U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37629723

Date: APR. 17, 2025

Appeal of Texas Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (H-1B)

The Petitioner, a real estate and urban development entrepreneur and businessman, 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 Third, Ninth, Eleventh, and D.C. Circuit Courts 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 the Petitioner qualified for classification as an individual of exceptional ability and that a discretionary waiver of the job offer requirement, and thus a labor certification, was not merited upon 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 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;
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> (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;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (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 a petitioner is 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 he or she has established 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 he or she demonstrates 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. ANALYSIS

The Petitioner is a real estate and urban development entrepreneur and businessman seeking to demonstrate eligibility in the EB-2 classification based on his exceptional ability. A Petitioner must demonstrate expertise significantly above that ordinarily encountered to show that he or she is of exceptional ability.

We agree with the Director's ultimate decision that the Petitioner is not of exceptional ability and therefore categorically ineligible for EB-2 permanent immigrant classification. The Director concluded that the Petitioner met three of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) but, upon final examination of the record in its totality, did not demonstrate a degree of expertise significantly above that ordinarily encountered in his field to merit a determination of exceptional ability. Upon de novo review, we conclude that the Petitioner has not demonstrated that he met at least three of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) for the reasons set forth 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).

We disagree with the Director's conclusion the Petitioner met this criterion and hereby withdraw it. To demonstrate eligibility under this criterion, the Petitioner submitted a copy of his "Tecnico em Contabilidade" or technician in accounting credential issued by [redacted] Brazil. But, despite the Petitioner's exhortations to the contrary, the Petitioner's credential and the other evidence in the record of proceeding does not sufficiently describe how accounting is related to the Petitioner's claimed field of exceptional ability, namely real estate and urban development entrepreneurship and business. The Petitioner stated that his "civil engineering skills combined with his entrepreneurship are a uniquely successful combination in the Real Estate and Urban development sector." In essence, it appears the Petitioner is contending his technician in accounting credential is related to the engineering skills that he will combine with his entrepreneurship to endeavor to function as a CEO (presumably chief executive officer) of a construction company in the field of real estate and urban development entrepreneurship and business. But the credential does not describe, and the record does not contain, any other official academic record to shed light on how accounting provides the "civil engineering skills" he intends to combine with "his entrepreneurship" and is therefore related to the field of real estate, and urban development entrepreneurship and business. In fact, it is unclear from the record of proceeding how even engineering skills, were they adequately documented by the Petitioner, combined with entrepreneurship would relate to the field of real estate and urban development entrepreneurship and business within which the Petitioner's claims exceptionality. In sum, it is not sufficiently evident how the Petitioner's credential is related to the Petitioner's claimed area of exceptional ability in real estate, urban development entrepreneurship and business. So, we conclude the evidence does not support the Petitioner's eligibility under 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 several certificates of inspection and completion of work and a construction permit to evidence his license to practice the profession or a certification for a particular profession or

occupation. 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 occupation. A certification, whilst not always required to work in an occupation, generally requires demonstrating competency to do a specific job. In the first instance, it is not sufficiently established in the record that the Petitioner is a member of the professions. A profession is one of the occupations listed in Section 101(a)(32) of the Immigration and Nationality Act (INA) as well as any occupation for which a baccalaureate or foreign equivalent is the minimum requirement for entry into the occupation. *See* 8 C.F.R. § 204.5(k)(2). A professional occupation is determined by the general requirements to enter the intended occupation, and not by the credentials of any one person seeking to work in that field. It is the petitioner's burden to establish, by a preponderance of the evidence, that the intended occupation requires at least a bachelor's degree or its foreign equivalent degree for entry. The Petitioner has not submitted sufficient material, relevant, or probative evidence to establish the requirements to function as a CEO of a construction company in the real estate and urban development entrepreneurship business. And when it is unclear that the Petitioner intends to function as a professional as part of his proposed endeavor, evidence of a license or certification is less persuasive because it does not support a profession or occupation. But, even setting aside the professional nature of the Petitioner's function in his proposed endeavor, we would still conclude the Petitioner has not demonstrated the documents he submitted are evidence of licensure or certification for a profession or occupation. 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 occupation. A certification, whilst not always required to work in an occupation, generally requires demonstrating competency to do a specific job. The record does not adequately support that the permit and certificates of inspection and completion submitted into the record are required to perform the duties the Petitioner intends to undertake in his proposed endeavor. Nor does the record indicate whether the permit and certificates of inspection and completion must be periodically refreshed or renewed to ensure maintenance of competency or standards the certifications and course completions purports to reflect. So, we cannot conclude the Petitioner has a license to practice the profession or certification for a particular profession or occupation.[1]

> *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 contended that he has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. In support, he submitted documentation purporting to demonstrate that he had "managed to build a true empire" by and through his construction companies. The Petitioner contended that the annual compensation withdrawal he elected during his previous employment as well as contracts that his companies maintained demonstrating partnership share were indicative of "his skill as a successful manager" and "significantly surpass[ed] the national minimum wage established for graduated civil engineers in Brazil." However, the Petitioner's claimed area of exceptional ability is real estate and urban development entrepreneurship and business, not civil

[1] We further note that the Director requested additional evidence of the Petitioner's eligibility under this criterion in a request for evidence (RFE). The Petitioner did not submit evidence in response to the request for evidence nor did he advance any material, relevant, or probative assertions or evidence in support of eligibility under this criterion on appeal. We are not required to consider issues that are not advanced on appeal. An issue not raised on appeal is in fact waived. *See Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2012) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

engineering. So, it is not apparent how the Petitioner's excerpt from the salary survey published by a regional engineering and agronomy council of the federal district in Brazil showing average wages for engineers and technologists is indicative of exceptional ability or even applicable to the case at hand. And the Petitioner's documentation of his bank balance and maintenance of lines of credit is not remuneration of salary as contemplated in the criteria. The record does not reflect the salary or remuneration expected for individuals of exceptional ability performing duties comparable to those the Petitioner intends to undertake. Also, the record does not provide a context to judge whether the Petitioner's annual compensation withdrawal or bank balance and lines of credit demonstrate exceptional ability significantly above that ordinarily encountered. So, we conclude that the Petitioner has not met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) because we cannot evaluate from information in the record whether the Petitioner's salary or remuneration demonstrated his exceptional ability.

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

The Petitioner asserts that his membership in the [redacted] evidences his membership in a professional association. We disagree. The [redacted] is not a professional association. The Petitioner's occupation and the occupation of builder as described in the [redacted] does not appear in the list of professions contained at section 101(a)(32) of the Act, and it is not included as an occupation that customarily requires a bachelor's or higher degree. *See* Update to Appendix A to the Preamble-Education and Training Categories by O*NET-SOC Occupations; Labor Certification for Permanent Employment of Immigrants in the United States and Procedures To Establish Job Zone Values When O*NET Job Zone Data Are Unavailable, 86 Fed. Reg. 63070 (Nov. 15, 2021). Moreover, the record does not contain evidence documenting the criteria for membership in the associations listed by the Petitioner. Consequently, an [redacted] is not a professional association as that term is contemplated in the regulations, and the Petitioner has not met this criterion.

III. CONCLUSION

The Petitioner has not established eligibility in at least three of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii).[2] So he 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. In addition, 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.

[2] We conclude the Petitioner has not met 4 out of the six criteria contained at 8 C.F.R. § 204.5(k)(3(ii). Consequently, analysis of the Petitioner's eligibility under the remaining criteria would serve no legal benefit. So, we reserve the issues of the Petitioner's eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(B) and (F). *See INS v. Bagamasbad*, 429 U.S. at 25.

ORDER: The appeal is dismissed.