



**U.S. Citizenship
and Immigration
Services**

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

In Re: 28287463

Date: SEPT. 18, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a plastic packaging manufacturer, seeks second preference immigrant classification for the Beneficiary as a member of the professions holding an advanced degree or as an individual of exceptional ability, 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 Nebraska Service Center denied the petition, concluding that the Beneficiary did not qualify for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability.¹ The matter is now before us on appeal.

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

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). In addition, "profession" is defined as of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.² 8 C.F.R. § 204.5(k)(3).

Furthermore, "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 the beneficiary satisfies at least three of six categories of evidence. 8 C.F.R.

¹ The Director's decision did not consider if the Beneficiary meets the requirements for a national interest waiver.

² Profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) of the Act.

§ 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 beneficiary 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 the beneficiary's 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 discretion⁴, 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. ANALYSIS

A. Member of the Professions Holding an Advanced Degree

In order to show that a beneficiary holds a qualifying advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, a petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Director acknowledged the Petitioner's submission of documents indicating that the Beneficiary holds the foreign equivalent of a U.S. baccalaureate degree, but concluded that the evidence submitted both initially and in response to the Director's request for evidence (RFE) did not show that the Beneficiary has at least five years of progressive post-baccalaureate experience in his specialty. *See* 8 C.F.R. § 204.5(k)(3)(i)(B).⁵ Because the Petitioner did not present evidence showing that the Beneficiary had at least five years of progressive post-baccalaureate experience in his specialty at the time of filing the Form I-140 petition, the Director correctly found that the Petitioner had not demonstrated the Beneficiary's eligibility as a member of the professions holding an advanced degree. The Petitioner does not contest this finding on appeal. *See Hristov v. Roark*, No. 09-CV-2731, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

³ 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>.

⁴ *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).

⁵ The record indicates that the Beneficiary received his foreign degree in electrical engineering in February 2016, that he began working full-time in his specialty in May 2017, and that the petition in this matter was filed in June 2021.

B. Exceptional Ability

In response to the Director's RFE, the Petitioner asserted that the Beneficiary satisfies at least three of the regulatory criteria for classification as an individual of exceptional ability. Specifically, the Petitioner claimed that the Beneficiary meets the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (C), (E), and (F). In denying the petition, the Director determined that the Beneficiary fulfilled only the academic record criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) and the license or certification criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). In the appeal brief, the Petitioner maintains that the Beneficiary also meets the membership criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E) and the recognition for achievements and significant contributions criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). After reviewing the evidence, we agree with the Director that the record does not support a finding that the Beneficiary satisfies the requirements of at least three criteria. The Director's decision clearly illustrates why the Beneficiary has not met the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(E) and (F).

The Petitioner's appeal is essentially a reiteration of the documentation and arguments previously offered with its RFE response. The Petitioner reasserts that the Beneficiary is of exceptional ability citing the same evidence, documentation, and arguments the Director evaluated in the response to the RFE. For example, while the Director determined that the Beneficiary's registration certificate from the Regional Council of Engineering and Agronomy [REDACTED] (CREA-[REDACTED]) satisfied the license or certification criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C), the Petitioner maintains on appeal that this same registration certificate also meets the membership criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).⁶ The Director's decision explained that CREA-[REDACTED] is a "government agency that is responsible for inspecting and judging the practice of engineers, geographers, geologists, agronomists and technicians related to those activities in Brazil" and that the Beneficiary's CREA-[REDACTED] registration certificate did not constitute his membership in a professional association. We agree with the Director's determination that the Petitioner has not shown the Beneficiary meets the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

With respect to the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), this regulation 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 contends on appeal that the Director's decision did not properly consider the letters submitted from R-D-, T-F-, J-V-, and S-S-. In the decision, the Director correctly determined that these four letters offered in support of the petition did "not demonstrate that the Beneficiary has been recognized by peers, governmental entities, or professional or business organizations for achievements and significant contributions to the industry or field."⁷ For example, while the letters from R-D- and T-F- (the Beneficiary's supervisors) described his work for both of their companies, they did not establish that he was recognized "for achievements and significant contributions to the industry or field." Likewise, the written advisory opinions from both J-V- and S-S- (professors at [REDACTED] University) discussed the Beneficiary's academic credentials, professional skills and certifications, and job experience, but this evidence does not show that his work has been recognized beyond his employers and their specific projects at a level indicative

⁶ The Petitioner presented the Beneficiary's CREA-[REDACTED] registration certificate under both criteria in response to the Director's RFE.

⁷ Regarding the two research articles authored by Beneficiary, the Director's decision stated the Petitioner had not established "the level of importance of the articles or whether [their] publication made a significant contribution to the field."

of “achievements and significant contributions to the industry or field.” We therefore agree with the Director that the Petitioner has not established the Beneficiary fulfills the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

Based on a de novo review, we will adopt and affirm the Director’s determination that the Petitioner has not provided sufficient evidence to demonstrate that the Beneficiary qualifies as an individual of exceptional ability. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Prado-Gonzalez v. INS*, 75 F.3d 631, 632 (11th Cir. 1996) (joining “every court of appeals that has considered this issue” holding that an appellate body may affirm the lower court’s decision for the reasons set forth therein); *Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting the practice of adopting and affirming the decision below has been “universally accepted by every other circuit that has squarely confronted the issue”); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight U.S. Courts of Appeals in holding that appellate adjudicators may adopt and affirm the decision below as long as they give “individualized consideration” to the case). Here, the Director’s decision gave individualized consideration of the evidence the Petitioner submitted as documentation of the Beneficiary’s exceptional ability and correctly concluded that he did not satisfy at least three of the regulatory criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii).⁸

C. 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, in order to qualify for a national interest waiver, the Petitioner must first show that the Beneficiary qualifies for EB-2 classification as either an advanced degree professional or an individual of exceptional ability. The Petitioner has not shown that the Beneficiary is an advanced degree professional or that he has satisfied the regulatory criteria and achieved the level of expertise required for exceptional ability classification. As the Petitioner has not established the Beneficiary’s eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot.

III. CONCLUSION

The Petitioner has not established that the Beneficiary satisfies the regulatory requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. 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.

⁸ Because the Beneficiary did not meet at least three criteria at 8 C.F.R. § 204.5(k)(3)(ii), it was unnecessary for the Director to conduct a final merits determination to decide whether the evidence in its totality shows that the Beneficiary is recognized as having “a degree of expertise significantly above that ordinarily encountered” in the field. *See* 8 C.F.R. § 204.5(k)(2).