U.S. Citizenship and Immigration Services

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

In Re: 28426525

Date: OCT. 04, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, seeks classification as a member of the professions holding an advanced degree or of exceptional ability, 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 employment based second preference (EB-2) 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. *See 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).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that that the Petitioner qualified for classification as an individual of exceptional ability and a discretionary waiver of the job offer requirement, and thus a labor certification, was not required upon application of the analytical framework we first explicated in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). 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, but only if a petitioner categorically establishes eligibility in the EB-2 classification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." To demonstrate exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

> (A) 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;
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> (B) 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;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

But meeting at least three criteria does not, in and of itself, establish eligibility for this classification. 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 we conclude that a petitioner has an advanced degree or is of exceptional ability such that they have established their eligibility for classification as an immigrant in the EB-2 classification, we evaluate the national interest in waiving the requirement of a job offer and thus a labor certification.

Whilst 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*, *see supra*. *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen 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.

## II. ANALYSIS

The Petitioner is an entrepreneur seeking to demonstrate eligibility in the EB-2 classification based on their exceptional ability. A Petitioner must demonstrate expertise significantly above that ordinarily encountered to show that they are of exceptional ability. In support, the Petitioner submitted letters from current and former employers, their Brazilian tax return and salary statistics, expert opinion, business plan, evidence purporting to reflect membership in a professional association, pictures of awards, and articles regarding the field of endeavor. [1]

We agree with the Director's ultimate decision that the Petitioner is not of exceptional ability and therefore categorically ineligible for the EB-2 classification. We agree with the Director that although the Petitioner has demonstrated that they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(B), they have not met any of the remaining criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) for which they submitted evidence and assertions in support. [2]

> *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 contended that they have commanded a salary, or other remuneration for services, which demonstrates exceptional ability. In support, they submitted their 2021 Brazilian income tax statement and a Brazilian salary survey for "entrepreneurs" translated into English from Portuguese. On appeal, the Petitioner asserts that their "remuneration was earned for [their] activities in the multiple companies [they own and operate]." Essentially, the Petitioner contends their wages earned from their successful and competent execution of entrepreneurial business operating duties demonstrates exceptional ability. But the record does not reflect the salary or remuneration expected for individuals of exceptional ability performing duties comparable to those the Petitioner intends to undertake as an entrepreneur. There is no evidence in the record which would permit us to evaluate the duties an entrepreneur of exceptional ability would perform for the salary and their remuneration as a point of comparison. And the broad job description of an entrepreneur contained in the salary survey the Petitioner submitted did not readily correspond to the description of services and duties the Petitioner had described for their proposed endeavor. So we agree with the Director that the Petitioner has not met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) because we cannot evaluate from information in the record whether the Petitioner's salary or remuneration demonstrated their exceptional ability.

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

The Petitioner's corporate entity has a membership in the [redacted]. The Petitioner contends that they, as the corporate entity's representative in the chamber, are by extension a member of the [redacted]. Membership in the [redacted] is not sufficient evidence of membership in a professional association. Firstly, the [redacted] is not a professional association. It is a local chamber of commerce. A

[1] While we may not discuss every document submitted, we have reviewed and considered each one.

[2] The Petitioner did not assert eligibility nor provide evidence of 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 under 8 C.F.R. § 204.5(k)(3)(ii)(A) or a license to practice the profession or certification for a particular profession or occupation under 8 C.F.R. § 204.5(k)(3)(ii)(C).

chamber of commerce is typically a form of business network. The network can ordinarily be composed of members engaged in different trades and industries. Moreover, membership is composed of the businesses in trade and industry in the area or region and not of any specific individual. The membership certificate confirms that it is the Petitioner's corporate entity which is a member of the [redacted] And the charter of the [redacted] states it is organized as a "civil society without economic purposes." Consequently, we conclude the Petitioner is not a member of a professional association and has not met 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 Petitioner submitted several support letters/letters of recommendation, certificate, and a picture of a physical award plaque to document the recognition of their achievements and significant contributions to their field.

The evidence the Petitioner submits does not meet the standard of proof because it does not satisfy the basic standards of the regulation. *See Matter of Chawathe*, 25 I&N Dec. at 374 n.7. The regulation requires evidence of recognition of achievements and significant contributions. When read together with the regulatory definition of exceptional ability, the evidence of recognition of achievement or significant contributions should show expertise significantly above that ordinarily encountered in the field.

The Petitioner's letters of recommendation contain complimentary statements about the Petitioner's performance of their duties that the Petitioner would like us to conclude are recognition of achievements and significant contributions. But these statements are not supported by any evidence in the record which reflects that these are noteworthy as achievements and significant contributions. For example, a letter in the record credits the Petitioner with having "developed the transition plan, determined the best commercial strategy, defined the best operating guidelines for new franchisees…". But the record does not sufficiently characterize how this demonstrates that the Petitioner's expertise as an entrepreneur is above that ordinarily encountered in their field.

Several letters are from the Petitioner's business partners who attested to having worked with them in a variety of ventures. The letters describe the success of the venture and obliquely credit the Petitioner for their insight, expertise, and market comprehension. But the record does not sufficient demonstrate or adequately explain how these attributes are indicative of exceptional expertise or a significant achievement or contribution to the field.

So whilst it can be concluded from an overall evaluation of the letters that the Petitioner submitted that they are a seasoned professional whose competence and reliability as an employee is valued and appreciated, the letters did not evidence the Petitioner's achievement or significant contributions and expertise significantly above that ordinarily encountered in the field required to demonstrate the Petitioner's exceptional ability.

USCIS may, in its discretion, use as advisory opinion statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *See Matter of Caron Int'l*,

19 I&N Dec. 791, 795 (Comm'r 1988). However, the submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.* The Petitioner submitted an expert opinion letter from [redacted] associate professor of strategic management and entrepreneurship at [redacted] University. [redacted] concluded that the Petitioner has exceptional ability in the specialty of business but did not adequately ground their conclusions in any objectively verifiable fact. For example, [redacted] concludes the Petitioner has commanded a salary or other remuneration for services that demonstrate their exceptional ability because they were "earning a salary in the six-digit range." But there is no regulatory or statutory provision that sets a minimum or maximum digit figure to indicate receipt of a particular salary demonstrates the exceptional ability of an individual. And [redacted] quotes portions of the Petitioner's letters of recommendation containing effusive praise for the Petitioner to conclude they have made achievements and significant contributions. But they did not lend their expertise, such that they say they have, to outline how the accomplishments or positive attributes mentioned in the quotations, are achievements or significant contributions such that they tend to relate to the Petitioner's exceptional ability. And [redacted] equates the Petitioner's organization's membership in an organization to evidence membership in a professional association without any discussion as to whether the association is in fact a professional association or simply a chamber of commerce business network. Finally, [redacted] concluded that the Petitioner met four of the six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii). But [redacted] only discussed three of the criteria and they did not identify the fourth criteria the Petitioner met.

And the Petitioner's certificate and awards issued to them and to their corporate venture are not evidence of the Petitioner's exceptional ability. Although they demonstrate the Petitioner's dedication to their profession and employment objectives, the record does not adequately describe how the certificate or awards are reflective of an expertise above that ordinarily encountered in the field of human resources. Nor does the record sufficiently demonstrate that the certificates and award are evidence of significant contributions to the field or achievements in the field of human resources. So we agree with the Director that the Petitioner does not meet this ground of eligibility.

## III. CONCLUSION

The Petitioner has not established eligibility in any of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). So they cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). And we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. In addition we need not reach a decision on whether, as a matter of discretion, the Petitioner is eligible for or otherwise merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve these issues. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is 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 alternate issues on appeal where an applicant is otherwise ineligible). The appeal is dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

**ORDER:** The appeal is dismissed.