U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-D-P

DATE: MAY 25, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an entrepreneur, seeks classification as a member of the professions holding an advanced degree or as an individual 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 normally attached to this 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.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not qualify as a member of the professions holding an advanced degree, and that he had not established that a waiver of a job offer requirement would be in the national interest.

The matter is now before us on appeal. In his appeal, the Petitioner indicates that he is seeking classification as an individual of exceptional ability rather than a member of the professions holding an advanced degree. He maintains that he is eligible for a national interest waiver and submits a statement and additional evidence.

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 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences arts or business. Because this classification normally 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.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General[1] may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[2] *Dhanasar* clarifies that, after EB-2 eligibility as an advanced degree professional or individual of exceptional ability has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national 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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the

[1] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

[2] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate 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. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate 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.[3]

II. ANALYSIS

A. Visa Preference Category

The Petitioner indicated on his Form I-140, Immigrant Petition for Alien Worker, Part 2, that he is seeking second preference classification as a "member of the professions holding an advanced degree or an alien of exceptional ability" along with a national interest waiver. In a letter accompanying the petition, Counsel stated that the Petitioner is "seeking EB-2 classification as an alien of extraordinary ability," that he has "demonstrated extraordinary ability and sustained acclaim in business," and that he "has achieved a level of expertise indicating that he is one of the small percent who has risen to the very top of his field."[4] Counsel's discussion of the extraordinary ability standards, relating to Section 203(b)(1)(A), appears to be inconsistent with the Petitioner's indication on his Form I-140 that he is seeking a national interest waiver as a member of the professions holding an advanced degree or an individual of exceptional ability. Based on the Petitioner's election on the Form I-140, we will adjudicate the petition in accordance with Section 203(b)(2) of the Act as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business.

In his appeal, the Petitioner states that he is seeking an immigrant visa "based upon his exceptional ability in the business world," and he maintains that he meets the elements of the national interest waiver described in *Dhanasar*. He does not, however, specifically address how he meets the eligibility requirements for the underlying visa classification.

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[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] Section 203(b)(1)(A) of the Act makes visas available to foreign nationals with extraordinary ability in the sciences, arts, education, business, or athletics as demonstrated by sustained national or international acclaim and achievements that have been recognized in the field through extensive documentation. The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). Individuals who qualify for this classification are not required to have a job offer or to obtain a labor certification.

B. Advanced Degree Professional

In the initial submission, counsel for the Petitioner stated that "[the Petitioner] has a Master's Degree in Business Administration from the in The Director issued a request for evidence (RFE) asking for a copy of the Petitioner's official academic record and degree as evidence that the Petitioner had earned an advanced degree as of the date of filing. Alternatively, the RFE informed the Petitioner that he could provide evidence that he has a U.S. baccalaureate degree or foreign equivalent degree along with evidence from current or former employers documenting five years of progressive post-baccalaureate experience in his field of specialty. The Petitioner did not provide the requested evidence. However, his response to the RFE included an ETA Form 9089, dated February 27, 2016, indicating that the highest level of education that he had achieved was high school. On appeal, the Petitioner confirms that he has not yet attained an advanced degree and states that he is currently enrolled in a Master's degree program in business administration at the As such, we find that the Petitioner has not established his eligibility as a member of the professions holding an advanced degree at the time of filing.

C. Exceptional Ability

In the initial filing, the Petitioner explained that he is a "chief executive/entrepreneur" and he intends to "use his broad experience as a successful entrepreneur to create business opportunities for himself and US workers. He will transfer his wealth of knowledge of developing business in the harshest of climates to the US environment." He further explained that he plans to "replicate his success in Nigeria to US markets with positive effect on employment and renewable energy systems." As noted above, the Petitioner states on appeal that he is seeking classification as an individual with exceptional ability in business.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six evidentiary criteria, of which an individual must meet at least three in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (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;

(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.

Only those who demonstrate "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as individuals of exceptional ability. 8 C.F.R. § 204.5(k)(2).

As discussed below, a review of the record indicates that the Petitioner does not meet at least three of the relevant evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii).

> *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).

The Petitioner has not met this criterion. As discussed above, the Petitioner's ETA Form 9089 indicates that high school was his highest level of education completed. While the Petitioner indicates that he is currently enrolled in a Master's degree program in business administration at the the Petitioner has not stated whether he obtained an undergraduate degree prior to enrolling in the Master's degree program. As he had not completed his degree at the time of filing, or provided evidence that he attained any other educational degree, diploma, certificate, or similar award relating to his field, he is not eligible for 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).

The Petitioner did not submit letters from prior employers. He did provide a December 2015 job offer letter for a sales consultant position with This letter does not address the Petitioner's previous full-time experience in business.

> *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 did not address this criterion or provide evidence of his eligibility.

> *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 did not address this criterion or provide evidence of his eligibility.

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

The Petitioner did not address this criterion or provide evidence of his eligibility.

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 explains that he "has created five extremely successful businesses in information and communication technology, renewable energy systems, online travel and reservation systems, turnaround innovation and business counseling." While he states that through these companies, he has provided "nine billion" dollars of energy services to the "highest level of government and the private sector," the record does not support this statement. The Petitioner submitted corporate formation documents and copies of Nigerian government contracts with and It is unclear how these companies relate to the Petitioner as his name does not appear on most of the documents. The memorandum of association for and the articles of association for do list the Petitioner as "director," however, the record does not contain evidence that the Petitioner's role in these companies led to recognition for achievement and contributions to the energy industry.

Additionally, while the Petitioner submitted an ETA Form 9089 attesting that he was employed by as "head of finance and administration" from February 2012 until February 2015, the record does not show that his employment garnered recognition for achievements and significant contributions to the industry. The Petitioner has not provided letters or testimony from interested parties attesting to his achievements or significant contributions. As the Petitioner has not provided evidence that he received recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations as of the petition's filing date, he has not established that he meets this regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

In sum, the evidence does not establish that the Petitioner meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). Further, a review of the record in the aggregate does not support a finding that he has achieved the level of expertise required for exceptional ability classification.

D. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. While the Petitioner asserts on appeal that he meets the regulatory framework articulated in *Dhanasar*, in order to qualify for a national interest waiver, the Petitioner must first show that he qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. The record does not demonstrate that the Petitioner is an advanced degree professional and, as discussed above, he has not shown that he is eligible for classification as an individual of exceptional ability. As the

Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot.

III. CONCLUSION

The Petitioner has not demonstrated that he qualifies for classification as an individual of exceptional ability under section 203(b)(2)(A) of the Act.

ORDER: The appeal is dismissed.

Cite as *Matter of D-D-P-* ID# 457568 (AAO May 25, 2017)