U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25693532

Date: MAR. 17, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a provider of logistics software and services, seeks to permanently employ the Beneficiary as head of its operations. The company requests his classification as a noncitizen of exceptional ability and a waiver of this immigrant visa category's normal requirement for a certification from the U.S. Department of Labor (DOL). *See* Immigration and Nationality Act (the Act) section 203(b)(2)(B)(i), 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) has discretion to forgo the labor certification requirement if a waiver is "in the national interest." *Id.*

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner demonstrated neither the Beneficiary's exceptional ability nor his proposed employment in the national interest. On appeal, the Petitioner contends that the Director's national interest analysis overlooked evidence and that, contrary to the decision, the Beneficiary meets preliminary evidence standards for a noncitizen of exceptional ability.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the Beneficiary satisfied the preliminary evidence standards for a noncitizen of exceptional ability. We will therefore withdraw the Director's contrary decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate a beneficiary's qualifications for the underlying immigrant visa category, as either a member of the professions holding an advanced degree or its equivalent, or a noncitizen of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act. In this visa category, a U.S. employer must normally seek a noncitizen's services and obtain DOL certification to permanently employ them in the country. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). To avoid the need for a job offer/labor certification, a petitioner must demonstrate that waiving the requirement is in the national interest. Section 203(b)(2)(B)(1) of the Act.

Neither the Act nor regulations define the term "national interest." But we have established a framework for adjudicating requests for national interest waivers. *See Matter of Dhanasar,* 26 I&N Dec. 884, 889 (AAO 2016). If a noncitizen otherwise qualifies as an advanced degree professional or noncitizen of exceptional ability, USCIS may waive the job-offer/labor certification requirement if the petitioner establishes that:

- The noncitizen's proposed U.S. work has "substantial merit" and "national importance;"
- They are "well-positioned" to advance their intended endeavor; and
- On balance, a waiver of the normal job-offer/labor certification requirement would benefit the United States.

Id.

II. ANALYSIS

The Beneficiary, a native and citizen of the United Kingdom (UK), earned a Business and Technical Education Council (BTEC) Higher National Certificate in computing and worked for a UK software company from 1997 to 2010. From 2010 to 2015, two of the company's customers employed him in U.S. nonimmigrant work visa status as a software consultant. The Beneficiary then founded the Petitioner in the United States and began heading its operations. The Petitioner sells the UK company's supply chain and logistics software in the United States and supports the company's U.S. customers, which include large, multinational companies in the automotive, railroad, chemical, and logistics industries. The Petitioner asserts the Beneficiary's qualifications as a noncitizen of exceptional ability in the field of "process execution technology, working in the global multimodal supply chain market."

A. Exceptional Ability

The term 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). When assessing exceptional ability, USCIS uses a two-step analysis. *See generally* 6 *USCIS Policy Manual* F.(5)(B)(2), https://www.uscis.gov/policy-manual. First, a petitioner must submit at least three of the following types of evidence:

- An official academic record showing the noncitizen's possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- Letters from current or former employers showing that the noncitizen has at least 10 years of full-time experience in the proposed occupation;
- A license to practice the profession or certification for the profession or occupation;
- Evidence of the noncitizen's receipt of a salary or other remuneration demonstrating exceptional ability;
- Proof of membership in professional associations; or
- 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). If these types of evidence do not "readily apply" to a beneficiary's occupation, a petitioner may establish eligibility by submitting "comparable evidence." 8 C.F.R. § 204.5(k)(3)(iii).

In the analysis's second part - the final merits determination - USCIS evaluates all evidence, considering the petition in its entirety. *See generally* 6 *USCIS Policy Manual* F.(5)(B)(2). The Agency must determine whether a petitioner, by a preponderance of evidence, has demonstrated a beneficiary's possession of a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

B. Evidentiary Standards

The record supports the Director's finding that the Petitioner demonstrated the Beneficiary's satisfaction of one evidentiary standard: letters showing his possession of at least 10 years of experience in the proposed occupation. *See* 8 C.F.R. § 204.5(k)(3)(ii)(B). Contrary to the Director's decision, however, we conclude that the Beneficiary meets at least two additional evidentiary standards.

1. Possession of a Certificate from an Institute of Learning

First, the Petitioner submitted an academic record showing the Beneficiary's possession of a certificate from a learning institution relating to his area of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner submitted a copy of the Beneficiary's 2005 BTEC higher national certificate from the UK. The certificate states his completion of a program in "computing" at the [redacted] Institute of Higher Education. An independent, professional evaluation of the credential states its equivalence to two years of U.S. university-level credit in computer technology.[1]

In a request for additional evidence (RFE), the Director questioned whether the Beneficiary's higher national certificate constitutes an "official academic record." *See* 8 C.F.R. § 204.5(k)(3)(ii)(A). In response, the Petitioner submitted evidence of its request for additional documentation regarding the Beneficiary's certificate but stated that the materials did not arrive in time to meet the response deadline. The Director's decision finds that the Petitioner did not meet the evidentiary standard because "[n]o new evidence was submitted with the RFE response."

Contrary to the Director's decision, we conclude that the Beneficiary's higher national certificate is an official academic record and meets the requirements of the evidentiary standard. In a decision that USCIS adopted as binding on all Agency employees, we considered the term "official academic record" in a similar evidentiary requirement for advanced degree professionals. *See Matter of O-A-, Inc.*, Adopted Decision 2017-03 (AAO Apr. 17, 2017) (citing 8 C.F.R. § 204.5(k)(3)(i)). We found that "[a]n 'official academic record' is not limited to a diploma" and noted that, for a noncitizen of

[1] The Electronic Database for Global Education (EDGE), an online resource that federal judges have found to be a reliable source of foreign education equivalencies, states that a BTEC higher national certificate compares to one year of U.S.-university level credit. *See* Am. Ass'n of Collegiate Registrars & Admissions Officers (AACRAO), EDGE, "About EDGE," https://www.aacrao.org/edge/about-edge; *see also Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (describing EDGE as "a respected source of information").

exceptional ability, USCIS may more broadly accept "a degree, diploma, certificate, or similar award." *Id.* at *3, *3 n.3. Also, a college or university need not issue an academic credential to a noncitizen of exceptional ability. Rather, a credential for a noncitizen of exceptional ability may more broadly derive from "a college, university, school, or other institution of learning." *See* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The copy of the Beneficiary's higher national certificate meets the evidentiary standard at 8 C.F.R. § 204.5(k)(3)(ii)(A). Consistent with the regulation, the document constitutes a "certificate" from "an institute of learning." Also, the certificate's field of study - "computing" – "relat[es] to the area of exceptional ability" because the Beneficiary uses computer software in his field of improving business supply chains. The certificate is also an "official academic record" because it demonstrates the Beneficiary's completion of all substantive certificate requirements and the institution's approval of the certificate. *See Matter of O-A-*, at *4. Further, the RFE did not identify a reason to doubt the certificate's authenticity or, under 8 C.F.R. § 103.2(b)(5), request the original certificate. The copy of the Beneficiary's higher national certificate therefore satisfies the evidentiary standard at 8 C.F.R. § 204.5(k)(3)(ii)(A).

2. Remuneration for Services

Also, the Petitioner submitted evidence that the Beneficiary's remuneration for his services demonstrates exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(D). Copies of the Beneficiary's federal income tax returns reflect the following annual amounts of wages and total incomes from combined wages and dividends: $81,000 and $216,260 in 2017; $56,250 and $235,915 in 2018; and $70,000 and $253,922 in 2019. Copies of the Petitioner's federal income tax returns for the same years indicate that the Beneficiary, the petitioning corporation's sole shareholder, derived most of his remuneration from the company's net income, which he received in annual dividends. The Petitioner's RFE response also included a copy of a salary survey stating an average annual salary for a "senior director" in the company's geographical area of $172,000.

Without mentioning the salary survey, the Director's decision finds insufficient evidence "that the beneficiary earned salaries" or that his salaries demonstrate exceptional ability. But the federal income tax returns of the Petitioner and Beneficiary demonstrate his receipt of salaries. Also, the Director errs by focusing on salaries. The evidentiary standard requires "[e]vidence 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) (emphasis added). Thus, the fact that most of the Beneficiary's income constituted dividends rather than salaries does not bar him from satisfying this evidentiary standard.

Also, the survey shows that the Beneficiary received substantially more remuneration - including both salaries and dividends - for his services than most others in similar positions in his geographical area, suggesting his possession of exceptional ability. The Beneficiary's proposed job title with the Petitioner is not "senior director" as stated in the survey. But the survey position reasonably compares with the Beneficiary's duties as head of the Petitioner's operations. We therefore conclude that the Petitioner has sufficiently demonstrated that the Beneficiary's remuneration reflects exceptional ability.

The Petitioner has met three of the six evidentiary standards for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). We will therefore withdraw the Director's contrary decision.

C. Final Merits Determination

After finding insufficient proof to meet the preliminary evidentiary standards, the Director did not make a final merits determination on the Beneficiary's claimed exceptional ability. We will therefore remand the matter.

On remand, the Director should review the entire record, evaluate the evidence, and conduct a final merits determination to ascertain whether the Petitioner has demonstrated the Beneficiary's possession of a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See generally* 6 *USCIS Policy Manual* F.(5)(B)(2).

D. National Interest

If the Director finds sufficient evidence of the Beneficiary's claimed exceptional ability, the Director should then reconsider whether the proposed employment is in the national interest.

Under the first *Dhanasar* prong, the Director found that the Petitioner did not demonstrate the national importance of the proposed endeavor. The decision states that the evidence "fails to demonstrate how working toward the shortage of U.S. computer professionals has national or even global implications."

The Petitioner, however, did not contend that the United States has a shortage of computer professionals. Rather, the Petitioner asserted that the Beneficiary's knowledge of the company's logistics software and his experience with the global supply chain will help major U.S. companies create jobs, avoid future supply chain disruptions, and secure critical U.S. infrastructure sectors.

Also, under *Dhanasar*'s second prong, the Director did not clearly explain why he found insufficient evidence of the Beneficiary's ability to advance the proposed endeavor. *See* 8 C.F.R. § 103.3(a)(1)(i) (requiring a denial notice to "explain in writing the specific reasons for denial"). The decision states:

> The beneficiary submitted evidence of support letters and certificates of training, which he claims significantly succeeded from his work. Therefore, this evidence does not demonstrate the beneficiary's work as a Head of U.S. Operations served as an impetus for progress in the field, has affected the technology field, or otherwise demonstrates his work constitutes a record of success or progress.

The Director also found the Beneficiary's academic accomplishments insufficient to demonstrate his ability to advance the proposed endeavor. But education is only one of many factors for consideration. *See Matter of Dhanasar*, 26 I&N Dec. at 890. The Director did not consider the Beneficiary's experience, skills, or knowledge, or the interests of potential software customers. *Id.*

Finally, in finding insufficient evidence that a waiver would benefit the United States under *Dhanasar*'s final prong, the Director's decision makes conclusory statements without citing evidence

or explaining the Director's reasoning. *See* 8 C.F.R. § 103.3(a)(1)(i) (requiring a denial notice to "explain in writing the *specific* reasons for denial") (emphasis added).

III. CONCLUSION

The Petitioner met preliminary, evidentiary standards for classifying the Beneficiary as a noncitizen of exceptional ability. To ascertain eligibility for the requested immigrant visa category, the Director must perform a final merits determination. If the Petitioner demonstrates eligibility for the category, the Director should then reconsider whether the proposed employment is in the national interest.

ORDER: The Director's decision is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.