U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27448763

Date: JUL. 07, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a manager in the area of computerized metal cutting and fabrication, 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 is eligible for, and merits as a matter of discretion, a national interest waiver. 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).

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).[1] Meeting

[1] 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).

at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] 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[3], 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 did not directly address the Petitioner's eligibility for the underlying EB-2 classification in her decision.[4] The Petitioner specifically requested classification as an individual of exceptional ability in his initial filing and in response to the Director's request for evidence (RFE), but the Director did not consider this in her decision, and only briefly mentioned his eligibility as a member of the professions holding an advanced degree. We will therefore consider the Petitioner's eligibility under both.

A. Member of the Professions Holding an Advanced Degree

In her decision, the Director describes the Director's education as a bachelor's degree in computer science and the foreign equivalent of one year of graduate study in the same field. She also later mentions, without providing an analysis, that the combination of his education and work experience make him qualified as an advanced degree professional. We disagree and withdraw the Director's conclusion.

The evidence of the Petitioner's educational credentials includes a diploma issued to him by a university in Venezuela on July 11, 2008, as well as related transcripts showing that he completed six semesters of coursework. An educational evaluation in the record determined that this education is

[2] 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.
[3] *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).
[4] Although the decision references the underlying classification in its analysis under the second prong of the *Dhanasar* framework, the Director does not clearly indicate whether the Petitioner is eligible or provide an accurate and complete analysis of the evidence submitted in support of his eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability.

the equivalent of an associates degree in information technology from an accredited college or university in the United States.

The plain language of the regulations indicates that an advanced degree equivalency must include a single bachelor's degree, without 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). In response to stakeholder input, 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, an advanced degree professional must have at least a U.S. bachelor's degree or a single foreign degree equivalent.

Here, as the Petitioner has not established that his degree is equivalent to a U.S. bachelor's degree, he does not qualify as an advanced degree professional.

B. Individual of Exceptional Ability

The Petitioner claimed to meet all six of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii) to show that he qualifies as an individual of exceptional ability. While the Director requested additional evidence relating to all of these criteria in her RFE, she did not address them in her decision. We will discuss the evidence submitted under each of the criteria below.

> *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)

As discussed above, the Petitioner submitted a diploma and transcripts showing that he holds the foreign equivalent of an associate's degree in information technology from an accredited institution in the United States. This degree relates to his claimed area of exceptional ability, management of computer-aided tools for the cutting of metal. He therefore meets this 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 record includes two letters from the Petitioner's former employers which show that he has at least ten years of full-time experience in the use and management of computer-aided tools used in the construction industry for metal cutting. This includes nearly four years with [redacted] and more than seven years of experience with [redacted] (BLK). As such, he meets this 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)

In support of his claim to this criterion, the Petitioner submitted a certificate stating that he completed requirements and passed a test to "be acknowledged as" a certified junior Linux operator. Although the record includes some basic information about the Linux computer operating system and what it is used for, it does not show that this certification is required for entry into the Petitioner's occupation or is specifically tailored for that occupation. The Petitioner indicates in his statement that this training aided him in carrying out his duties, but does not suggest that it was required. We conclude that the Petitioner does not meet this criterion.

Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability; 8 C.F.R. § 204.5(k)(3)(ii)(D)

As evidence of his salary, the Petitioner referred to the letter from BLK, which states that he "would make $3500 monthly" in his position as an operations manager overseeing metal cutting and building fabrication. However, the record does not include verifiable evidence of the Petitioner's salary, such as foreign tax documents, despite the Director's specific request for such evidence in her RFE, and it is therefore insufficient to show his actual salary or remuneration.

Also, the Petitioner submitted a report from the website www.salaryexplorer.com titled "Information Technology Average Salaries in Panama 2022." We first note that it is not apparent that the position held by the Petitioner, which the record indicates involves programming CNC machines among many other duties, was included in this report. In addition, the report notes that the figures presented are "the combined average of many different jobs," and that more accurate data can be found by using specific job titles. Therefore, even if the Petitioner had submitted sufficient evidence of his salary, this evidence is not a sufficient basis for comparison to determine that his salary demonstrates exceptional ability. For both of these reasons, the Petitioner has not shown that he meets this criterion.

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

The Petitioner submitted evidence that he has been a member of IEEE for three years. He did not submit documentary evidence of this organization's membership requirements, but instead referred to an expert opinion letter which states that a member must "be a graduate of a technology or engineering program of an appropriately accredited institution of higher education." However, 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 be members of a profession as defined in the regulation. Even assuming that the expert opinion letter accurately states IEEE's membership requirements, without additional information it does not establish that the

organization qualifies as a professional association. The Petitioner therefore does not meet 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)

In support of his claim to this criterion, the Petitioner relies upon the previously mentioned reference letters from his former employers. These letters describe some of the construction projects in which the Petitioner was involved, and are generally complimentary regarding the service he provided to his employers and their clients. But the plain language of this criterion requires evidence of "significant contributions to the industry or field," meaning that any such contributions must be significant and must extend beyond a particular organization. Although the writers of these letters vaguely mention economic impacts of these projects to the communities in which they were built, they do not indicate that in working on them, the Petitioner made a significant contribution to the construction industry. In addition, we note that these letters were prepared for purposes of this petition. As such, this evidence is less probative than evidence of contemporaneous recognition of any achievements and significant contributions made by the Petitioner. We therefore conclude that the Petitioner does not meet this criterion.

C. Final Merits Determination

As the Petitioner has not established that he meets the requisite three evidentiary criteria, we need not conduct a final merits determination of whether he possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. Nevertheless, we have reviewed the totality of the evidence and conclude that he does not meet the elevated standard for this classification. While the Petitioner has related education and years of experience in the programming and operation of CNC machines and management of the fabrication of metal construction components, the record does not show that his level of expertise is unusual or stands out in this field.

III. NATIONAL INTEREST WAIVER

Per the discussion above, the Petitioner has not established his eligibility for the underlying EB-2 classification, and he is therefore not eligible for a waiver of that classification's job offer requirement. However, we will briefly discuss whether he meets the first prong under the *Dhanasar* analytical framework.

The first prong, 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 her decision, the Director determined that the Petitioner's proposed endeavor, to continue working with his current employer as an "operations manager of computerized cuts," is of substantial merit. Based upon the evidence of the Petitioner's potential contribution to construction projects, we agree.

Turning to the national importance of his endeavor, the Director concluded that the Petitioner did not establish that his proposed endeavor, continuing to work in his current position for his current employer, would prospectively impact the region or nation beyond that employer and its clients. On appeal, the Petitioner focuses on the importance of the construction industry to the United States' economy, and notes that his work is "related to the development of 3D printing technology to space exploration, both of which are important areas of focus for the country." However, as stated above, the focus of the *Dhanasar* framework's first prong is the petitioner's specific endeavor, not the entire industry or field in which they work. In this case, while the economic impact and national importance of the overall construction industry cannot be doubted, the Petitioner has not shown how his proposed work for his employer will potentially have broader implications for the industry or substantial positive economic effects for the region or nation. Also, while we acknowledge the Petitioner's statement regarding his employer's connection to a builder of 3D printed housing, the evidence does not support the potential prospective impact of his proposed endeavor on that specific field or space exploration.

The Petitioner also asserts on appeal that the Director erred in not considering the two expert opinion letters that were submitted, and that these letters show that his proposed endeavor has the potential to improve efficiency, accuracy, and safety in construction projects in the United States. Both experts provide an analysis of how the Petitioner meets each of the evidentiary criteria applicable to individuals of exceptional ability and each prong in the *Dhanasar* analytical framework, but neither claims to be an expert in the area of immigration law. 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.* Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Id.* Here, when addressing the national importance of the Petitioner's proposed endeavor, both experts write broadly about the use of information technology in the construction industry, and mention technologies that are not directly related to the proposed endeavor. For example, [redacted] focuses much of his discussion on the benefits of cloud computing for the construction industry, but the neither the Petitioner nor his employer indicates that his proposed work involves the implementation of cloud computing. The impact of other technologies such as building information modelling (BIM) and the use of drones are mentioned in the letters and by the Petitioner on appeal, but these also are not included in the descriptions of his proposed endeavor. Therefore, these expert opinion letters do not support the national importance of the Petitioner's proposed endeavor.

In addition, the Petitioner asserts on appeal that the government and media reports concerning national infrastructure improvement plans show the national importance of his endeavor. We first note that the sections of these reports which the Petitioner highlights on appeal focus primarily on the construction and repair of highways and bridges and the removal of lead pipes, whereas his proposed endeavor involves building construction, which is only briefly mentioned in one of the reports. Second, these reports show the national importance of the construction industry as a whole, and therefore do not support the importance of the Petitioner's specific proposed endeavor, which is the focus of our analysis under first prong of the *Dhanasar* framework.

For all of the reasons given above, we agree with the Director's conclusion that the Petitioner has not established that his proposed endeavor is of national importance and he therefore does not meet the

first prong of the *Dhanasar* analytical framework. As a petitioner must meet all three prongs of the framework to be eligible for a national interest waiver, we reserve our evaluation of whether the Petitioner is well positioned to advance his endeavor and whether, on balance, it would be in the national interest to waive the EB-2 classification's job offer requirement. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); *see also Matter of D-L-S-*, 28 I&N Dec. 568, 576–77 n.10 (BIA 2022) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

IV. CONCLUSION

The Petitioner has not established his eligibility for the underlying EB-2 immigrant visa classification, as either an advanced degree professional or an individual of exceptional ability. In addition, he has not shown that he is eligible for, and merits as a matter of discretion, a national interest waiver of the job offer requirement, and thus of a labor certification. Accordingly, the petition will remain denied.

ORDER: The appeal is dismissed.