U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30627094

Date: APR. 04, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a financial administrator, seeks classification as a member of the professions holding an advanced degree or 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 employment based second preference (EB-2) classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). 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. *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

The Director of the Texas Service Center denied the petition, concluding the record did not establish that the Petitioner qualified for classification as an employment based second preference permanent immigrant and a discretionary waiver of the job offer requirement, and thus a labor certification was not merited upon the application of the analytical framework we first explicated in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). The matter is now before us on appeal pursuant to 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. 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 advanced degree to mean any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree and so permit classification as an EB-2 permanent immigrant. Progressive experience can be demonstrated by the Petitioner by providing letters from current or former employers showing that they have at least five years of progressive post-baccalaureate experience in the specialty. The regulation at 8 C.F.R § 204.5(g)(1) requires letters from current or former employers include the name, address, and title of the writer, and a specific description of the duties performed.

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).

But meeting at least three criteria does not, in and of itself, establish eligibility for this classification. 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 we conclude that a petitioner has an advanced degree or is of exceptional ability such that they have established their eligibility for classification as an immigrant in the EB-2 classification, we evaluate the national interest in waiving the requirement of a job offer and thus a labor certification.

Whilst neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, *see supra*. *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen is well positioned to advance the proposed endeavor, and (3) that on balance it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

II. CATEGORICAL INELIGIBILITY FOR EB-2 CLASSIFICATION

In the first instance, we note the Director's request for evidence (RFE) requested the Petitioner provide evidence to demonstrate their categorical eligibility for classification as an EB-2 immigrant. We conclude the record as it is currently composed does not contain sufficient relevant, material, or probative evidence to demonstrate the Petitioner has earned a U.S. master's degree or its single source foreign equivalent or accrued at least five years of progressive post-baccalaureate experience after attaining a U.S. bachelor's degree or its single source foreign equivalent. So we conclude that the Petitioner is not qualified for EB-2 immigrant classification as an advanced degree professional. And the record does not contain sufficient evidence to establish that the Petitioner qualifies for EB-2 immigrant classification as an individual of exceptional ability. So we conclude that the Petitioner is categorically ineligible for EB-2 immigrant classification.

A. The Petitioner Has Not Sufficiently Demonstrated Eligibility For EB-2 Classification As An Advanced Degree Professional

The evidence the Petitioner submitted into the record does not sufficiently establish the Petitioner's eligibility for EB-2 classification as a member of the professions holding an advanced degree. As stated previously, the regulation at 8 C.F.R. § 204.5(k)(2) defines advanced degree to mean any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree and so permit classification as an EB-2 permanent immigrant. Progressive experience can be demonstrated by the Petitioner by providing letters from current or former employers showing that they have at least five years of progressive post-baccalaureate experience in the specialty. The regulation at 8 C.F.R § 204.5(g)(1) requires letters from current or former employers include the name, address, and title of the writer, and a specific description of the duties performed.

The Petitioner has not submitted adequate documentation to demonstrate that they had accumulated at least five years of progressive post-baccalaureate work experience. In support of their progressive work experience, the Petitioner submitted letters from [redacted] The initial letters did not contain the required description of the duties performed. In response to the request for evidence, the Petitioner submitted new letters, on letterhead, which contained the name, address, and title of the writer as well as a specific description of the duties performed. The letter from [redacted] however, was not probative to the Petitioner's eligibility as an advanced degree professional because the duration of employment pre-dated the Petitioner's purported acquisition of their

bachelor's degree in administration on July 4, 2011. Only post-baccalaureate work experience can be considered to determine if an individual is an advanced degree professional.

The Petitioner's new letter from [redacted] was sufficient to document progressive experience between May 23, 2011 and February 7, 2012.

But the Petitioner's new letter from [redacted] introduced ambiguity and uncertainty due to its inconsistency with the letter from [redacted] the Petitioner submitted initially with the petition. The first letter indicated the Petitioner served as a vehicle financing manager between December 7, 2012 and December 28, 2016. The letter submitted with the Petitioner's response to the RFE indicated the Petitioner's job title was manager of financing and contained an inexact and period of employment from December 2012 to February 2017 conflicting with the period of employment listed in the first letter. Moreover, the new letter contained reference to a different initial starting job title as a commercial operator and also conflicted with the employment history the Petitioner listed on the Form ETA 750B submitted initially with the Petition. These unexplained inconsistencies and discrepancies materially diminish the weight we ascribe to the Petitioner's submitted evidence. Doubt cast on any aspect of a petitioner's evidence may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). So we cannot reliably determine the Petitioner's employment period.

And the Petitioner's part-time employment with [redacted] is not material, probative, or relevant to an evaluation of the Petitioner's progressively responsible post-baccalaureate work experience because it commenced after the filing of the petition. A petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc Comm'r 1998).

Moreover, we harbor doubts as to whether the Petitioner has earned the single source equivalent of a U.S. bachelor's degree. The Petitioner purportedly finished a bachelor of administration degree from [redacted] on July 4, 2011. The Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), reflects that bachelor's degrees earned at accredited institutions of higher education in Brazil are the single source equivalent to a United States bachelor's degree if they are of either four or five years in duration, but programs of study of three years are not. The Petitioner's transcript reflects that they engaged in their course of study between 2003 and 2011. It is unclear, and the record does not contain documentation indicating, whether the Petitioner's course of study was three, four, or five years in duration.

And the educational evaluation the Petitioner submitted from [redacted] senior evaluator, United States Credential Evaluations, is not sufficiently probative because it concludes the Petitioner earned a master's degree in financial management upon evaluation of the combination of the Petitioner's education and work experience. The plain language of the regulation at 8 C.F.R. § 204.5(k)(2) states an advanced degree equivalency must consist of a single source degree, with no provision for substituting experience or combining lesser educational credentials with work experience. 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). But the evaluation the Petitioner submitted relies upon a combination of a degree and work experience to reach its conclusion. It does not comply with the requirements of the regulations. So, it is not of sufficiently relevant, material, or probative value to evaluating if the Petitioner's claimed educational credential is an advanced degree or its single source foreign equivalent.

Consequently, we are unable to determine if the Petitioner has earned the single source equivalent to a U.S. bachelor's degree and we withdraw the Director's conclusion to the contrary. And the record as it is currently composed does not contain sufficient relevant, material, or probative evidence to demonstrate the Petitioner has earned a U.S. master's degree or its single source foreign equivalent or accrued at least five years of progressive post-baccalaureate experience after attaining a U.S. bachelor's degree or its single source foreign equivalent. So we conclude the Petitioner has not demonstrated eligibility for classification in the employment based second preference permanent immigrant as an advanced degree professional.

B. The Petitioner Is Not An Individual of Exceptional Ability

The Director's decision did not evaluate whether the Petitioner demonstrated eligibility for EB-2 classification as an individual of exceptional ability. But the Petitioner submitted evidence in their initial petition, the response to the RFE, and the appeal for us to consider their eligibility for EB-2 permanent immigrant classification as a non-citizen of exceptional ability. Whilst it is not evident in the record whether the Petitioner's bachelor's degree in administration is the single source equivalent of a U.S. bachelor's degree, it is sufficiently evident that the Petitioner has earned a degree from a university relating to the claimed area of exceptional ability as contained in 8 C.F.R. § 204.5(k)(3)(ii)(A). And the Petitioner has submitted evidence in the form of letter(s) from current or former employer(s) showing that they have at least ten years of work experience spanning pre and purportedly post baccalaureate periods of time in the occupation as contained in 8 C.F.R. § 204.5(k)(3)(ii)(B). Nevertheless, the remaining evidence in the record does not sufficiently demonstrate the Petitioner's eligibility for EB-2 nonimmigrant classification as an individual of exceptional ability.[1]

> *Evidence of 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 the assertion that they possess licensure or certification to perform the duties of a financial administrator, the Petitioner submitted a copy of their "Certificate of Registration and Current Professional Status" and "Professional Identity Card" issued by the Regional Administration Council of Minas Gerais, Brazil. But these documents are not persuasive to demonstrate the Petitioner's financial administrator license or certification.

Licenses and certifications show that a person has the specific knowledge or skill needed to do a job. A license, generally conferred by an official government body, confers legal authority to work in an

[1] The Petitioner initially provided evidence to assert they commanded a salary, or other remuneration for services, which demonstrates exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(D), but then chose to abandon their pursuit of eligibility under that prong on appeal.

occupation. A certification, whilst not always required to work in an occupation, generally requires demonstrating competency to do a specific job.

The licensure or certification submitted by the Petitioner appears to apply to a different profession or occupation than the one the Petitioner intends to undertake in the United States. The record reflects that the Petitioner's registration and professional identity are classified by the respective regulatory bodies as an "administrator." But the Petitioner intends to perform the duties in financial services. Although the field of administration is vast, the Petitioner's evidence does not adequately demonstrate that their licensure or certification as an "administrator" corresponds to their financial services occupation.

In further support of their licensure or certification to perform the duties of a financial analyst, the Petitioner submitted a copy with translation of a certificate reflecting the Petitioner was approved for "CPA-10" certification from ANBIMA – Brazilian Association of Financial and Capital Market Entities. But these documents are not persuasive to demonstrate a financial license or certification. ANBIMA – Brazilian Association of Financial and Capital Market Entities is not an official government body. It is a trade organization representing institutions in Brazil operating in the financial and capital markets. The record does not contain an indication of the mandate or authority that ANBIMA exercises over the financial analyst occupation. And the record does not establish that the "CPA-10" certification is a licensure or certification related to financial analysis occupations. Publicly available information on the ANBIMA – Brazilian Association of Financial and Capital Market Entities indicates that the "CPA-10" is for bank or other financial institution professionals who distribute retail investment products from bank branches or service platforms irrespective to adhered to a certification code. The certification is also open to students, which also draws into question its applicability to and necessity for performance of the duties of a profession. The evidence in the record simply does not demonstrate how the Petitioner's "CAP-10" certification is related to performing the overarching duties of the Petitioner's profession or occupation. And the evidence in the record does not describe how the certification demonstrates the Petitioner's competency to perform their job duties. The record does not indicate what standards the certification reflect the Petitioner met. Nor does the certification indicate whether they must be periodically refreshed or renewed to ensure the professional holding the certifications maintains the competency or standards the certificate purport to reflect. And, as the Petitioner conceded on appeal, a requirement of a license or certification is not a prerequisite to serve in financial services in the United States or in Brazil in the manner the Petitioner contemplates. Accordingly, we cannot conclude that the Petitioner has a license to practice the profession or certification for the particular profession or occupation of a finance professional.

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

The Petitioner submitted their membership in the American Finance Association as evidence of their membership in professional associations. But the evidence in the record does not adequately describe the criteria for membership in this organizations and consequently we are unable to conclude that membership in it is reserved for professionals. Consequently, the record does not convincingly describe the Petitioner's membership in the American Finance Association as membership in professional associations as that term is contemplated in the regulations, and we conclude the Petitioner has not met 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 several letters of support prepared contemporaneously with these immigrant petition proceedings to demonstrate that they have been recognized for achievements and significant contributions to their field by peers, governmental entities or professional or business organizations. But the evidence the Petitioner submitted did not meet the standard of proof because it did not satisfy the basic standards of the regulations. *See Matter of Chawathe*, 25 I&N Dec. at 374 n.7. The regulation requires evidence of recognition of achievements and significant contributions. When read together with the regulatory definition of exceptional ability, the evidence of recognition of achievement of significant contributions should show expertise significantly above that ordinarily encountered in the field.

The Petitioner's letters of support generally contain vague statements about the writers' impressions of the Petitioner's positive work attributes and their overall strength of character. The Petitioner asks us to conclude the writers' conclusions alone constitute recognition of achievements and significant contributions. But these statements are not supported by any evidence in the record which reflects that these letters represent noteworthy achievements and significant contributions. For example, one letter writer attested the Petitioner "has extensive experience in coordinating teams" and "prepared the strategic action plan for the introduction and maintenance of products" by searching for "new ways to achieve better sales performance." But it is not clear how sales performance relates to the financial administration the Petitioner seeks to perform as part of their proposed endeavor. Nor are the "new ways to achieve better sales performance" identified such that they can be evaluated to determine if they are a significant contribution showing expertise significantly above that ordinarily encountered in the field. Another letter writer credited the Petitioner with "developing and implementing new projects and processes" under the writer's management. Again, the new projects and processes were not identified nor supported with evidence in the record so that they could be examined to determine if they are a significant contribution showing expertise significantly above that ordinarily encountered in the field. Another letter writer lauded the Petitioner for "excelling in delivering results and achieving the goals set every month." But the competent prosecution of assigned job duties, in and of itself, is not indicative of a significant contribution or achievement showing expertise significantly above that ordinarily encountered in the field. The Petitioner's responsibility for reducing financial waste by two percent was noted in one writer's letter. But material, relevant, and probative evidence in the record does not specify how a two percent reduction in financial waste is an achievement or significant contribution showcasing the Petitioner's expertise significantly above that ordinarily encountered in their field. One letter writer who worked with the Petitioner at a bank drew special attention to their mutual employer's increase in market share in financing of heavy vehicles from 10% to 50% in six months. However, the record does not contain any corroborating evidence for this claim and we are unable to evaluate whether an increase in market share, in and of itself, is an achievement or significant contribution demonstrating expertise significantly above that ordinarily encountered in the field. The Petitioner's "advice" is similarly credited with "a 30% increase in our revenues." But the record does not identify the contours of that advice with material, relevant, or probative evidence such that we can determine if it is an achievement or significant contribution evidencing expertise significantly above that ordinarily encountered in the field. So we cannot conclude that the Petitioner meets this ground of eligibility.

The Petitioner has established eligibility in only two of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). They cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). So 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. Consequently, we conclude the Petitioner has not demonstrated their eligibility for permanent immigrant classification in the EB-2 category.

III. CONCLUSION

The Petitioner has not adequately established categorical eligibility as an advanced degree professional. Moreover the Petitioner has not established eligibility in any of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). They cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). And 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. Without the Petitioner's demonstration of the predicate employment based second preference permanent immigrant categorical eligibility, 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.