



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

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

In Re: 20504355

Date: JUN. 24, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a sales director, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 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 Petitioner did not qualify for classification as an individual of exceptional ability. On appeal, the Petitioner submits a brief asserting that he is eligible for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. 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.

Section 203(b) of the Act sets out this sequential framework:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the

sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien’s services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an individual must meet in order to qualify as an individual of exceptional ability in the sciences, the arts, or business:

(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;

(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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(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.

Only those who demonstrate “a degree of expertise significantly above that ordinarily encountered” are eligible for classification as individuals of exceptional ability. 8 C.F.R. § 204.5(k)(2).

While 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*, 26 I&N Dec. 884 (AAO 2016).¹ *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion², grant a national interest waiver if the petitioner demonstrates: (1) that the foreign

¹ In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm’r 1998) (*NYSDOT*).

² See also *Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS’ decision to grant or deny a national interest waiver to be discretionary in nature).

national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national 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 Director found that the Petitioner did not meet at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). More specifically, the Director found the Petitioner only met the criteria under the criteria related to letters from former employers and salary and therefore did not qualify as an individual of exceptional ability.

A. Evidentiary Criteria for Exceptional Ability

As discussed below, a review of the record indicates that the Petitioner does not meet at least three of the relevant evidentiary criteria.

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)

At the time of filing, the Petitioner submitted certificates from the [REDACTED] Engineering School, his employers, the [REDACTED] [REDACTED] and [REDACTED]. The Director issued a request for evidence (RFE) indicating the submitted certificates only showed course completion but the Petitioner had not provided documentation showing the certificates were official academic records and requested the Petitioner provide officially certified records, entries on official records, or official statements from the granting institutions. In response to the Director's RFE, the Petitioner stated he would not be submitting evidence for this criterion. The Director then found the Petitioner did not meet this criterion.

On appeal, the Petitioner provides evidence already submitted at the time of filing and argues the Director did not give due regard to this evidence. We disagree. The Director noted the certificates submitted in the record did not appear to be official academic records and provided the opportunity to the Petitioner to submit additional evidence to establish eligibility. On appeal, we agree with the Director's finding, noting that the record lacks evidence demonstrating the certificates submitted are official academic records showing the Petitioner has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to sales. *Id.* Therefore, the Petitioner has not established that he meets this regulatory 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)

The Petitioner provided employment verification letters detailing his job duties while employed by [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] and [REDACTED] covering over 10 years of full-time experience. Accordingly, the Petitioner has established that he meets this regulatory 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 Petitioner did not provide evidence of a license to practice the profession or certification for a particular profession. Therefore, the Petitioner has not established that he meets this regulatory criterion.

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)

At the time of filing, the Petitioner did not submit evidence or claim to meet this criterion. However, in response to the Director's RFE, the Petitioner provided comparable salary information and tax statements indicating his salary was significantly higher than the typical salary for a sales director with his experience. Accordingly, the Petitioner has established that he meets this regulatory criterion.

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

The Petitioner did not provide evidence of membership in professional associations. Therefore, the Petitioner has not established that he meets this regulatory 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 letters of reference and maintains that he meets this regulatory criterion. The Director determined the Petitioner did not meet the requirements of this criterion because the submitted letters did not provide specific examples of how the Petitioner's work was recognized as an achievement or significant contribution to the sales field or industry. On appeal, the Petitioner resubmits letters previously provided in the record.

The record contains letters of reference from various individuals who previously worked with the Petitioner.³ The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the individual's eligibility. *See Matter of Caron International*, 19 I&N Dec. 791, 795-796 (Comm'r 1988); *see also Matter of V-K-*, 24 I&N Dec. at 500 n.2 (BIA 2008). Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. The authors of the letters of reference describe the Petitioner as a highly successful sales director and claim the Petitioner has earned a high salary by bringing in revenue for his employer and clients. However, the letters of recommendation did not provide specific examples of how the Petitioner's work was recognized as an achievement or significant contribution to the industry or field rather than as an achievement for an employer or client.

While the Petitioner has earned praise from his peers for his role in obtaining sales contracts for his employer and clients, these letters do not specify that he has been recognized by peers, governmental

³ While we discuss a sampling of these letters, we have reviewed and considered each one.

entities, or professional or business organizations for achievements and significant contributions to the industry or field.

On appeal, the Petitioner submitted evidence of a news article, other work contributions, lectures, additional certificates, and his participation in seminars and congresses. The news article quotes the Petitioner's estimate of the average time to complete a [] project but does not recognize the Petitioner for any achievement or significant contribution to the industry or field. The other work contributions contain pictures of the Petitioner being recognized for visiting work sites, meetings, and presentations but does not specifically recognize the Petitioner for any achievement or significant contribution to the industry or field. The Petitioner provided certificates of attendance for his participation in seminars, congresses, and lectures but the certificates lack specific detail regarding any achievements or significant contributions to the industry or field. Likewise, the additional certificates indicate the Petitioner participated in trainings and was recognized for his work contributions by his employer but they do not specifically mention any achievements or significant contributions to the overall industry or field.

On appeal, the Petitioner also submits the above evidence on appeal as comparable evidence for this criterion. The regulation at 8 C.F.R. § 204.5(k)(3)(iii) allows for the submission of "comparable evidence" if the above standards "do not readily apply to the beneficiary's occupation." Here, the Petitioner does not argue and does not provide any documentary evidence indicating that the standards at 8 C.F.R. § 204.5(k)(3)(ii)(F) are not readily applicable to his occupation, or that any of his documentation is "comparable" to the specific objective evidence required at *id.* Therefore, the Petitioner has not established that he meets this regulatory criterion.

Summary

The record supports the Director's finding that the Petitioner did not meet at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(iii) allows for the submission of "comparable evidence" if the above standards "do not readily apply to the beneficiary's occupation." In this case, the Petitioner has not demonstrated that the standards at 8 C.F.R. § 204.5(k)(3)(ii) are not readily applicable to his occupation, or that any of his documentation is "comparable" to the specific objective evidence required at 8 C.F.R. § 204.5(k)(3)(ii)(A) – (F).

The Petitioner in this matter has not established eligibility as an individual of exceptional ability under section 203(b)(2)(A) of the Act. As previously outlined, the Petitioner must show that he is either an advanced degree professional or possesses exceptional ability before we reach the question of the national interest waiver. The Petitioner does not claim that he is an advanced degree professional, and as previously discussed, has not shown that he meets regulatory criteria for classification as an individual of exceptional ability.

B. National Interest Waiver

Because the Petitioner has not first established that he is an individual of exceptional ability, further analysis of his eligibility for a national interest waiver under *Dhanasar* would serve no meaningful

purpose.⁴ On appeal, the Petitioner argues that the Constitution's Due Process Clause required the Director provide a determination regarding the Petitioner's qualification for a national interest waiver which the Director declined to do in this case. Specifically, the Petitioner argues he was deprived of the opportunity to address his qualifications for the national interest waiver under the *Dhanasar* analysis. USCIS administers the EB-2 program pursuant to statutory and regulatory authorities, and the Petitioner does not argue that a specific provision of the EB-2 statute or regulations is unconstitutional. To the extent that the Petitioner's due process argument had been grounded in the constitutionality of the EB-2 statutes and regulations, we lack jurisdiction to rule on the constitutionality of laws enacted by Congress or of regulations promulgated by DHS. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). Therefore, we will consider the Petitioner's process concerns as they relate to whether USCIS complied with the applicable statute and regulations.

We find that USCIS sufficiently complied with the relevant regulations and did not violate the Petitioner's procedural due process requirements. A national interest waiver of a job offer is available to members of the professions holding advanced degrees or individuals of exceptional ability under section 203(b)(2)(B)(i) of the Act. A petitioner must first demonstrate they qualify as a member of the professions holding an advanced degree or as an individual of exceptional ability before demonstrating they qualify for a national interest waiver. *Dhanasar*, 26 I&N at 886; *see also* section 203(b)(2)(C) of the Act (providing that possession of requisite academic degree or professional license "shall not by itself be considered sufficient evidence of exceptional ability"). The record shows the Director determined the Petitioner did not demonstrate he qualified as a member of the professions holding an advanced degree or an individual of exceptional ability and therefore need not make a determination on whether the Petitioner qualifies for a national interest waiver of the job offer. In this case, the Petitioner was given sufficient notice of his ineligibility to satisfy the agency's procedural due process requirements.

III. CONCLUSION

The Petitioner has not met at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). 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.

⁴ *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, USCIS may, as matter of discretion, grant a national interest waiver.