U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28433697

Date: NOV. 27, 2023

Appeal of Texas 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 an individual of exceptional ability. *See* 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 EB-2 immigrant 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.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish the Petitioner's eligibility for the EB-2 classification or for a national interest waiver. 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. 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).

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 into the occupation.[1] 8 C.F.R. § 204.5(k)(3).

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).[2] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[3] 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." *Id.* 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,[4] 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.[5]

II. ANALYSIS

The Petitioner asserts that he is both a member of the professions holding an advanced degree and an individual of exceptional ability. The Director concluded that the Petitioner did not establish that he meets the EB-2 eligibility requirements. Upon review of the record, we conclude that the Petitioner has not demonstrated his qualifications as an advanced degree professional, nor has he demonstrated that he qualifies as an individual of exceptional ability.

A. Eligibility as a Member of the Professions Holding an Advanced Degree

The Petitioner refers to his vocation alternately as an industrial automation developer and a software developer. The Petitioner intends to continue his work developing software for heating, ventilation, and air conditioning (HVAC) systems, as well as refrigeration equipment. The record includes a certificate from a technical school in Brazil for a year-long training course in industrial automation

[1] Profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) of the Act.

[2] 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).

[3] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

[4] *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).

[5] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

and several certificates for the completion of other shorter training programs in the Petitioner's field. On appeal, the Petitioner asserts that the Brazilian institution is "well-known" and "recognized by the UN as one of the three most important actors in technical and vocational education in the Southern Hemisphere." The record, however, does not contain evidence to show that the program the Petitioner completed with this institution is the foreign equivalent of either a U.S. bachelor's degree[6] or advanced degree. The Petitioner also asserts that an expert opinion letter and an education evaluation previously submitted establish that the Petitioner has received "the equivalent of a US degree of Bachelor in Science in Information Technology." The letter and evaluation do not provide explanations of how the Petitioner's vocational coursework and work experience in Brazil equate to the receipt of a U.S. bachelor's degree. Although the letters discuss the relevance of the Petitioner's work experience in evaluating whether he has attained the foreign equivalent of a bachelor's degree, the regulation at 8 C.F.R. § 204.5(k)(2) does not provide for a substitution of vocational training and experience to be considered as the equivalent of a bachelor's degree; both the Act[7] and the regulations contemplate only a single degree, not a combination of education and experience claimed as the equivalent, in aggregate, of a degree. We also note that the evaluation uses an argument to equate the Petitioner's work experience that does not apply to immigrant petitions, but to certain nonimmigrant petitions. Credential evaluations are reviewed for advisory purposes only; if questionable in any way, USCIS may give them less weight. *Matter of Caron Int'l*, 19 I&N Dec. 791 (Comm'r) 1988). Further, the record does not include evidence to demonstrate that the Petitioner's intended occupation is a profession requiring the attainment of at least a bachelor's degree for entry. *See* 8 C.F.R. § 204.5(k)(3). The Petitioner has not established eligibility for the EB-2 classification as a member of the professions holding an advanced degree.

B. Eligibility as an Individual of Exceptional Ability

As noted above, to demonstrate eligibility as an individual of exceptional ability, a petitioner must initially submit documentation that satisfies at least three of six categories of evidence at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). The Director determined that the Petitioner met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) but did not meet the remaining criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B)-(F).

> *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 record shows that the Petitioner has earned certificates relating to his claimed area of exceptional ability. We agree with the Director that the record 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).*

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[6] Even if the record established that the Petitioner holds the foreign equivalent of a U.S. bachelor's degree, which it does not, the record does not demonstrate that the Petitioner has at least five years of progressive, post-baccalaureate experience in his specialty. 8 C.F.R. § 204.5(k)(2).

[7] *See* section 203(b)(2)(A) of the Act.

The record includes letters from previous clients attesting to their experience with the Petitioner's services.[8] Most of these letters, however, reference only general dates of services received between 2010 and 2021. One letter from an HVAC company states that the Petitioner has worked for the company in various capacities for eleven years; however, the letter does not specify whether the Petitioner was employed full- or part-time, provide specific dates of employment, or describe the Petitioner's duties in his positions with the company. The letters do not serve as evidence of a continuous timeline of full-time employment over a period of at least ten years.[9] We agree with the Director that the record does not satisfy 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 the Petitioner's certifications are not licenses to practice a profession or occupation. However, the Director overlooked the fact that the record includes credible evidence of certifications that the Petitioner has received for his occupation. Thus, we disagree with the Director's determination with regard to the Petitioner's eligibility under this criterion. The record satisfies this criterion because the Petitioner has a certification for his particular occupation. We therefore withdraw the Director's determination regarding this criterion.

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

The record includes paychecks and invoices that alternately refer to the Petitioner as a developer and a refrigeration technician. The record also includes a printout from a salary comparison website showing the average salary of an entry-level software developer in Brazil in 2023. Because the Petitioner's tax returns are from 2019, 2020, and 2021, it is not clear whether the Petitioner's income during those years may have been higher than the average income for a software developer; the record does not contain salary comparisons for those years. In addition, the record does not contain credible evidence demonstrating that the Petitioner's income during those years or any other year was a result of his purported exceptional ability. We note that a letter from one HVAC company states the following (quoted as written):

> [The Petitioner] is always looking to expand his knowledge and that is why he become a fundamental part of our company on these 11 years working together here at our business, also because of that he always had an better income than average programmers and developers in this market…. [The Petitioner] had an special annual income above the average because of his special skills developing business solutions and software to our partners and customers, so he turned in an exceptional person and necessary for the whole country after develop many solutions around the world.

While this HVAC company claims that the Petitioner received a higher-than-average salary for his work, we do not consider this to be credible evidence to demonstrate the Petitioner's eligibility under

[8] While we have not listed each piece of evidence separately, we have reviewed the entirety of the record.

[9] *See* 8 C.F.R. § 204.5(g)(1) (stating that evidence relating to qualifying experience shall be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties).

this criterion for several reasons. The company has not provided dates or positions in which the Petitioner received a higher salary for his purported exceptional ability in a particular field. The company also does not provide the Petitioner's salaries at a given time or in a given position. Although several pay statements from the company show that the Petitioner worked as a refrigeration technician, the record does not contain evidence of the average salaries of refrigeration technicians during the time of the Petitioner's employment in that position. Further, the company's claim that the Petitioner's income has been based on his "special skills" is not supported by probative evidence from customers or other parties with knowledge of his work to demonstrate his exceptional ability.[10] Moreover, a statement from the Petitioner indicates that he was self-employed during a portion of his time with this HVAC company; it is not clear how the Petitioner's income was affected by his self-employment during his time with the HVAC company. Notably, his tax returns may reflect higher income amounts unrelated to his purported exceptional ability. We agree with the Director that the record does not satisfy this criterion.

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

The Petitioner has submitted evidence to show that he has been a member of the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) since November 1, 2022. As this membership post-dates the filing date of his petition, we will not consider this evidence.[11] Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1). We agree with the Director that the record does not satisfy 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 record contains numerous letters from clients and previous employers attesting to the Petitioner's past success in fulfilling their needs. While some of these letters discuss specific projects carried out by the Petitioner, they do not reference any formal recognition of achievements or contributions to the HVAC industry or the field of software development. The record does not otherwise contain documentation related to any impact of the Petitioner's work on the industry or field. We agree with the Director that the record does not satisfy this criterion.

The Petitioner has not established that he meets three of the six evidentiary criteria under 8 C.F.R. 204.5(k)(3)(ii), and so he has not met the initial requirement to demonstrate his eligibility as an individual of exceptional ability. Thus, we need not conduct a final merits determination of whether he is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

In sum, the Petitioner has not established eligibility for the EB-2 classification as a member of the professions holding an advanced degree or, alternatively, as an individual with exceptional ability. Therefore, he is ineligible for a national interest waiver. Because the identified reasons for dismissal

[10] The Petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369 at 376.

[11] *See Matter of Izummi*, 22 I&N Dec. at 175 (stating that a petition cannot be approved at a future date after the self-petitioner becomes eligible under a new set of facts).

are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the *Dhanasar* framework. *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 meets the requirements of EB-2 classification. His petition will remain denied.

ORDER: The appeal is dismissed.