U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26953957

Date: JUN. 13, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a radiology technician, seeks classification as an individual of exceptional ability. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner is an individual of exceptional ability nor that a waiver of the job offer requirement is 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 petitioner must first demonstrate qualification for the underlying EB-2 immigrant 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.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, the petitioner must then establish eligibility for a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither 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 USCIS may, as a matter of discretion,[1] grant a national interest waiver if the petitioner demonstrates that:

[1] *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).

- 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. ANALYSIS

The Director found that the Petitioner did not establish that he is an individual of exceptional ability, and as such did not establish that he qualifies for EB-2 classification.[2] The Director further found that the Petitioner did not establish eligibility under any of the three required prongs of the *Dhanasar* analytical framework, and therefore did not establish that a waiver of the classification's job offer requirement is in the national interest.

A. Qualification for EB-2 classification

The Petitioner asserts that he qualifies for EB-2 classification as an individual of exceptional ability. "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). An individual 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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[3] If a petitioner does demonstrate meeting at least three criteria, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. The Director found that the Petitioner met one of the initial criteria. For the reasons provided below, we conclude that the Petitioner does not meet the initial evidentiary requirements for classification as an individual of exceptional ability. We evaluate each of the regulatory criteria in turn.

> *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 evidence of meeting this criterion, the Petitioner submitted a copy of his diploma and transcripts for his "diploma de tecnico em radiologia medica," or technician in medical radiology degree, from the Centro de Educacao Tecnologica [redacted] Brazil, which he received in 2005.[4]

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[2] The Petitioner does not assert that he qualifies for EB-2 classification as an advanced degree professional.

[3] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

[4] We reviewed the American Association of Collegiate Registrars and Admissions Officers (AACRAO) Electronic Database for Global Education (EDGE). According to EDGE, the diploma represents attainment of a level of education comparable to completion of a vocational or other specialized high school curriculum in the United States. We consider EDGE to be a reliable source of information about foreign credential equivalencies. *See Confluence Intern., Inc. v. Holder,* Civil No. 08-2665 (DSD-JJG), 2009 WL 825793 (D. Minn. Mar. 27, 2009); *Tisco Group, Inc. v. Napolitano*, No. 09-cv-10072, 2010 WL 3464314 (E.D. Mich. Aug. 30, 2010); *Sunshine Rehab Services, Inc.* No. 09-13605, 2010 WL 3325442 (E.D. Mich. Aug. 20, 2010). *See also Viraj, LLC v. Holder,* No. 2:12-CV-00127-RWS, 2013 WL 1943431 (N.D. Ga. May 18, 2013). *See* https://www.aacrao.org/edge/country/brazil for information regarding the education system in Brazil.

The Director accepted this as evidence to meet this criteria, as it relates to radiology, the Petitioner's stated area of exceptional ability.

As such, the Petitioner has established eligibility under 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).

As claimed evidence of meeting this criterion, the Petitioner submitted copies of pages from his Brazilian employment book and social security card (Brazilian workbook), a "length of service certificate" from a municipal government in Brazil, an employment statement from the [redacted] in Brazil, and what appears to be pages from a judgment in a labor lawsuit.

The length of service certificate from the municipal government of [redacted] in Brazil, dated January 27, 2009, states that the Petitioner was employed as a technician in radiology from August 1, 2006 to January 30, 2009. The certificate is signed, although the name and title are illegible. However, the certificate does not state whether the Petitioner was employed full-time.

The employment statement from the government of the [redacted] signed by [redacted] on June 22, 2020, states that the Petitioner was employed at Hospital [redacted] operated by the [redacted] as a radiology technician from December 1, 2015 to September 29, 2018. This statement also does not state whether the Petitioner was employed full-time.

The Brazilian workbook contains entries stating that the Petitioner was employed as a radiology technician as follows:

- From December 1, 2011 until May 6, 2014 at Instituto [redacted]
- From June 17, 2013 until December 12, 2014 at [redacted]
- From April 2, 2014 until September 5, 2018 at [redacted]

The entries in the workbook do not state whether the Petitioner was employed full-time, and do not reflect his employment with the municipal government from 2006 to 2009 claimed above, or his employment with the Hospital [redacted] His claimed experience with Hospital [redacted] also appears to conflict both in timeframe and employer with the listed experience at [redacted] The Petitioner does not explain this discrepancy in the record. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, the Petitioner submitted two pages from what appears to be a judgment in a labor lawsuit. Although the Petitioner may be the plaintiff in this matter, this is not clearly stated in the pages provided. The pages provided indicate that the plaintiff in the matter was hired by Hospital [redacted] on January 4, 2010 as a radiology technician and dismissed on December 12, 2014. The pages also state that the plaintiff's workbook was "registered only on date 06/17/2013." The judgment does not state the number of hours per week that the plaintiff was employed. The Petitioner has not sufficiently explained the significance of this judgment nor provided the entire document for our review to

conclude that it relates to him. Nevertheless, we surmise that the Petitioner submitted this document in an attempt to establish that the Petitioner's hire date at [redacted] which appears in his Brazilian workbook as June 17, 2013, is incorrect and should state January 4, 2010. The evidence provided, however, does not establish this, and we consider the [redacted] experience from June 17, 2013 onward.

As stated above, none of the evidence that the Petitioner has submitted states that he was employed full-time nor provides the average number of hours per week worked. Additionally, we note that some of the employment dates in the workbook overlap with each other and with the employment period in the Petitioner's employment statement from the [redacted] The Petitioner has not further clarified the number of hours per week worked in these positions. Finally, the Petitioner has provided only his Brazilian workbook as evidence of several of his claimed periods of employment. The Petitioner has not provided letters from current or former employers for these positions, as required by the plain language of the regulation, nor has the Petitioner provided an explanation as to why that evidence is unavailable to him.

As such, we conclude that the Petitioner has not provided sufficient documentary evidence to establish 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).

The Petitioner submitted an identification card from the "National Council of Technicians in Radiology" in Brazil. The card states "LICENSE: RADIOLOGY" and provides a "radiology technician CRTR number" of [redacted]

The Petitioner claims that this document evidences his license to practice the occupation because the National Council of Technicians in Radiology is the federal body that is responsible for the registration of radiology technicians in Brazil and that only those registered with this agency may enter the job market in the occupation. In support of this statement, the Petitioner provides the URL for a website that is in Portuguese. However, the Petitioner did not provide any documentary evidence related to this claim and did not provide a translation of the information contained on the website.[5] Although we acknowledge that the identification card appears to relate to his occupation as a radiology technician, the Petitioner has not provided documentary evidence with a certified English translation to establish that the National Council of Technicians in Radiology is an official body in Brazil that issues licenses.

We conclude that the Petitioner's unsupported assertion is not sufficient to meet his burden of proof. *See Matter of Chawathe*, 25 I&N Dec. at 375-76. Although the Petitioner cites to a website in support of this claim, the Petitioner did not include in his filing documentation from a credible source, such as official information from this claimed foreign federal agency, with a certified English translation. This is insufficient, because *Matter of Chawathe* contemplates that a petitioner submit "relevant, probative, and credible evidence" to meet his burden of proof. *Id.* at 376.

[5] Any document containing foreign language submitted to USCIS must be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3).

Therefore, we conclude that the Petitioner has not provided sufficient documentary evidence to establish this 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 Petitioner submitted partial copies of his income tax statements from Brazil for 2013 to 2017 and a printout from the website salario.com which provides salary ranges for radiology technicians in Brazil.

We acknowledge that the Petitioner's reported income amounts from 2013 through 2017 are higher than the average salary amount stated in the salario.com printout. However, we note that the salario.com printout states that the salary information was collected in 2020 and 2021. Additionally, we note that the salary ranges are based on a 28-hour workweek, rather than a full-time 40-hour workweek. Finally, the salario.com printout states that the information is based only on the base pay stated in the Brazilian workbook, and does not include any additional bonuses, commissions, hazard pay, or overtime pay.

The Petitioner has not established that salary information collected in 2020 and 2021 is a valid point of comparison for the wages he earned from 2013 to 2017, or whether there have been fluctuations in currency or inflation that would affect average wages during these time periods. The Petitioner also has not established the average number of hours that he worked per week to determine whether a 28-hour workweek is an accurate comparison.[6] Moreover, he has not established whether his wages include additional pay for overtime, hazard pay, or other additional amounts that would increase his earnings but would be unrelated to whether he demonstrates exceptional ability. For these reasons, we conclude that the Petitioner has not established that the salario.com salary ranges represent an accurate salary comparison, nor has he established that the salary difference between the stated average salary and the Petitioner's salary is due to the Petitioner's exceptional ability.

As such, we conclude that the Petitioner has not provided sufficient documentary evidence or information to establish this criterion.

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

This criterion requires evidence of membership in a professional association. The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation having a minimum requirement of a United States bachelor's degree or foreign equivalent for entry into the occupation.

As claimed evidence that the Petitioner meets this criterion, he submitted a certificate from the "Regional Council of Radiology Technicians" in Brazil which states that the Petitioner is registered by the council under registration number [redacted]. The Petitioner also submitted another copy of the

[6] As discussed above, we conclude that the Petitioner has not established that he was employed full-time in his prior positions, and therefore has not established that he possesses at least ten years of full-time experience in the occupation. However, if he were employed full-time during these years, this would appear to undercut his claim that his salary demonstrates his exceptional ability, as it may simply reflect working additional hours per week. On the other hand, if he were working only 28 hours per week on average, this would further undercut his claim that he has at least ten years of full-time experience in the occupation.

same identification card from the "National Council of Radiology Technicians" in Brazil that he submitted as evidence in support of his claimed eligibility for the license criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

Again, the Petitioner asserts that the National Council of Radiology Technicians maintains the registrations of individuals qualified to work in the radiology technician field. The Petitioner also states that the Council helps those in the field seek professional improvement through courses, congresses, and other events. However, as noted above, the Petitioner has not provided documentary evidence in support of this claim with any required translation and provides only the URL for a website in Portuguese.

Although we acknowledge that the Petitioner's certificate and identification card do appear to relate to his occupation as a radiology technician, the Petitioner has not established the requirements for an individual to be registered with either the Regional Council or the National Council of Radiology Technicians, and as such has not established that either of these councils qualify as "professional associations" within the meaning of the regulations. *See* 8 C.F.R. § 204.5(k)(2). Moreover, we note that the Petitioner has not claimed that a radiology technician in Brazil must possess the equivalent of a U.S. bachelor's degree, nor has he provided evidence that he himself possesses the equivalent of a U.S. bachelor's degree. Since the Petitioner has not provided evidence establishing that either council requires its members to be professionals as defined in the regulations, he did not meet his burden to establish that either qualifies as a professional association.

Accordingly, we conclude that the Petitioner has not provided sufficient documentary evidence to establish 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 Petitioner submitted three letters of recommendation in support of this criterion. Each of the letters is from an orthopedic surgeon who claims to have supervised the Petitioner and each speaks highly of the Petitioner's professionalism and competence as a radiology technician. However, the letters do not describe achievements or significant contributions to the radiology field by the Petitioner, nor do they describe the Petitioner as receiving such recognition from governmental entities or professional organizations. The letters do mention a technique that the Petitioner may have assisted in developing that led to a less invasive treatment option for patients. However, this potential contribution to the field is not clearly explained in the letters, the Petitioner did not provide other evidence related to the development of this technique, and without further information we are unable to determine how significant this technique is nor how much the Petitioner contributed to its development.

Moreover, we note that all three of the letters use very similar language and follow a nearly identical structure. For example, all three of the letters state of the Petitioner that they "satisfactorily certify his suitability, professionalism, competence, attendance and responsibility." All of the letters also contain a variation of the phrase "the solid knowledge of [the Petitioner] had a lot to contribute to the success of the institution where he may work." Even where the language is not identical, each of the letters

follows the same pattern of first discussing the Petitioner's general expertise as a radiology technician, then his experience assisting in the operating room, and then discussing the claimed technique that he helped develop. As a general concept, when a petitioner has provided affidavits from different persons that contribute to the eligibility claim, but the language and structure contained within the affidavits is notably similar, the trier of fact may treat those similarities as a basis for questioning a petitioner's claims.[7] When affidavits contain such similarities, it is reasonable to infer that the petitioner who submitted the notably similar documents is the actual source from where the suspicious similarities derive. *Cf. Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007); *Wang v. Lynch*, 824 F.3d at 592. As a result, the letters possess significantly diminished probative value. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe*, 25 I&N Dec. at 376 (quoting *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

As such, we conclude that the Petitioner has not established this criterion.

Therefore, the Petitioner has established that he satisfies only one of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Because the Petitioner does not satisfy at least three of the criteria, we need not conduct a final merits determination to evaluate whether he has achieved the degree of expertise required for exceptional ability classification.[8] As such, the Petitioner does not qualify as an individual of exceptional ability. Having determined that the Petitioner does not qualify as an individual of exceptional ability, we conclude that the Petitioner has not demonstrated eligibility for the underlying EB-2 classification.

B. Eligibility for a National Interest Waiver

The next issue is whether the Petitioner has established that a waiver of the classifications' job offer requirement is in the national interest. Because the Petitioner has not established that he meets the threshold requirement of eligibility for the underlying EB-2 classification, we need not address whether he is eligible for, and merits as a matter of discretion, a waiver of that classification's job offer requirement. *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).

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as an individual of exceptional ability. 8 C.F.R. § 204.5(k)(3). Because the Petitioner has not established

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[7] *See Matter of R-K-K-*, 26 I&N Dec. 658, 665 (BIA 2015); *Singh v. Garland*, No. 19-60937, 2021 WL 5984797, at *2 (5th Cir. Dec. 17, 2021); *Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006); *Wang v. Lynch*, 824 F.3d 587, 592 (6th Cir. 2016); *Dehonzai v. Holder*, 650 F.3d 1, 8 (1st Cir. 2011); *Hamal v. U.S. Dep't of Homeland Security*, No. 19-2534, WL 2338316, at *4, n.3 (D.D.C. June 8, 2021).

[8] However, even were we to conclude that the Petitioner submitted sufficient evidence to establish that he possesses at least ten years of full-time work experience, the license that he claims is necessary for employment in the occupation, and that he belongs to a professional association of radiology technicians, this evidence would only establish that the Petitioner meets the qualifications to be employed as a radiology technician and that he has worked in the field. Were we to conduct a final merits determination, we would conclude that the evidence in its totality does not show that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

eligibility for the underlying EB-2 immigrant classification, we conclude that the Petitioner has not established eligibility for a national interest waiver. We reserve our opinion regarding whether the Petitioner has satisfied any of the three prongs of the *Dhanasar* analytical framework.

ORDER: The appeal is dismissed.