U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32390658

Date: JUL. 17, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in the information technology industry, seeks classification as a member of the professions holding an advanced degree or of exceptional ability. *See* 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 EB-2 immigrant 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v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).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 that the record did not establish that that the Petitioner qualified for classification as an individual of exceptional ability and 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 (AA)O 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 petition 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
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> (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. ANALYSIS

The Petitioner is an entrepreneur in the information technology industry seeking to demonstrate eligibility in the EB-2 classification based on their exceptional ability.[1] A petitioner must demonstrate expertise significantly above that ordinarily encountered to show that they are of exceptional ability. We agree with the Director's conclusion that the Petitioner is not of exceptional ability and therefore categorically ineligible for the 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). Specifically, the Director concluded that the Petitioner demonstrated they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(A)[2], (B),[3] and (E) but, upon final examination of the record in totality, did not demonstrate a degree of expertise significantly above that ordinarily encountered in their field to merit a determination of exceptional ability.

Whilst we agree with the Director's conclusion the Petitioner did not demonstrate eligibility for EB-2 permanent immigrant classification, we do so on a different basis. We conduct a final merits determination only after determining a Petitioner met three of the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). We hereby withdraw the Director's final merits determination. Upon de novo review, we conclude 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 because the Petitioner has not demonstrated that they met at least three of the six threshold criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) for the reasons set forth below.

> *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 certifications and individual course completion certificates issued by corporate entities such as VMWare, Citrix, and Windows in discrete subjects. The Petitioner asserts that these are evidence of certifications required to perform the duties they intend to undertake in their proposed endeavor. 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 20 certifications and individual course completion certificates the Petitioner submitted into the record are required to perform the duties the Petitioner intends to undertake in their proposed endeavor. The Petitioner proposed to own and operate an information technology consulting entity in the area of cloud solutions. On appeal, the Petitioner asserts that their ownership and operation of the information technology consulting entity would require them to perform duties requiring the certifications they received and courses they completed. According to

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[1] The Petitioner does not claim eligibility for, nor do they submit evidence seeking, classification in the EB-2 permanent immigrant category as an advanced degree professional.

[2] We conclude the Petitioner has submitted sufficient evidence in the form of an official academic record showing they have earned a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning related to the area of exceptional ability to fulfill meeting the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(A).

[3] We conclude the Petitioner has submitted sufficient evidence demonstrating at least ten years of full-time experience in the occupation they seek to fulfill meeting the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(B).

the business plan the Petitioner submitted, the Petitioner's entity would provide consulting services in the architecture, implementation, and automation design of cloud solutions. But it is not readily apparent from the record that certifications in VMWare, Citrix, and Windows are a prerequisite to the architecture, implementation, and automation design of cloud solutions. Nor are they, as the Petitioner themself states on appeal, a prerequisite to the ownership and operation of the information technology cloud services consulting entity the Petitioner proposed as a conduit for their endeavor. Or in other words, the evidence in the record does not demonstrate the certifications and course completions evidenced by the 20 certificates the Petitioner submitted into the record are related to performing the overarching duties of the Petitioner's profession or occupation. The record does not indicate what standards the certifications and course completions reflect the Petitioner meets and how they relate to the endeavor they propose to accomplish in the United States. For example, it is not clear how professional certification in VMWare, administration of Citrix XenApp and XenDesktop or Window Server administration or virtualization relates to the architecture, implementation, and automaton design of cloud solutions. Nor does the record indicate whether the certifications and course completions 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.

> *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 they have commanded a salary, or other remuneration for services, which demonstrates exceptional ability. In support, they submitted their 2022 Brazilian income tax statement, an article regarding the correlation that salaries increase by each IT certification earned, and a Brazilian salary survey for "information technology test analyst." On appeal, the Petitioner asserts that their "high earnings are a clear indication of success in the field which demonstrates [their] exceptional ability." The Petitioner contends that their 2022 salary as an employee of their previous employer when compared to the average salary in Brazil for an IT professional also illustrates their exceptional ability. Essentially, the Petitioner contends their wages earned from their successful and competent execution of duties in the information technology field demonstrates exceptional ability. But 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 either as an entrepreneur or a consultant on cloud services in the information technology industry. There is no evidence in the record which would permit us to evaluate the duties an entrepreneur of exceptional ability or an information technology consultant of exceptional ability on cloud services would perform and their remuneration as a point of comparison. And the broad job description of duties contained in the salary survey the Petitioner submitted did not readily correspond to the description of services and duties the Petitioner had described for their proposed endeavor. So, we agree with the Director 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 their exceptional ability.

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

We disagree with the Director's conclusion that the Petitioner met this criterion and hereby withdraw it. The Petitioner's membership in the Brazilian Computer Society (Sociedad Brasileira de Computação) is not sufficient evidence of membership in a professional association.

The evidence the Petitioner submitted establishes the Petitioner's membership in the association. But it does not clarify the requirements or eligibility criteria for membership. Additionally, the Petitioner asserts that membership in the Brazilian Computer Society is open to "students, teachers, professionals, researchers and enthusiasts." The evidence in the record and the Petitioner's assertions do not indicate that a bachelor's degree is a minimum requirement for membership as a professional in the association when membership is open to "enthusiasts" in the field. So, we are unable to evaluate whether membership in the association is reserved for professionals in the field of information technology.

And even if the organizations did require members of the association to have bachelor's degrees in related fields required to enter the profession, the Petitioner would not be eligible for membership because they have not demonstrated that they have earned a bachelor's degree in their field such that they could enter the profession and qualify for membership in the relevant association. The record reflects the Petitioner has the single source equivalent of a U.S. associates degree and a post graduate certificate.

So, the evidence in the record does not materially, relevantly, or probatively establish that the associations the Petitioner is a member of are professional association as that term is contemplated in the regulations, and 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 support letters/letters of recommendation, award certificates, professional certifications, evidence of seminar participation, to document the recognition of their achievements and significant contributions to their field.[4]

The evidence the Petitioner submits does not meet the standard of proof because it does 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 or significant contributions should show expertise significantly above that ordinarily encountered in the field.

The record does not adequately support the Petitioner's assertion that their "achievements and significant contributions" were recognized as significantly above those ordinarily encountered in their

[4] While we may not discuss every document submitted, we have reviewed and considered each one.

industry or field. The Petitioner submitted numerous letters recounting their previous employment experiences. The Petitioner contended that these descriptions of their previous employment described the achievements and significant contributions they were credited with demonstrating their exceptional ability. The letters the Petitioner submitted simply describe work assignments and the realization of corporate objectives by the Petitioner. But they do not describe how the end result of work assignments, laudable and valuable as it might be to the employer and their clients, was indicative of the Petitioner's achievements and significant contributions above that ordinarily encountered in their field. For example, a letter from Mr. [redacted] describes the allocation of a "challenge" to the Petitioner to set up a contingency for applications running on Microsoft Cluster in the main data center. But the writer does not adequately establish the nature of this "challenge" and how its resolution by the Petitioner was indicative of an achievement or significant contribution outside that ordinarily encountered in the field. In another letter, [redacted] credited the Petitioner's work with a cost savings of approximately $1,000,000. Whilst [redacted] described this as a distinguishing factor for the Petitioner's standing amongst other employees at the employer, it is not clear how a cost savings of $1,000,000 is an achievement or significant contribution over and above that ordinarily encountered in the field when the objective of the [redacted] project was to adjust undersized virtual machines in the environment for optimal use. All the letters the Petitioner submitted into the record, in sum, reflect that the Petitioner is a seasoned professional whose competence and reliability as an employee, consultant, colleague, or partner is valued and appreciated. But the letters, along with the remaining evidence in the record, did not evidence any achievement and significant contributions significantly above that ordinarily encountered in the field required to demonstrate the Petitioner's exceptional ability.

The Petitioner's awards indicate recognition from their employer. But it is not evident in the record whether the awards recognize achievements or significant contributions not ordinarily encountered in the field. The awards appear to be institutional recognitions related to the performance of job duties in a matter that exceeded the employer's expectations. However, the evidence in the record does not demonstrate that exceeding an employer's expectations, as demonstrated here, is an achievement or significant contribution above that ordinarily encountered in the field.

The Petitioner also refers to the 20 certifications and course completion certificates they have collected over the course of their career as tending to reflect their exceptional ability. But these certifications and course completion certificates reflect the acquisition of professional skills and competencies. They do not demonstrate the exceptional ability of the Petitioner because it is not adequately established how the acquisition of the professional skills and competencies described by the certificate documents reflect an achievement or significant contribution not ordinarily encountered in the Petitioner's field.

Finally, the Petitioner's participation in seminars reflects the Petitioner's ability to "educate and inform" in their field. However, the record does not reflect the metrics utilized to select speakers and whether those metrics selected speakers based on their achievements or significant contributions or if selection as a speaker was a recognition of the speaker's achievement or significant contribution to the field which is not ordinarily encountered in the field.

So, we conclude that the evidence does not support the Petitioner's eligibility under 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). So, 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. 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.

ORDER: The appeal is dismissed.