U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28448757

Date: OCT. 10, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a tourism and hospitality manager, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and/or an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for the EB-2 classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. In addition, the Director concluded that the Petitioner does not merit, as a matter of discretion, a waiver of the classification's 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 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 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." 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 U.S. Citizenship and Immigration Services (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.

II. EB-2 CLASSIFICATION

The Director concluded that the Petitioner was not eligible for the EB-2 classification, either as a member of the professions holding an advanced degree or as an individual of exceptional ability. As will be discussed below, we agree with the Director's ultimate conclusion on both counts.

A. Member of the Professions Holding an Advanced Degree

The Petitioner submitted evidence that he completed a two-year "Technological Higher Course in Hotel Business" program at the [redacted] in Brazil in 2012, and a *lato sensu* course in "MBA in Business Management" at the Institute of Post-Graduation and Graduation in 2018. Academic credential evaluations submitted for these programs conclude that they are the equivalent of two years and one year, respectively, of undergraduate study. Thus, neither of these credentials are the foreign equivalent of a United States baccalaureate degree.

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[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).

A third evaluation, submitted in response to the Director's request for evidence (RFE), considers these two credentials in combination with evidence of the Petitioner's work experience to conclude that the Petitioner holds the foreign equivalent of a United States bachelor's degree in hospitality management.[5]

The plain language of the regulations, however, indicates that an advanced degree equivalency must include a single bachelor's degree, with no provision for substituting experience for education or combining lesser educational credentials. The regulations require five years of progressive experience to follow "[a] United States baccalaureate degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(2).

Also, when introducing the EB-2 regulations, the former Immigration and Naturalization Service (INS) explained that "the proposed rule does not provide a procedure to allow experience alone to substitute for either a baccalaureate degree or an advanced degree." Proposed Rule on Employment-Based Petitions, 56 Fed. Reg. 30703, 30706 (July 15, 1991). After stakeholder comment, the INS reviewed the Immigration Act of 1990 Act and found the proposed regulations consistent with Congressional intent. The INS stated:

> [B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

INS Final Rule on Employment-Based Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added). Thus, a petitioner seeking classification as an advanced degree professional must have at least a U.S. bachelor's degree or a foreign equivalent degree. *See generally* 6 *USCIS Policy Manual* F.5(A)(2), www.uscis.gov/policy-manual.

USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* As the third evaluation relies upon a combination of two separate educational credentials and work experience to reach its conclusion, and therefore does not comport with the plain language of the relevant regulation, that conclusion will not be given consideration.

On appeal, the Petitioner asserts that USCIS has previously considered a three-year undergraduate degree to be equivalent to a United States bachelor's degree when submitted in support of a petition seeking a national interest waiver. A U.S. bachelor's degree usually requires four years of university studies. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm'r 1977). While some foreign three-year undergraduate degrees may be equivalent to a U.S. bachelor's degree, since the length and admittance requirements for degree programs vary according to the country where they were issued, the Petitioner does not explain why this is relevant to his academic credentials and eligibility. In addition, we are not required to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). Further, the Petitioner appears to refer to three of our non-

[5] The evaluator bases his evaluation on a "3-for-1 rule" for evaluating the equivalency of work experience to education, but does not reference a statute, regulation, or other source. The regulations pertaining to the requested classification at 8 C.F.R. § 204.5(k) do not include such a rule.

precedent decisions in support of his assertion, but not does not include citations or copies of these decisions. Even if these decisions are pertinent to the Petitioner's eligibility, which cannot be determined from the record, they were not published as precedents and therefore do not bind us in this adjudication. *See* 8 C.F.R. § 103.3(c). And perhaps most importantly, none of the educational evaluations submitted by the Petitioner conclude that his educational credentials alone are equivalent to a United States baccalaureate degree. For all of these reasons, the Petitioner has not established on appeal that his educational credentials are equivalent to a U.S. bachelor's degree. Because he does not possess a U.S. bachelor's degree or foreign equivalent degree, he is not eligible as a member of the professions holding an advanced degree.[6]

B. Individual of Exceptional Ability

The Director also determined in their decision that the Petitioner is not eligible for the EB-2 classification as an individual of exceptional ability, as he meets only one of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). On appeal, the Petitioner asserts that he meets four additional criteria.

> *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*; 8 C.F.R. § 204.5(k)(3)(ii)(A)

The Director concluded that, the Petitioner meets this criterion after listing several educational and training certificates submitted to the record. Based on the certificate and transcripts from [redacted] described above, we agree.

> *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)

While the Director acknowledged nearly twenty recommendation letters and other evidence pertaining to this criterion, they concluded that these letters did not sufficiently demonstrate that the Petitioner has at least ten years of full-time work experience as a tourism and hospitality manager.[7]

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[6] The Director also found that the position which the Petitioner intends to engage in through his proposed endeavor, tourism and hospitality manager, does not require a bachelor's degree, it does not qualify as a professional position. While the Petitioner does not contest this aspect of the Director's decision on appeal, we note that because the Petitioner is seeking a national interest waiver, there is no job offer requirement relating to this petition. The correct focus is whether the Petitioner qualifies as an advanced degree professional as someone who proposes to engage and/or is engaged in a profession as defined at section 101(a)(32) of the INA. However, since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve this issue. *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).

[7] We note that the decision includes a statement suggesting that the Petitioner does meet this criterion. As this contradicts the Director's previous discussion and ultimate conclusion regarding this criterion, we will consider the statement to be erroneous.

On appeal, the Petitioner begins by misquoting the regulation as requiring five years of post-baccalaureate experience or ten years of full-time experience in the occupation sought. He then asserts that per 8 C.F.R. 204.5(g)(1), which relates to evidence of qualifying experience or training, evidence submitted under this criterion may include "other documentation relating to the alien's experience," and refers to social security and labor documentation from Brazil.

Our review of the record confirms that the Petitioner was employed as follows:

- November 2008 through August 2011 (2 years, 9 months), [redacted] General Manager – confirmed by letters from [redacted] and shown in the Petitioner's social security documentation
- November 2013 through May 2016 (2 years, 6 months), General Manager for [redacted] – confirmed by letters from [redacted] and [redacted] and shown in the Petitioner's social security documentation
- April 2017 through June 2020 (3 years, 2 months), Operational Manager, [redacted] – confirmed by letters from [redacted] and shown in the Petitioner's social security documentation

The total amount of work experience demonstrated by this evidence is 8 years and 5 months, less than the required 10 years. While other letters and documentation show the Petitioner's employment as a receptionist, head of reception, and consultant, this criterion requires experience to be in the position sought. The evidence regarding these positions is insufficient to show that they were in the position of tourism and hospitality manager. Accordingly, the Petitioner has not demonstrated that he meets this evidentiary 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 found that the Petitioner's statement that his profession does not require a certificate or license to be determinative that he does not meet this criterion. On appeal, the Petitioner asserts that he is a "Tourismologist" who is recognized by Brazilian law as a professional. While he references sections of foreign law, the Petitioner has not submitted evidence that he holds a license or certification for his occupation as required by the plain language of the regulation. He therefore does not meet this criterion.

> *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)

The Petitioner submitted evidence of his salary in the years from 2008 to 2020, with his highest earnings occurring in 2018 at approximately R$ 80,000. He also submitted a salary report from payscale.com which showed that the average base salary in the hotel industry in [redacted] Brazil is R$ 44,000. However, there are several reasons why this report does not help to demonstrate that the Petitioner commanded a salary reflective of exceptional ability. First, the reported salary is for all hotel industry workers, and therefore does not reflect the salary for the Petitioner's occupation of hotel manager. Second, it is an average base salary, so it does not show the higher salaries expected of those having exceptional ability in the field. Third, the report shows salaries for a different city

then where the Petitioner was working in 2018, and does not indicate the time period from which these figures were drawn. It therefore does not constitute a basis for comparison of the Petitioner's earnings to other hotel managers in the same location and time period. Finally, we note that the report shows that spa managers, who are managers in the hotel and tourism industry, earn an average of R$ 120,000 per year, much higher than the Petitioner's highest annual earnings. For all of these reasons, the evidence is insufficient to show that the Petitioner's salary demonstrates exceptional ability in his field.

C. Final Merits Determination

The Petitioner has not established that he meets at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). Although he claims that he also meets the criterion relating to recognition for achievements and significant contributions to his field, he cannot meet at least three of the criteria to satisfy the initial evidence requirement for this classification. Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding that additional criterion. *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).

The Petitioner has not met the initial evidence requirement, so we need not provide the type of final merits determination referenced in USCIS policy. Nevertheless, we have reviewed the entire record and conclude that it does not establish that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. Although he has successfully progressed in the field and earned the respect of his employers, the record does not show that he has set himself apart from his peers employed in similar positions.

III. NATIONAL INTEREST WAIVER

The Petitioner has not established his eligibility for the underlying EB-2 classification, either as a member of the professions holding an advanced degree or as an individual of exceptional ability. He is therefore not eligible for a waiver of that classification's job offer requirement. Nevertheless, we will briefly address his claim under the first prong of the *Dhanasar* analytical framework.

The first prong of that framework, substantial merit and national importance, focuses on the specific endeavor that the individual proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889.

In their decision, the Director determined that the Petitioner's proposed endeavor of continuing his employment as a hotel and tourism manager in the United States is of substantial merit. We agree that the record sufficiently shows the proposed endeavor's merit in the area of business.

Turning to the national importance of the proposed endeavor, the Director concluded that the evidence submitted by the Petitioner focused on the importance of the hospitality industry overall rather than

that of his specific endeavor, contrary to the guidelines outlined in *Dhanasar*. Specifically, the Director noted that the Petitioner's proposed endeavor of gaining employment as a general manager in the hospitality industry had not been show to have the potential to create jobs or have any other positive economic effects in the United States. They also concluded that the Petitioner had not shown that his employment in such a position would potentially have a broader impact on the hospitality industry which would extend beyond his employer and the clients or guests he would serve.

On appeal, the Petitioner cites various statistics concerning the hospitality industry in the United States, concluding that it "has the potential to impact the United States positively in job creation, economic growth, international relations, and cultural preservation." He also asserts that his professional plan, and an expert opinion letter submitted with his initial petition, show how his proposed endeavor specifically will be of national importance. But the expert opinion letter referred to similar industry statistics as the Petitioner does on appeal, adding only that "it is important for an experienced and highly skilled professional, such as [Petitioner], to contribute to lodging management in order to sustain the degree of economic importance hotels have on the nation's economy." The letter writer does not explain how the Petitioner's experience and skills will allow him to have an economic impact beyond the scope of his employer, or broadly affect the hospitality industry. In addition, a petitioner's work experience, education and training are considered when evaluating whether they are well-positioned to advance their proposed endeavor under *Dhanasar*'s second prong.

The Petitioner has not demonstrated that his proposed endeavor is of national importance, and he thus does not meet the first prong of the *Dhanasar* analytical framework. Since he is therefore not eligible for a national interest waiver, we need not discuss his arguments under the remaining prongs of the framework.

ORDER: The appeal is dismissed.