U.S. Citizenship and Immigration Services

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

In Re: 28545931

Date: NOV. 29, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an information technology (IT) project manager, seeks employment-based second preference (EB-2) immigrant classification as 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.

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

[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.

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 intends to provide IT services to businesses in the United States. The Petitioner asserts that he qualifies for the EB-2 classification as an individual of exceptional ability. The Director concluded that the Petitioner did not establish that he meets the EB-2 eligibility requirements. On appeal, the Petitioner asserts that the Director's decision is erroneous because she overlooked certain evidence. Upon review of the record, we conclude that the Petitioner has not demonstrated that he qualifies 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).

> *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 an associate's degree and a certificate related to his claimed area of exceptional ability. The record satisfies this criterion.

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[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.

> *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 Petitioner claims to have met this criterion because he has more than ten years of experience in the provision of IT services to companies, including several years of employment as the owner of his own company. The Director determined that the Petitioner did not meet this criterion, concluding, in part, that letters submitted in response to a request for evidence (RFE) were not sufficient to establish that the Petitioner has at least ten years of full-time experience in the occupation for which he has requested the EB-2 classification. The Director stated that "the evidence is insufficient because the testimonial letters were not issued by the petitioner's actual former employer(s)," but were written by former co-collaborators, colleagues, and the employees of the Petitioner. We note that the RFE stated the following:

> Any evidence of experience must be in the form of a letter(s) from the petitioner's current or former employer(s). The employer must issue the letter of experience on official letterhead and must list the employer's name and address, the date, the signer's name and title and original signature, and a description of the petitioner's experience, including dates of employment and specific duties. If such evidence is not available, the petitioner must demonstrate this and submit secondary evidence of the petitioner's employment, including but not limited to: employment contracts; pay statements; Wage and Tax Statements (IRS Forms W-2); and personnel records.

In addition to letters, the Petitioner submitted documentation of his employment experience, including invoices for work performed. The Director concluded that "work presentations and purchase orders" submitted in response to the RFE did not serve as "sufficient secondary evidence in support of [the Petitioner's] claimed experience and business ownership in Brazil." On appeal, the Petitioner asserts that the Director overlooked certain evidence in evaluating the Petitioner's eligibility under this criterion.

Upon review of the record, we withdraw the Director's conclusion that the Petitioner does not meet this criterion. The record includes a signed statement dated May 18, 2022, from the Petitioner, in his capacity as the owner of his company, describing his experience leading several projects that he developed while contracting with a number of businesses, including those operating in the automotive, manufacturing, health sciences, logistics, financial, and security sectors. *See* 8 C.F.R. § 204.5(g)(1). To corroborate the credibility of his statement, the Petitioner submitted a letter from a member of management at a company for which the Petitioner provided IT services. The letter is signed and dated; it is on company letterhead and includes the employer's name and address, as well as the occupational title of the author. The letter describes the Petitioner's roles and states that the author was responsible for the contract with the Petitioner's company and attests to his full-time work from January 2, 2000, to September 30, 2009. A similar corroborating letter from a member of management at a separate company attests to the Petitioner's full-time work from October 1, 2009, to March 14, 2011. The remaining letters from other individuals, along with invoices and other evidence submitted to demonstrate the existence and operation of the Petitioner's company in Brazil, corroborate the Petitioner's statement regarding his employment experience. Therefore, we conclude that the record satisfies this criterion.

> *A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(C).*

The Petitioner does not claim to meet this criterion, and the record does not include any licenses or certifications related to his proposed occupation. Therefore, we deem this issue to be waived, and we will not address this criterion further.[6]

> *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 Petitioner does not claim to meet this criterion, and the record does not include documentation of his salary or remuneration for services he has provided. Therefore, we deem this issue to be waived, and we will not address this criterion further.[7]

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

The Director determined that the Petitioner did not establish eligibility under this criterion, stating that the evidence did not show when the Petitioner became a member of the Project Management Institute (PMI) and that he did not submit evidence of his "official membership in CompTIA with the RFE response." On appeal, the Petitioner asserts that the evidence submitted establishes his eligibility under this criterion. The Petitioner has submitted evidence to show that he is a member of the PMI, including his certificate of membership, a webpage showing his profile, and the institute's bylaws. The bylaws describe the qualifications for membership as follows:

> Any person who is interested in, or engaged in, the practice, teaching or other application of project management, including research concerning project management, may qualify as a Regular Member of the Institute.

The regulation at 8 C.F.R. § 204.5(k)(3) defines "profession" as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Accordingly, a professional association is one which requires its members to be members of a profession as defined in the regulation. Neither the PMI bylaws nor any other evidence in the record indicates that PMI membership requires the attainment of, at minimum, a baccalaureate degree related to project management. The Petitioner has also submitted a webpage showing his membership with CompTIA. The record does not include any additional information about CompTIA concerning its membership requirements to establish that it qualifies as a professional association for EB-2 eligibility purposes. 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).*

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[6] *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).

[7] *Id*. at 336 n.5.

The Director determined that the Petitioner did not meet this criterion. On appeal, the Petitioner asserts that the Director overlooked letters of support that "clearly state the tremendous achievements and contributions to the industry...." The record contains several letters from the Petitioner's colleagues attesting to the Petitioner's past success in managing various IT projects and the positive outcomes experienced by the Petitioner's clients. While some of these letters discuss specific projects carried out by the Petitioner, they do not reference any formal recognition[8] of achievements or contributions to the IT industry. Also included in the record are expert opinion letters that discuss the field of information technology and the Petitioner's endeavor to offer his services to small- and medium-sized businesses in the United States. While the letters reference the Petitioner's experience in his field, they do not reference any recognition from piers, government entities, or professional or business organizations that the Petitioner has received for achievements or significant contributions to his field. The record does not otherwise contain documentation related to any impact of the Petitioner's work on the IT industry or in the field of IT project management. 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. Therefore, 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 sciences, arts, or business. Nevertheless, we have reviewed the totality of the evidence and conclude that he does not meet the elevated standard for this classification. While the Petitioner has related education and experience in IT project management, the record does not show that his level of expertise is unusual or stands out 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 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. The petition will remain denied.

**ORDER:** The appeal is dismissed.

[8] Formal recognition in the form of certificates and other documentation that are contemporaneous with a petitioner's claimed contributions and achievements may have more weight than letters prepared for the petitioner recognizing an individual's achievements. *See* 6 *USCIS Policy Manual* F.5(B)(2), https:///www.uscis.gov/policy-manual. In this case, the Petitioner appears to have been recognized by colleagues for his successes within the scope of his work duties.