U.S. Citizenship and Immigration Services

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

In Re: 27437364

Date: SEP. 07, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant 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 had not established eligibility for the underlying EB-2 classification as an individual of exceptional ability. In addition, the Director concluded that the Petitioner did not establish eligibility for 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.

In order to qualify as an individual of exceptional ability in the sciences, the arts, or business, a petitioner must initially submit documentation that satisfies at least three of six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). 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).

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) allows for the submission of "comparable evidence" if the regulatory standards "do not readily apply to the beneficiary's occupation."

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. 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. *See Kazarian* v. *USCIS,* 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); *See* USCIS 6 Policy Manual F.2, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2.

Once a petitioner first demonstrates qualification for the underlying EB-2 visa classification, they must then demonstrate they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[1], grant a national interest waiver if the petitioner shows:

- 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 Petitioner initially stated on the petition that his proposed employment is an entrepreneur who "creates a new business" and described himself as "a seasoned professional in the field of the proposed endeavor; Entrepreneurship." The Petitioner also submitted a business plan for [redacted] a marketing consulting and e-commerce company which he will direct and operate in the state of Florida. The Petitioner stated that the company will "provide consulting services to corporate clients and help them optimize their digital marketing strategies as well as establish or improve the efficiency of existing online sales channels." The Petitioner added that the company will also "distribute products through multiple online channels, primarily the Company's [redacted] [mattresses], [redacted] [women's protective products], and [redacted] [skincare]" and "export products to Brazil, Canada, Australia, and the United Kingdom."

The Petitioner further explained that his proposed endeavor encompasses a variety of business elements and multiple industries:

> While many businessmen focus on specializing in one business-related element, Petitioner's exceptional intellect and operational abilities have allowed for him to become [an] expert in numerous business segments including digital marketing strategies with focus on ecommerce, commercial management, market research and analysis, information technology, international negotiation and partnerships, as well as strategic business planning and all the elements it encompasses."

[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).

After reviewing the Petitioner's response to the RFE, the Director concluded that the Petitioner did not establish that he qualified for the requested EB-2 classification, or that a waiver of the classification's job offer requirement would be in the national interest.

A. Exceptional Ability

We will first address the threshold requirement that the Petitioner must qualify for classification under Section 203(b)(2)(B)(i) of the Act, as an individual of exceptional ability.

On appeal, the Petitioner maintains that the Director misapplied the standard of proof and states: "we urge that USCIS reevaluate the previously submitted documents and when doing so, apply the preponderance of the evidence standard, the Petitioner is required to show merely that each essential element is more than 50% likely to be true."

Regarding the standard of proof, the Petitioner must prove by a preponderance of evidence that he is fully qualified for the benefit sought. *See Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The preponderance of evidence standard does not mean that the Petitioner can partially comply with the eligibility criteria required by law or submit incomplete evidence. Furthermore, to determine whether a petitioner has met his burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-76; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989).

Here, the Director thoroughly reviewed, discussed, and analyzed all evidence submitted on record concerning each of six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F) by the preponderance of evidence standard. The Director specifically addressed the evidence presented and explained reasons why the evidence was insufficient for each criterion. Thereafter, the Director concluded that the evidence is incomplete to satisfy at least three of six criteria.

Specifically, the Director determined that the Petitioner fulfilled only the academic record criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) and the membership in professional associations criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).[2] On appeal, the Petitioner does not meaningfully analyze how the Director's decision specifically erred and asserts that the record as it stands was sufficient in finding that he is an individual of exceptional ability. Upon de novo review, we agree with the Director that the Petitioner has not met the remaining criteria as discussed below.

1. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B)

The Director found that the Petitioner did not meet the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B) which requires "evidence in the form of letter(s) from current or former employer(s) showing that the [individual] has at least ten years of full-time experience in the occupation for which he or she is being sought." The record contains a letter from the Petitioner's business partner, describing his roles and experience with [redacted] Brasil from October 2020 to March 2022, and a letter from the

[2] Although the Petitioner states on appeal that the Director found he met only one criterion, the Director in fact concluded that he satisfied two criteria.

commercial director of [redacted] who employed the Petitioner's consulting services from January 2016 to January 2017. These two letters by themselves do not show that the Petitioner has at least ten years of full-time experience in the field. The Petitioner submitted contracts and business licenses of his own companies as comparable evidence, but they lack pertinent information, such as the duration of his work experience, number of hours worked, and the job duties, to establish that the Petitioner "has at least ten years of full-time experience" as an entrepreneur. Therefore, we agree with the Director that the Petitioner did not demonstrate that he meets this criterion.

2. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C)

This criterion requires "[a] license to practice the profession or certification for a particular profession or occupation." The Petitioner acknowledged that his profession does not require a license to practice, and thus, the Director concluded that the Petitioner did not meet this criterion. In response to the Director's RFE, the Petitioner asserted that his "extensive career" as entrepreneur can substitute for his lack of a license and satisfies this criterion.

A petitioner can submit comparable evidence to establish eligibility if the regulatory standards do not readily apply but must explain 1) why he has not submitted evidence that would satisfy the criteria set forth in 8 C.F.R. 204.5(k)(3)(ii); and 2) why the evidence he has submitted is "comparable" to that required under 8 C.F.R. 204.5(k)(3)(ii). *See also generally* 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual.

To explain why the Petitioner has not submitted evidence that would satisfy the regulatory criterion, the Petitioner referenced the U.S. Bureau of the Labor Statistics (BLS) description on "How to Become a Top Executive." Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Top Executives (Sept. 8, 2022), https://www.bls.gov/ooh/management/top-executives.htm#tab-4. However, the quoted passage from BLS directly contradicts the Petitioner's position as it states: "some top executive positions may require the applicant to have a license or certification relevant to their area of management. For example, some employers may require their chief executive officer to be a certified public account (CPA)." Therefore, the Petitioner has not sufficiently explained this criterion does not apply to his occupation as an entrepreneur.

Furthermore, the Petitioner has not sufficiently demonstrated that his "extensive career" as an entrepreneur is truly comparable evidence. The Petitioner claimed to have demonstrated a degree of expertise significantly above the ordinary and declared that he worked with "companies of great stature" and obtained "professional recommendation letters from top leaders within said companies acknowledging [his] exemplary work and brilliant performance in executing his work as an Entrepreneur and Digital Marketing Specialist." However, the record contains typical documents for business creation, such as company registration, bylaws, and certificates, and do not reflect the same caliber of expertise as receiving a license to practice the profession or a certification for a particular profession. While the Petitioner has submitted recommendation letters, they are from his business partners verifying that he has performed entrepreneurial activities and do not explain how these activities are comparable to a license to practice his profession. Therefore, the Petitioner did not demonstrate that he meets this criterion through the submission of comparable evidence.

3. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D)

This criterion requires "[e]vidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability." To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of their claimed exceptional ability relative to others working in the field. Initially the Petitioner submitted a letter from his accountant listing his yearly income from his companies from 2015 to 2020 without any other supporting documentation to demonstrate context for comparison with others in the field. In response to the RFE, the Petitioner offered the 2021 tax returns for his company, [redacted] and claimed that his partnership income of $820,712 exceeded the median annual wage for a position of chief executive in the United States of $179,520, as demonstrated by the U.S. Bureau of Labor Statistics. However, the record does not contain evidence to establish how his compensation compares to other CEOs working in digital marketing or e-commerce in the same geographical area. Further, the record does not show that the Petitioner's ownership income is a direct result of his exceptional ability. Therefore, the Petitioner has not met this criterion.

4. Criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F)

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." The Petitioner's evidence for this criterion consisted of various certificates of learning, support letters, an article on marketing that quotes the Petitioner, and a letter from [redacted] Florida.

The certificates of learning demonstrate that the Petitioner has acquired knowledge in a variety of topics useful in the field, but they do not recognize the Petitioner for any achievement or significant contribution to the industry or field. Similarly, the support letters are from those who worked with the Petitioner in the past and contain general praise for the Petitioner's expertise and work ethics, but they do not indicate that the Petitioner's contributions go beyond being a dedicated and competent owner and manager of his own companies.

The Petitioner also submitted one article from an unknown source quoting the Petitioner's statements on traditional marketing versus growth marketing, but the record lacks evidence demonstrating this represents a significant achievement or recognition in the field.

The record further includes a letter from the President of [redacted] Florida, a nonprofit organization of Brazilian business leaders, stating that the Petitioner is an associate of the organization. The letter explains that the organization's purpose is "to encourage and promote networking among prominent business leaders of the most varied operating sectors" and praises the Petitioner for networking and communication skills. However, the Petitioner has not offered any independent and corroborating documentation, such as admission requirements or the level of prestige in the field, to show that being admitted as an associate of this organization is a significant achievement or recognition. Therefore, we find that the evidence is insufficient in demonstrating evidence for this criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

For the reasons set forth above, the evidence does not establish that the Petitioner has not satisfied at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), and thus, we need not conduct a final merits determination. Nevertheless, we have reviewed the record in the aggregate and examined "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. While we acknowledge that the Petitioner has had a successful career as an entrepreneur, he has not demonstrated exceptional ability that rises above that ordinarily encountered in his field.

With the appeal, the Petitioner has not provided any new evidence to address the insufficiencies in the record listed by the Director. The Petitioner's failure to provide complete and probative evidence to satisfy each of the above remaining criteria at 8 C.F.R. § 204.5(k)(3)(ii) is sufficient cause to dismiss this appeal.

B. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. As previously outlined, the Petitioner has not established eligibility for the underlying EB-2 immigrant classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding his eligibility for a national interest waiver under the *Dhanasar* analytical framework. *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 alternative issues on appeal where an applicant is otherwise ineligible).

## III. CONCLUSION

The Petitioner has not met at least three of the six regulatory criteria required to qualify as an individual of exceptional ability pursuant to 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.