U.S. Citizenship and Immigration Services

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

In Re: 27439103

Date: AUG. 1, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur and electrician, seeks employment-based second preference (EB-2) immigrant classification as 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 qualified for classification as an individual of exceptional ability. The Director further concluded that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. 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 petition 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;

(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.

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).

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[1] 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[2], 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.

[1] 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.
[2] *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).

## II. ANALYSIS

Although the Petitioner has satisfied the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (C), for the reasons below, we disagree with the Director that he met the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) and (E). We also cannot conclude that the Petitioner demonstrated eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(D) and (F).

> *Evidence in the form of letter(s) from current or former employer(s) showing that the noncitizen 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).

We disagree with the Director's conclusion that the Petitioner met this criterion and hereby withdraw it. The Petitioner submitted employment letters from [redacted] The letters from [redacted] verify that the Petitioner worked 44-hours per week as an electrician from June 2006 to June 2010 and was promoted to chief electrician from July 2010 to February 2015, a period of approximately eight years and eight months. While the letter from [redacted] verifies that the Petitioner worked as a self-employed electrician from March 1996 to March 2006, it does not indicate that this was full-time employment. Therefore, the Petitioner has not demonstrated that he has at least 10 years of full-time experience in the occupation of electrician or entrepreneur.

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

The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as "any occupation for which a United States baccalaureate degree or its foreign equivalent is minimum requirement for entry into the occupation." Accordingly, a professional association is one which requires its members to hold at least a U.S. bachelor's degree or the foreign equivalent.

The Petitioner submitted evidence that he has been a member of the Regional Board of Industrial Technicians and the Federal Board of Industrial Technicians; however, he did not submit documentary evidence of this organization's membership requirements. In addition, the Petitioner provided evidence that he has been a member of the American Solar Energy Society. While the Petitioner submitted printouts from the American Solar Energy Society's website, the documents do not include information regarding its membership requirements.

The Petitioner therefore has not demonstrated his membership in a professional association and we must withdraw the Director's determination that he had.

> *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)

To meet this criterion, the Petitioner must demonstrate that the salary or other remuneration he has commanded is indicative of his exceptional ability relative to others working in the field.[3] In support of this criterion, the Petitioner submitted a letter from [redacted] The letter states that during the Petitioner's employment from 2006 to 2010, he was paid an average of R$1,200 per month, plus

[3] *See* 6 *USCIS Policy Manual, supra,* at F.5(B)(2).

overtime and 20% commission, which on average totaled R$1,800 per month. The letter further states that the monthly salary of the other electricians at the time was around R$605, "but, because [the Petitioner] stood out, having commitment and knowledge, the company rewarded [the Petitioner] with financial recognition." Once he was promoted to head electrician, the Petitioner received R$2,500 per month, plus overtime and 40% commission, totaling an average of R$4,000 per month. The letter also states that "[f]or conventional electricians the monthly salary at the time was around R$1,300.00" but the Petitioner "demonstrated experience, high productivity, competence and skills that highlighted him from other professionals." The Petitioner also submitted unsigned contracts for electrical work, which show the contract amounts of R$65,000, R$70,000, R$73,737, R$103,666.59, and R$250,000.

However, the record does not contain evidence regarding the salary and bonuses of electricians and earnings for similar contracted projects in Brazil during this period or other sufficient evidence to establish that the Petitioner's remuneration was indicative of his claimed exceptional ability relative to others working in the field. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without more, the Petitioner has not demonstrated that he meets 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 record includes four letters from the Petitioner's employers and colleagues commending his work, along with copies of two awards entitled Friend of the Military Fire Department and Imperador Dom Pedro II. Although the complimentary letters establish that the Petitioner's work benefitted his employers, their clients, and specific mission objectives, they do not include specific details explaining how performing his job duties qualifies as recognition for achievements and significant contributions to the industry or field. Moreover, the Petitioner does not provide any information regarding the awards, such as the awarding entity's criteria and evaluation methods, to establish that he received them as recognition for his achievements and significant contributions to his industry or field, as required. For the reasons discussed, we conclude the Petitioner has not established eligibility under this criterion.

## III. CONCLUSION

Because the Petitioner has only met two of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii), he cannot fulfill the initial evidentiary requirement of three criteria. Thus, 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.