



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

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

In Re: 28819257

Date: NOV. 03, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in the technology industry, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). He also seeks a national interest waiver of the job offer requirement attached to this classification under section 203(b)(2)(1)(B) of the Act.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish the Petitioner's eligibility for EB-2 classification as an individual of exceptional ability. The Director further determined that the Petitioner did not establish that it would be in the national interest to grant a discretionary waiver of the job offer requirement. 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 a member of the professions holding an advanced degree or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act. 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).<sup>1</sup> Meeting at least three criteria, however, does not, in and

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<sup>1</sup> If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

of itself, establish eligibility for this classification.<sup>2</sup> If a petitioner does so, 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 a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish that they merit a discretionary waiver of the job offer requirement “in the national interest.” Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term “national interest,” *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that USCIS may, as matter of discretion<sup>3</sup>, grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

## II. EXCEPTIONAL ABILITY CLASSIFICATION

The first issue to be addressed is whether the Petitioner established his eligibility for EB-2 classification as an individual of exceptional ability in the arts, sciences, or business. The Petitioner indicates that his proposed endeavor in the United States is to work as the owner and CEO of a Florida-based company that has developed a social media application. The mobile application, [REDACTED] is designed to link tourists with knowledgeable “locals” in major cities with the goal of improving their travel experience.

The Director determined that the Petitioner did not submit evidence that satisfied the plain language of any of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). The Director acknowledged the Petitioner’s assertion that he could establish his eligibility through comparable evidence, but noted that, in several instances, he did not meet his burden to demonstrate why the standards at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to his occupation. On appeal, the Petitioner asserts that the reasons provided for the denial of his petition were “merely perfunctory” and reflect a lack of understanding of his case or an “inability to comprehend” the purpose of his endeavor.

For the reasons provided below, we agree with the Director’s conclusion that the Petitioner did not satisfy the initial evidentiary requirements for classification as an individual of exceptional ability by meeting at least three criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has not demonstrated his eligibility through submission of comparable evidence.

### A. Evidentiary Criteria

Although the Petitioner previously claimed he could satisfy all six evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii), on appeal, he specifically addresses the five criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B)

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<sup>2</sup> U.S. Citizenship and Immigration Services (USCIS) has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5>.

<sup>3</sup> 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).

through (F). He does not contest the Director's determination that he did not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), which requires an official academic record showing that the individual 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. An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). We discuss the remaining criteria below.

*Evidence in the form of letter(s) from current or former employer(s) showing that the individual 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)

This criterion focuses on evidence of experience in the occupation which the individual intends to pursue in the United States. As noted, the Petitioner intends to pursue work as an entrepreneur and CEO in the technology industry.

The Petitioner submitted a Form ETA 750 Part B, Statement of Qualifications of Alien, listing his employment in three jobs since September 2015. He stated he served as: (1) managing partner of [redacted] from September 2015 until August 2017, (2) managing partner of [redacted] from April 2018 until October 2021; and (3) founder and CEO of [redacted] (Brazil) since April 2021. His resume and professional plan listed his additional employment as the founder and managing partner of the restaurant [redacted] in Portugal from November 2015 until November 2016. Finally, the Petitioner states that, from 2007 until April 2014, he was a "music artist/DJ and music producer" performing as "[redacted]" during which time he played at music festivals in Europe and Africa and distributed his music on platforms including Spotify and YouTube.

As initial evidence in support of this criterion, the Petitioner submitted the following:

- A letter from the accountant for [redacted] (Brazil), who confirmed the Petitioner's role as CEO of the company since April 30, 2021 and described his duties.
- A letter from the accountant for [redacted] (United States), who confirmed the Petitioner's position as founder and CEO since the company's formation in June 2021 and described his duties.
- A letter from a partner of [redacted] (Portugal), who confirmed the Petitioner's position as managing partner of this company from April 2018 until October 2021 and described his duties.
- Copy of the "permanent certificate" for [redacted] which shows the company was registered in Portugal in September 2015, and identifies the Petitioner as its majority partner and manager.
- Copy of the National Trademark (wordmark) issued by the Portuguese National Institute of Industrial Property (INPI) for the name [redacted]. This document identifies the Petitioner as the holder of the wordmark and indicates that he submitted the application in August 2015.
- Copy of a Logotype (device mark) issued by INPI for the name [redacted]. This document identifies the Petitioner as the holder of the device mark and states he submitted the application in February 2013.

In a request for evidence, the Director observed that the initial evidence did not include letters from former employers showing that the Petitioner has at least ten years of full-time experience in the occupation he intends to pursue in the United States, as required by 8 C.F.R. § 204.5(k)(3)(ii)(B). The Director requested official verification letters on employer letterhead stating the employer's name and address, the signer's name and title, the exact dates of employment, the number of hours the Petitioner worked per week, and a description of the duties he performed in each position.

In response to the RFE, the Petitioner emphasized he has been an entrepreneur for "his entire adult life" and noted that entrepreneurs "are not likely to have former employers who can attest to their experience in the occupation." The Petitioner referred the Director to review the professional plan submitted with the petition, which contains a narrative description of his employment history.

The Director acknowledged the Petitioner's claim regarding his inability to obtain the types of employment verification letters required by the plain language of the regulation. However, in determining whether the Petitioner provided comparable evidence, the Director concluded that he did not submit objective, documentary evidence to demonstrate his ten years of full-time experience in the occupation in which he intends to work in the United States. The Director emphasized that the previously submitted professional plan "is not considered objective documentary evidence." We agree with the Director's determination that the Petitioner did not demonstrate that he meets this criterion.

As noted, the Petitioner indicates he was a "Music Artist/DJ and Music Producer" from 2007 until April 2014, but the record lacks corroborating evidence of those dates. He describes his music career as "an entrepreneurial project . . . primarily focused on me and my talent." However, he provided insufficient documentation regarding the nature of this "entrepreneurial project," such as, for example, evidence that he established and ran a company or enterprise to oversee or manage his artistic endeavors. As such, the record does not contain sufficient evidence to demonstrate the Petitioner's pursuit of his music career qualifies as full-time experience as an entrepreneur, nor did he explain how his experience as a music artist, DJ and music producer is in the same occupation as his intended position as the CEO and founder of a technology company.

According to the Petitioner's resume and professional plan, he transitioned to an entrepreneurial career in business in 2015. The Petitioner filed the petition in January 2022, less than seven years after his career transition from artist to entrepreneur. Therefore, while the record contains some evidence that generally corroborates his claimed employment as an entrepreneur since 2015, he did not meet his burden to demonstrate that he had been employed or engaged in this occupation on a full-time basis for at least ten years at the time he filed this petition. Accordingly, he did not establish that he meets 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)

At the time of filing, the Petitioner submitted evidence that he possesses a yachtsman's license and a radiotelephone operator Class A license, both issued by the Portuguese government. In the RFE, the Director acknowledged this evidence but noted that the submitted licenses are unrelated to the Petitioner's intended field of endeavor. The Director also noted that he had not established that a

license or certification is required for the Petitioner to work as an entrepreneur in the technology industry.

In response to the RFE, the Petitioner stated that he is “the originator and developer” of the “[REDACTED]” app and that his company and the mobile application are licensed exclusively through an Apple Developer Program License Agreement. He explained that since applications must be “evaluated, vetted, beta tested and fully considered” before being selected by Apple,” he meets this criterion based on the onboarding of “[REDACTED]” into the Apple Developer Environment. He submitted a screenshot from the Apple App Store as evidence that “[REDACTED]” is attributed to his company “[REDACTED]” and available as a free download on the platform.

The Director considered whether this evidence could serve as “comparable evidence” to satisfy this criterion, but noted that the Petitioner did not show that he was licensed as the originator and developer of the “[REDACTED]” app.

In addressing this criterion on appeal, the Petitioner’s brief contains quotes attributed to “[REDACTED]” and Forbes, with no further explanation or references to the Director’s decision. The offered quotes highlight the importance of entrepreneurs as a source of innovation and as key drivers of the economy, but these considerations do not serve as comparable evidence of the Petitioner’s eligibility under this criterion. We agree with the Director’s conclusion that the Petitioner’s documented Portuguese yachtsman licenses are unrelated to his field of endeavor and that evidence of the presence of his company’s mobile application in the Apple Store is not sufficient to establish that he meets this criterion through comparable evidence.

*Evidence that the individual has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D)*

To satisfy this criterion, the evidence must show that the individual has commanded a salary or remuneration that is indicative of their claimed exceptional ability relative to others working the field.

As initial evidence in support of this criterion, the Petitioner submitted, in relevant part, copies of his monthly pay statements from “[REDACTED]” indicating that he received a gross monthly salary of R\$20,000 as managing partner of this entity for the months of June 2021 through September 2021. In the RFE, the Director acknowledged this evidence, but advised that the record lacked objective comparative earnings data to demonstrate that the Petitioner had commanded a salary, or other remuneration for services, which demonstrates exceptional ability in relation to those performing similar work in the technology industry during the same period.

In response to the RFE, the Petitioner submitted copies of bank statements for his U.S.-based company for the months of February 2022 through October 2022, and asserted that the evidence shows that “the company, in less than one year, is showing monthly income of approximately \$30,000.” Along with the bank statements, the Petitioner’s evidence in support of this criterion included copies (or partial copies) of published articles about the Petitioner and/or his ventures.<sup>4</sup> Several articles mention the

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<sup>4</sup> Some of the articles are in the Portuguese language and were not accompanied by an English translation as required by 8 C.F.R. § 103.2(b)(3).

Petitioner's inclusion in the cast of the reality show [redacted] and note that the show would "follow the lives of six wealthy millennials on a luxury trip to [redacted]. The Petitioner did not explain how these published materials establish his eligibility under this criterion.

The Director determined that the bank statements and articles submitted in response to the RFE did not provide objective evidence of wages the Petitioner received for his work in the claimed area of exceptional ability and noted that he did not provide comparative earning data for similarly employed workers in the technology industry as requested in the RFE. In addition, the Director observed that the bank statements included in the RFE response all postdated the filing of the petition in January 2022 and therefore could not establish eligibility at the time of filing. Accordingly, the Director concluded that the Petitioner did not demonstrate that he meets this criterion.

In his brief on appeal, the Petitioner states:

According to [redacted] CEO and Founder of [redacted] the average startup founder's salary in 2023 was down to approximately \$145,000 from \$150,000 in 2022. This is slightly higher than the average startup CEO salary of \$142,000 in 2023, driven by technical founders who earn more than their CEO counterparts.

The Petitioner quotes two additional paragraphs presumably from the same unidentified article, and states that based on this article, he "earned in 2022 twice as much as a Founder of a startup earns in his feed [*sic*] round year in just six months since he received authorization to work." He states that "all documents" were sent in response to the RFE and "were ignored."

We agree with the Director's determination that the Petitioner did not provide sufficient objective documentary evidence demonstrating that he meets the plain language of this regulatory criterion, nor did he demonstrate that this criterion is not readily applicable to his occupation. First, the only objective evidence the Petitioner provided of his prior earnings consisted of the monthly pay statements issued to him by [redacted] in 2021. He was provided an opportunity to submit comparative wage data to show that this salary is commensurate with exceptional ability, but he did not provide such evidence in response to the RFE. Because he did not provide a basis for comparison of this salary relative to others working in the field, the Petitioner did not establish that he met this criterion based on the salary he received in Brazil in 2021.

In response to the RFE and on appeal, the Petitioner claims eligibility based on his earnings with his U.S.-based company in 2022. However, as noted by the Director, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). That decision, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), further provides that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Therefore, the Petitioner cannot establish his eligibility under this criterion based on evidence of his salary or other remuneration that postdates the filing of this petition in January 2022.

Nevertheless, we note the company's 2022 bank statements submitted in response to the RFE do not establish the amount of the salary or other remuneration the Petitioner received in his role as founder

and CEO. Further, the bank statements were not accompanied by any comparative wage data showing that his earnings are indicative of his exceptional ability. On appeal, he provides an average salary for a start-up founder from an unidentified source and claims that his earnings over a period of six months in 2022 were more than double that average amount. However, the record still lacks objective evidence of his salary or other remuneration for services as the founder and CEO of the U.S. company as of the date of filing.

Finally, the Petitioner's claim that the Director ignored evidence submitted in response to the RFE is not supported by the record. As noted, in addressing this criterion in his RFE response, the Petitioner submitted 2022 bank statements for his U.S. company and copies of articles about him and his various endeavors. This evidence was directly addressed in the Director's decision, and we agree that neither the bank statements nor the published materials demonstrated that the Petitioner has commanded a high salary or other remuneration for services that demonstrate exceptional ability.

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

The Petitioner did not claim eligibility under this criterion at the time of filing or in his response to the RFE. On appeal, he asserts that he applied for membership in the Consumer Technology Association in January 2022, shortly after filing this petition. He states that, after a lengthy period of evaluation, "both my company, [redacted] and I, as its founder, were approved thereby fulfilling another one of the required criteria." He also mentions that he has four additional memberships under review which will enhance his recognition and stature in the technology field.

The Petitioner does not claim or provide evidence that he was a member of any professional association when he filed this petition. Again, we emphasize that eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1); *see also Katigbak*, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Izummi*, 22 I&N Dec. at 175. Therefore, we will not evaluate the Petitioner's claim that membership in CTA establishes his eligibility under this criterion.

**B. Summary and Reserved Issue**

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. As the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii), we reserve and will not address this remaining criterion.

Further, 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). *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions 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 alternative issues on appeal where an applicant is otherwise ineligible).

### III. NATIONAL INTEREST WAIVER

The Petitioner has not established his qualification for the requested EB-2 classification and is therefore ineligible to be granted a national interest waiver as a matter of discretion. Although the Petitioner asserts on appeal that he meets all three of the prongs under the *Dhanasar* analytical framework and that the Director erred in concluding otherwise, we will reserve these issues. See *Bagamashad*, 429 U.S. at 25-26; see also *Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

### IV. CONCLUSION

Because he did submit evidence to satisfy three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), the Petitioner has not established that he is eligible to be classified as an individual of exceptional ability in the sciences, arts, or business. Accordingly, the petition will remain denied and 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.