



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

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

In Re: 25731070

Date: MAR. 6, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a general and operations manager,¹ seeks second preference immigrant 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).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established that he was individual of exceptional ability.² 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.

¹ Although the Petitioner identified his job title as "general and operation manager on the Form I-140, Immigrant Petition for Alien Worker, he also claimed to be "an entrepreneur in the field of road and transport tourism."

² The Director also concluded that the Petitioner did not establish eligibility as an advanced degree professional under 8 C.F.R. § 204.5(k)(3)(i). The Petitioner did not claim eligibility as an advanced degree professional, nor does he dispute this conclusion on appeal. We therefore consider this issue to be waived. *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).

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. –

(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, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(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.

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.”

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

Advanced degree means any 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. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

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.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

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).³ *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,⁴ 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. *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

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. Here, the Petitioner asserted that he qualifies as an individual of exceptional ability, and submitted supporting evidence. In denying the petition, the Director determined that the Petitioner had not shown that he meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii).

After reviewing the evidence, we conclude that the record does not support a finding that the Petitioner satisfies the requirements of at least three 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 Petitioner did not claim to meet 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 that the Petitioner met this criterion. However, for the reasons below, we must withdraw the Director’s conclusion.

The Petitioner submitted three declarations from an accountant and three certificates from the Trade Board of [] reflecting the corporate status of each of his claimed employers. The plain language of the regulation, however, requires letter(s) which are *from current or former employers*. The Petitioner has not established that the accountant qualifies as an employer, as required by the regulation. Moreover, beyond listing the Petitioner’s job titles, the declarations do not specify whether

³ 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*).

⁴ *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS’ decision to grant or deny a national interest waiver to be discretionary in nature).

the positions were full-time, nor do they articulate the specific duties performed by the Petitioner.⁵ The Petitioner has not demonstrated that any of the provided documentation satisfies this requirement and therefore 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 Petitioner did not claim to meet 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 initially submitted a letter from his accountant, which outlined his average income for the years 2018, 2019, and 2020. In response to the Director's request for evidence, the Petitioner provided a website printout of salary data for the position of "General Manager" in Brazil. Although the printout lists the average wage for a general manager position, it is unclear if the salary listed corresponds to an hourly, monthly, annual, or some other salary timeframe. Further, the printout does not state the date of the provided salary data.

On appeal, the Petitioner asserts that the salary data provided demonstrates that his average monthly salary for the years 2018, 2019 and 2020 "is approximately 57% above the average income of the Brazilian market." However, as noted above, the printout provided does not reflect the time period of the salary data such that we can determine whether it corresponds to the relevant years for which the Petitioner provided evidence of his income. Even if it were established that the Petitioner received a salary that exceeded the figure on the printout, it would still only provide a very limited picture of the Petitioner's salary in comparison to others in the profession.⁶ In other words, even if the Petitioner provided sufficient evidence to establish that his salary was in fact higher than other general and operations managers, it would simply establish that he earned a higher-than-average salary. The evidence does not suggest that the salary he earned was due to his ability.

On appeal, the Petitioner relies on an opinion letter from [redacted] Assistant Professor of Professional Practice at [redacted] University, as further evidence of his eligibility under this criterion. The letter states, in part, that the "testimonials and documentary evidence provided demonstrate that [the Petitioner] has a record of notable success, as he has had a leading role in defining projects, especially those related to general and operational management." However, Professor [redacted] letter is a national interest waiver eligibility evaluation that discusses the Petitioner's eligibility under the *Dhanasar* framework. The letter does not provide information pertaining to salary data or other evidence demonstrating that the Petitioner has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. Therefore, it has little probative value under this criterion.

The record does not support a finding that the Petitioner has commanded a salary that demonstrates exceptional ability. For the foregoing reasons, the Petitioner has not satisfied this criterion.

⁵ Two of the declarations include one sentence stating generally that the Petitioner's duties were related to the direction and coordination of business activities.

⁶ We again note that although the Petitioner identified his job title as "general and operation manager" on the Form I-40, he also claimed that he was "an entrepreneur in the field of transport and road tourism" in the record of proceedings.

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

The Petitioner submitted documentation regarding his membership in the [REDACTED] [REDACTED] He did not, however, provide supporting evidence, such as the membership requirements or by-laws, which establishes that the organization is a professional association. As noted above, profession is defined as “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.” 8 C.F.R. § 204.5(k)(2). The Petitioner likewise provided no information regarding the basis used by the organization to admit the Petitioner as a member. Accordingly, we conclude that the Petitioner has not established that he satisfies 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 Director determined that the Petitioner met this criterion. For the reasons below, however, we must withdraw the Director’s conclusion.

The record includes a number of recommendation letters from peers of the Petitioner, as well as a national interest waiver eligibility evaluation. While the evidence establishes that the Petitioner is well-respected and a contributing member of his community, the plain language of the criterion requires recognition for achievements and *significant contributions to the industry or field*. Without additional evidence, such as objective information regarding the Petitioner’s specific and significant contributions to the transport and road tourism industry, he has not established that he meets this criterion.

The Petitioner’s professional acquaintances and colleagues authored the letters of recommendation. The authors describe the Petitioner and the quality of services he provides, along with details concerning the projects and results the Petitioner achieved for companies and clients. Although they praise the Petitioner’s professional skills and experience, as well as the success of the projects upon which the Petitioner worked, the authors do not suggest that the Petitioner received recognition for achievements and significant contributions to the industry or field. Rather, as explained, the authors described the results the Petitioner achieved on individual projects for individual companies.

Additionally, we return to the evaluation from Professor [REDACTED] Although Professor [REDACTED] offered his opinion on the Petitioner’s experience and eligibility under the *Dhanasar* framework, the evaluation does not contain a cogent discussion of how the Petitioner qualifies as an individual of exceptional ability nor does it contain support for a conclusion that the Petitioner has received recognition for achievements and significant contributions to the industry or field. Much of the evaluation repeats the contents of the Petitioner’s resume or contains statements repeated by other authors. As previously explained, the record contains insufficient evidence to establish that the Petitioner has received recognition for achievements and significant contributions to the industry or field. Rather, as noted, the Petitioner’s professional accomplishments appear to impact the parties relevant to individual transactions but do not appear to reach the industry or field as a whole. As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, we will reject an opinion or

give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.* We are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to “fact”). Here, Professor [redacted] evaluation does not sufficiently address the Petitioner’s eligibility for the underlying employment classification. Therefore, it has little probative value under this criterion.

Accordingly, we conclude that the evidence does not establish the Petitioner’s eligibility under this criterion.

In summary, 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 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. As the Petitioner has not met the threshold requirement for this underlying classification, further analysis of his eligibility for a national interest waiver would serve no meaningful purpose.

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. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.