether that data set contained a component from individuals with exceptional ability. Put another way. the record does not support the Petitioner's assertion that the "high" salary listed on the chart relates to individuals with ability considered significantly above that ordinarily encountered such that it is exceptional. Similarly, the

[1] The Petitioner did not submit evidence of 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 to meet the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(A).

[2] We agree with the Director and conclude the Petitioner has demonstrated eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(B) and (C).

table submitted by the Petition in response to the Director's RFE does not illuminate how the Petitioner's salary is indicative of their exceptional ability because it does not demonstrate how the Petitioner's gross commissions are reflective of exceptional performance. In other words, the record does not provide a context to judge whether the Petitioner's gross commissions demonstrate exceptional ability significantly above that ordinarily encountered. In sum, whilst we recognize the Petitioner's salary is based on his sales in a traditional commission model, we cannot determine based on the evidence in the record that the commissions the Petitioner commanded were significantly greater than those ordinarily earned by individuals similarly situated to the Petitioner such that it is evidence of the Petitioner's exceptional ability. So we agree with the Director that 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 membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

We disagree with the Director that the Petitioner met this criterion and hereby withdraw it. The Petitioner's membership in the Toronto Real Estate Board, the Ontario Real Estate Association, and the Canadian Real Estate Association is not sufficient evidence of membership in a professional association. These organizations are not professional associations. The occupation of commercial development specialist or realtor does not appear in the list of professions contained at section 101(a)(32) of the Act, and it is not included as an occupation that customarily requires a bachelor's or higher degree. *See* Update to Appendix A to the Preamble-Education and Training Categories by O*NET-SOC Occupations; Labor Certification for Permanent Employment of Immigrants in the United States and Procedures To Establish Job Zone Values When O*NET Job Zone Data Are Unavailable, 86 Fed. Reg. 63070 (Nov. 15, 2021). Moreover, the record does not contain evidence documenting the criteria for membership in the associations listed by the Petitioner. The Petitioner submitted the "Toronto Real Estate Board's Multiple Listing Service (MLS) Rules and Policies" but the document did not specify if a bachelor's degree is a minimum requirement for membership as a professional in the association. Similarly, the copy of the "The Realtor Code" issued by the Canadian Real Estate Association submitted by the Petitioner simply advanced a code of professional responsibility and ethics for realtors and does not describe the requirements for membership in the association to evaluate whether the requirements indicate the association is a collection of professionals. And the copy of the Ontario Real Estate and Business Brokers Act of 2020 describes the framework for regulation of real estate and business brokers in the province but does not contain any criteria for us to evaluate whether the occupation customarily requires a bachelor's or higher degree. Consequently, an association of realtors, real estate sales professionals, or commercial development specialists is not a professional association as that term is contemplated in the regulations, and the Petitioner has not met this criterion.

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 several support letters/letters of recommendation and award certificates to document the recognition of their achievements and significant contributions to their field.[3]

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 record does not adequately support the Petitioner's assertion that their "achievements and significant contributions" were recognized as significantly above those ordinarily encountered in their industry or field. For example, whilst the awards granted to the Petitioner by their employer were afforded to five percent of their employer's worldwide sales force, it is not clear in the record how recognition in the top give percent of [redacted] sales force is an achievement of note in the field of real estate development. And whilst the record reflects the Petitioner managed a project requiring construction of internet browsing rooms to proliferate internet access in underrepresented parts of Venezuela in time and under budget, it is not clear in the record how the successful completion of this project is an achievement or significant contribution to the field of real estate development. For example, it is not clear how the expansion of internet access in rural Venezuela related to the Petitioner's field or industry. And even if it is the actual construction of the browsing rooms and not their intended effect for which the Petitioner asserts they were recognized, it is not clear in the record how completion of this task, even if larger and under budget, is an achievement or significant contribution in the real estate development field. The record does not highlight any issues or circumstances which would assist in consideration of this construction project in a sense which would highlights it as an achievement and significant contribution to the field of real estate development.

The remaining letters the Petitioner submitted reflect that they are a seasoned professional whose competence and reliability as an employee is valued and appreciated. But the letters, along with the remaining evidence in the record, did not evidence the Petitioner's achievement and significant contributions significantly above that ordinarily encountered in the field required to demonstrate the Petitioner's exceptional ability.

III. CONCLUSION

The Petitioner has not established eligibility in at least three 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*

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

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.