U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 37760244

Date: APR. 29, 2025

Appeal of Texas Service Center Decision

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

The Petitioner, a business consultant and entrepreneur in the field of digital marketing, 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 Service Center Operations (SCOPS) denied the petition, concluding the record did not establish that the Petitioner is 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 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 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

As indicated above, petitioners must meet at least three of the regulatory criteria for classification as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). In denying the petition, SCOPS stated, without any analysis, that the Petitioner fulfilled three of the six criteria but did not indicate which three.[3] In addition, SCOPS concluded the Petitioner did not possess a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business without providing a final merits determination. While we agree with SCOPS' ultimate conclusion, for the reasons discussed below, we disagree the Petitioner meets at least three of the criteria. On appeal, the Petitioner asserts his "expertise is above the average" and maintains he meets all six criteria.

> *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).

In support of this criterion, the Petitioner submitted a copy of his high school transcripts, which include courses such as: Portuguese, Social Studies, Science, Mathematics, Modern Foreign Language English, Physical Education, Art, and Moral and Civil Education. Notably, the Petitioner does not show how his high school diploma, which appears to reflect the equivalent of a general high school education, relates to his area of exceptional ability – business and marketing, as is required by the plain language of the regulation. Without more, we cannot conclude that the Petitioner has demonstrated he meets this criterion.

[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] In the request for evidence (RFE), SCOPS stated that the Petitioner met the criterion relating to ten years of full-time experience in the occupation. However, as will be discussed, the Petitioner has not established that he meets this criterion.

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. 8 C.F.R. § 204.5(k)(3)(ii)(B).

To meet this criterion, the Petitioner relies on a variety of documents, including registration documents for his company in Brazil, his Labor and Social Security Card from the Brazilian Ministry of Labor and Employment, and several letters of recommendation. However, the plain language of this criterion states the evidence must (1) be in the form of letter(s), (2) be from current or former employer(s), and (3) establish at least ten years of full-time experience. Here, the Petitioner has not submitted any letters from employers showing he has at least ten years of experience in his proposed occupation. Therefore, he has not established he meets 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).

In support, the Petitioner provides The Articles of Association for his company in Brazil and his Labor and Social Security Card from the Brazilian Ministry of Labor and Employment. The Petitioner asserts this "evidence collectively confirms that [he] possess[es] the necessary qualifications, certifications, and legal standing to practice [his] profession, meeting the requirements for this criterion." The Petitioner has not, however, established that either of these documents is a license or certification for a particular profession or occupation. For instance, the Labor and Social Security Card contains records of his employment but is not specific to any particular profession or occupation. Thus, the Petitioner has not established eligibility under this criterion.

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).

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*.[4] On appeal, the Petitioner submits the same documentation he previously provided with the initial petition and in response to the RFE, including a declaration from his accountant related to his business in Brazil and a printout from the Salario BR website.

The declaration from his accountant states that the Petitioner "obtained in the period below the following withdrawals" and listed his role as "the director" of the company:

2011 – BRL 148.165,00	2016 – BRL 211.195,00
2012 – BRL 174,820,00	2017 – BRL 235.123,00
2013 – BRL 185.320,00	2018 – BRL 258.859,00
2014 – BRL 192.185,00	2019 – BRL 279.365,00

First, it is unclear what is meant by "withdrawals." For example, did the withdrawals cover all of the payroll, does it reflect only money paid directly to the Petitioner as remuneration or does it reflect the company's net profits? Second, the accountant's declaration is not substantiated with independent

[4] *See* 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

and objective evidence, such as invoices, payroll records, bank statements, and/or tax returns. Without more details regarding the figures provided, we are unable to determine their significance.

Further, the Salario BR website screenshot provides information for the position of marketing manager and is valid from June 5, 2023 to June 4, 2024 (more than 3 years after the most recent information provided by the accountant) and lacks sufficient information or details to verify the applicability and accuracy of the stated salary information. For instance, the screenshot lacks such critical information as how the data was compiled, the statistical significance of the data, and other indications of the reliability and comparability of this data to the Petitioner's occupation. Here, the Petitioner has not established that the information from Salario BR for a marketing manager is sufficiently similar to his position as owner and director of his company and does not reflect any of the years covered by the accountant's declaration and, thus, it is not a proper basis for comparison.

For all the foregoing reasons, the Petitioner has not established that he meets this criterion.

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

This criterion requires evidence of "membership in professional associations." 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."[5] On appeal, the Petitioner highlights his memberships with Associatec and Advertising Professionals Association (APP). However, the record does not include evidence such as the membership requirements, to demonstrate that Associatec or APP are professional associations within the meaning of the regulations at 8 C.F.R. § 204.5(k)(2) and (3)(ii)(E). As such, the Petitioner has not demonstrated he meets this criterion.

As the Petitioner has not met any criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(E), we need not determine whether he satisfies the remaining criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) as he would still not meet at least three of the six criteria as required. Thus, we also 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).

ORDER: The appeal is dismissed.

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