U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37090134

Date: APR. 28, 2025

Appeal of Texas Service Center Decision

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

The Petitioner, a construction manager and entrepreneur in the construction industry, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this 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 the record did not establish that the Petitioner was an individual of exceptional ability and that a waiver of the required job offer, and thus of the labor certification, would be 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 qualify for the underlying EB-2 visa classification, a petitioner must establish they are an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act.

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 satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. *See generally* 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual. 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 the requisite degree of expertise and will substantially benefit

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate that 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 the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[2] 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.

Id.

II. ANALYSIS

A. Exceptional Ability

The Director concluded the Petitioner met three of the six evidentiary criteria, official academic records, license to practice the profession, and membership in professional associations, but that, upon review of the evidence in its totality, had not established he is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. While we agree with the Director's ultimate conclusion, for the reasons discussed below, we disagree the Petitioner meets the membership in professional associations criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

The regulation at 8 C.F.R. § 204.5(k)(2) defines profession as "one 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."[3] The Petitioner submitted a copy of his Professional Identity Card stating he is registered with the [redacted] and the [redacted] as a Telecommunications Technician. He also provided a document entitled Decree No. 23.569 of December 11th, 1933 that provides the Brazilian provisions for the practice of the professions of engineer, architect and surveyor related to the [redacted] not the [redacted], which issued the card. Here, the Petitioner has not established or even explained the relationship, if any, between the [redacted] and the [redacted] or between a Telecommunications Technician (as listed on the Professional Identity Card) and the positions of engineer, architect and surveyor (the positions described in Decree No. 23.569). Notably, the position of Telecommunications Technician is not mentioned in the Decree No. 23.569. Without more, we cannot conclude that the Petitioner,

[2] *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Third, Ninth, Eleventh, and D.C. Circuit Courts of Appeals in concluding that USCIS' decision to grant or deny a national interest waiver is discretionary in nature).

[3] The occupations listed in this section are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

who has not demonstrated that he possesses the equivalent of U.S. bachelor's degree in the occupation, meets this criterion.[4] Thus, we withdraw the Director's determination to the contrary.

B. Final Merits Determination

Even though the Petitioner has not established that he meets three of the six evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii), we nonetheless have reviewed the record in the aggregate and agree with the Director that the record does not establish the Petitioner possesses a degree of expertise significantly above that ordinarily encountered in her field.

On appeal, the Petitioner asserts his "professional achievements and expertise not only meet but exceed the standards typically found in the construction management field." The Petitioner focuses on his "over 20 years of comprehensive experience, emphasizing [his] expertise as a Construction Manager with a strong background in both construction and telecommunications," as well as his educational background and professional certifications. The Petitioner provides the same documentation that he submitted with his response to the Director's request for evidence, including his business plan for [redacted], an expert opinion letter, recommendation letters, and income information for his other business, [redacted].

In reviewing the totality of the evidence in a final merits determination, we consider the quality of the evidence.[5] While we acknowledge the evidence demonstrates the Petitioner has education, training, experience, and a successful career in the construction industry, we agree with the Director that this evidence does not establish he possesses expertise significantly above that ordinarily encountered in the field. For example, although the Petitioner provides an expert opinion letter and recommendation letters that discuss his experience and qualifications, they provide little discussion as to how his expertise is significantly above others in the field. Here, the Petitioner has not shown how his expertise through his education, job experience, and/or professional accomplishments is significantly above that ordinarily encountered in the construction industry.

The record does not establish the Petitioner's eligibility as an individual of exceptional ability as it does not demonstrate that he meets three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) or that he has obtained a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).[6]

C. National Interest Waiver

The Petitioner has not established that he is eligible for the EB-2 classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the remaining issues, including whether he is eligible for a national interest waiver. *See INS v Bagamasbad*, 429 U.S. 24, 25 ("courts and agencies are not required to make findings on issues the decision of which is

[4] The Petitioner provided a copy of his diploma for completing the Telecommunications High School Level Technician course.
[5] *See also* 6 USCIS Policy Manual, *supra*, F.5(B)(2).
[6] *Id.*

unnecessary to the results they reached"); *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 demonstrated that he qualifies as an individual of exceptional ability under section 203(b)(2)(A) of the Act. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.