U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20517881

Date: MAY 09, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, an information technology professional, 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, and that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

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. –
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> (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.
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> (B) Waiver of job offer –
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> (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;
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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
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> (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

[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*).

of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign 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 *id* (A)-(B) 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)

The Petitioner submitted a diploma and certificate of completion granting the professional title of Data Processing Technician from the [redacted] Business School. Accordingly, the Petitioner has 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] from May 2011 until the time of filing as well as employment with [redacted]. 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 provided a copy of his Microsoft Certified Professional certificate as part of his initial petition. The Director, in a request for evidence (RFE), requested the Petitioner provide more information regarding this certificate such as whether it is required for a particular profession or occupation. The Petitioner declined to submit additional evidence regarding this criterion in his response to the RFE and the Director found the Petitioner did not qualify for this criterion for failing to submit additional evidence and therefore failing to pursue this criterion. Now, on appeal, the Petitioner argues the information technology field does not require a license and the licensure or certification requirement does not readily apply to the Petitioner's occupation, pursuant to 8 C.F.R. § 204.5(k)(3)(iii).

[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).

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." Aside from his argument on appeal, the Petitioner does not provide any documentary evidence indicating that his certificate is comparable evidence or that licensure and certification requirements are not readily applicable to his occupation. In this case, the Petitioner has not submitted evidence showing that his Microsoft Certified Professional certificate is a license to practice the profession or a certification for a particular profession or occupation. Additionally, the Petitioner has not demonstrated that the standards at 8 C.F.R. § 204.5(k)(3)(ii)(C) 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.

> *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 Director determined the Petitioner did not meet this criterion because the submitted wage surveys, valid from August 2017 to August 2018, did not establish whether the listed wages were based on an hourly, weekly, monthly, or annual basis. Additionally, the Petitioner's income taxes from 2015 to 2017 did not establish that the wages of a computer technician were comparable to an information system manager and were earned prior to the survey's validity period. However, neither the Petitioner's appellate brief nor the evidence submitted on appeal address his qualification under this criterion. When dismissing an appeal, we generally do not address issues that were not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be "waived."[3] Since the Petitioner did not address this issue with specificity on appeal, we deem the issue waived and find the Petitioner has not 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 information technology field or industry. On appeal, the Petitioner resubmits letters previously provided in the response to the Director's RFE.

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[3] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). The courts' view of issue waiver varies from circuit to circuit. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (finding that an issue referred to in an affected party's statement of the case but not discussed in the body of the brief is deemed waived); *but see Hoxha v. Holder*, 559 F.3d 157, 163 (3d Cir. 2009) (issue raised in notice of appeal form is not waived, despite failure to address in the brief).

IThe record contains letters of reference from various individuals who previously worked with the Petitioner.[4] 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 individual's eligibility for the benefit sought. *Id.* 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 id.* at 795-796; *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. Even when written by independent experts, letters solicited by an individual in support of an immigration petition are of less weight than preexisting, independent evidence.

A letter from [redacted] Partner and Managing Director of [redacted] indicated the Petitioner worked with clients that had national recognition. [redacted] additionally noted the Petitioner distinguished himself by his ability to understand process and provide technical solutions, such as when he "displayed a great technical capacity by assimilating the large number of functional features developed for the company" while working with a client. A letter from [redacted] President of [redacted] discussed the Petitioner's projects developed specifically for a client. However, [redacted] and [redacted] 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 notable achievements within an organization or on behalf of a client. Additionally, the national recognition of an organization is reflective of the company's achievements and significant contributions to a field or industry but does not itself show any particular employee has been recognized for achievements or significant contributions in the industry or field.

The Petitioner provided additional letters in response to the Director's RFE. [redacted] Strategic Planning Director at [redacted] discussed several projects the Petitioner worked at the company such as managing a large database where the Petitioner showed "great technical knowledge in managing large volumes of data" and "actively contributed to the hardware specifications for storage, networking, load balancing, and cluster and RAID with the IBM team." [redacted] concluded the Petitioner "was essentially important in significantly helping the [redacted] optimize their operations through integral business solutions." While [redacted] displays a high level of acclaim for the Petitioner's work at [redacted] particularly as it relates to the management of database systems at his employer, he does not provide specific examples of how the Petitioner's work was recognized as an achievement or significant contribution to the industry or field.

[redacted] Technology Manager at [redacted] stated his company asked [redacted] to "develop a tailored system for monitoring company indicators in 2015" and "[t]he target audience for this solution would be the partners, so the survey stage would be very crucial." The Petitioner was involved in the project through [redacted] and facilitated communication between teams while contributing his own knowledge. [redacted] indicated a prototype was presented and "several suggestions from [the Petitioner] were incorporated into the indicator management model" which remains active in the company. [redacted] Director of [redacted] for [redacted] also discussed the Petitioner's work with clients of [redacted]

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

stated [redacted] contracted with [redacted] where the Petitioner led a team to carry out a demand study and the Petitioner "managed to absorb all the needs, elaborating the best functional package that was offered to us. The solution was developed and implemented in about six months, with [the Petitioner]'s direct participation in the key moments of the approval process, including his direct performance in [redacted] clients, assisting them in extracting information and supporting the criteria adopted by the consulting team from [redacted]. While [redacted] and [redacted] praise the Petitioner's achievements for [redacted] clients, neither 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 successful projects completed for his employer and clients, these letters do not specify that he has been recognized by peers, governmental entities, or professional or business organizations for achievements and significant contributions to the industry or field. 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.[5]

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.

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

ORDER: The appeal is dismissed.