U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34407050

Date: OCT. 29, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a computer systems analyst, seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 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 Petitioner did not establish that he was an individual of exceptional ability.[1] In addition, the Director concluded the Petitioner did not demonstrate his eligibility for a national interest waiver. The Petitioner later filed a combined motion to reopen and reconsider that the Director dismissed. 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 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. Section 203(b)(2)(B)(i) of the Act. 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.

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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. *See* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual. If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that

[1] The Petitioner did not claim to be nor did the record show he held an advanced degree.

they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field. *Id.*

II. ANALYSIS

In denying the petition, the Director determined that the Petitioner did not meet any of the criteria for exceptional ability, but later in dismissing the combined motion to reopen and reconsider they concluded he established eligibility under the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), related to him submitting an official academic record showing that he held a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability. However, in denying the petition and dismissing the later motion, the Director concluded that the Petitioner did not demonstrate he met the following asserted criteria at: 1) 8 C.F.R. § 204.5(k)(3)(ii)(B), involving 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; 2) 8 C.F.R. § 204.5(k)(3)(ii)(D), related to evidence that the individual has commanded a salary, or other remuneration for services, which demonstrates exceptional ability; and 3) 8 C.F.R. § 204.5(k)(3)(ii)(F), specific to evidence of recognition for achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations.

On appeal, the Petitioner contends he demonstrated his eligibility under the criteria discussed above, and further asserts that he also established his eligibility under the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E), specific to evidence of membership in a professional association.

> *Evidence that the individual has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D)

In the petition, the Petitioner stated he would be employed in the United States as a computer systems analyst for $99,270 per year and that he was employed abroad as an information technology consultant for over 18 years leading "a series of critical Systems implementation projects in Brazil for Multinational companies." In support of the petition, the Petitioner submitted a letter from his accountant in Brazil stating that he earned: R$201,200 in 2018, R$233,000 in 2019, and R$487,390 in 2020 for "remuneration of his profession in the Area of Information Technology."[2] The accountant further stated that "this profession has a base salary of R$102,180…therefore, we can affirm that [the Petitioner], has received income 200.58% above the average salary of his profession as a technical consultant in Information Technology." In addition, the Petitioner provided information from a website reflecting the average salaries of various information technology professions in Brazil for 2022. The website listed the average monthly salaries for over 230 information technology positions, reflecting monthly salaries ranging from R$4460 to B$14,000 per month.

In response to the Director's request for evidence (RFE), the Petitioner submitted another letter from the same Brazilian accountant indicating that the Petitioner earned the following: R$487,390 in 2020, R$269,694.01 in 2021, and R$523,000 in 2022 for his work in "Information Technology." The accountant stated that since the base salary of a "technical consultant in Information Technology" was

[2] The petition was filed in late November 2022.

R$102,180 annually, the Petitioner received an average income 317.59% above this amount. The Petitioner further provided Brazilian income tax documentation for each year reflecting that the above stated income was received during each year as "exempt income and non-taxable" and as "profits and dividends received."

In support of these assertions, the Petitioner also submitted a website printout reflecting the average salary of "General Directors of Companies and Organizations" for 2021, showing that this profession had a monthly average of R$18,629.05 monthly (or an annual average of approximately $223,548.60 annually) in Brazil. In support of the combined motion to reopen and reconsider, the Petitioner asserted that the Petitioner "earned an annual income…approximately 235% higher than the average earnings of the highest paid professionals in his industry," reasoning that "according to Glassdoor, the salary for a consultant in the field of information technology [in Brazil] with over 15 years' experience is approximately BRL 156,000 [annually]." On appeal, the Petitioner again points to this evidence and contends that his "substantial earning power clearly illustrates his commanding position within his profession and is a testament to [the Petitioner's] exceptional abilities, as such a significantly higher salary would not be accorded to an average individual."

Upon review, the Petitioner has not sufficiently established that he commanded a salary, or other remuneration for his services, demonstrating exceptional ability. First, the Petitioner provided varying assertions regarding his stated profession, indicating in the petition he would work as a computer systems analyst and that he worked abroad as an information technology consultant, a technical consultant in information technology, and even as a general director of a company. The Petitioner submitted documentation reflecting that there were over 230 positions within the information technology field, all with varying average monthly and annual salaries. As such, it is not clear within which position the Petitioner worked in the information technology field in Brazil, nor the annual salary considered relevant for someone working in his role and his level of experience.

For instance, in support of the petition and in response to the RFE, the Petitioner compared his salary to that of a "consultant in information technology" at an annual salary of R$102,180, while in support of the later motion and now on appeal, asserted an applicable average salary for his claimed profession and experience as R$156,000 per year. However, the provided printout from Glassdoor does not indicate how experience impacts the average annual salary of an information technology worker, and it only provides general information on the average salaries of all information technology workers, rather than a specific position within that field. As such, the Petitioner has not sufficiently demonstrated his profession abroad and the applicable average annual salary given his level of experience in Brazil, and in turn, whether his income demonstrates exceptional ability.

Further, it is also not sufficiently clear for what the Petitioner received compensation abroad, namely, the income reflected in his Brazilian tax returns. As discussed, the Petitioner's Brazilian tax returns showed income for "exempt income and non-taxable" and as "profits and dividends received." This would appear to indicate that the Petitioner received income from his Brazilian consulting company; however, it is not sufficiently clear that this income represented salary or renumeration for a particular information technology profession, or revenue and/or profits received from his business venture or compensation for a role as a general director of a company (another profession cited by the Petitioner). The Petitioner must resolve inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, for the foregoing reasons, we agree with the Director that the submitted evidence does not establish that the Petitioner commanded a salary demonstrating exceptional ability and eligibility under the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

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

The Petitioner did not assert or submit evidence in support of the petition, in response to the RFE, or on motion indicating that he was eligible under this criterion. Now, on appeal, the Petitioner submits evidence it contends establishes that he "has fulfilled the requirements for professional membership in the world's largest computing society." The Petitioner states that we "shall accept new evidence on appeal, as the evidence need not be new or previously available."

However, the Petitioner was put on notice and given a reasonable opportunity to provide evidence to demonstrate he qualified under this criterion; as such, we will not consider it for the first time on appeal. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial"). Therefore, the Petitioner has not established this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F).

The Director concluded the Petitioner did not meet this criterion reasoning that submitted letters of support did not reflect he received recognition for achievements and significant contributions to the field of computer systems analysts or information technology consultants. In the initial denial decision, the Director indicated that while the provided letters reflected the Petitioner's skills and they were likely commendable, they did not substantiate how he received recognition for achievements and significant contributions to his industry or field.

On appeal, the Petitioner again points to the provided "letters of recommendation" and claims that these reflect his recognition for achievements and significant contributions. For instance, the Petitioner emphasizes a letter from an IT professional services executive in Brazil emphasizing the Petitioner's "exceptional ability to stay current with industry trends and his financial acumen, highlight his capability to start ventures without outside investment." Likewise, the Petitioner discussed a letter from an IT infrastructure leader noting the Petitioner has a "high level of skill as an IT consultant and…exceptional ability to provide services and achieve professional goals," while another letter from an information technology consulting company in Brazil highlighted his "contributions to technology and information management, particularly in enhancing performance, establishing organizational standards, and identifying solutions for performance issues." Lastly, the Petitioner points to another letter from a colleague who worked with him on a "critical project for one of Brazil's largest construction companies." In this letter, the Petitioner's colleague "praised [the Petitioner's] role as an independent consultant and technician, noting that his outstanding performance was significantly superior to that of other technicians."

We agree with the Director that the provided "letters of recommendation" do not sufficiently demonstrate the Petitioner's recognition for achievements and significant contributions to his field. First, the letters largely highlight the Petitioner's general skills and capabilities rather than his achievements and significant contributions to his field; for example, discussing his "capability to start ventures," his "high level of skill," his ability to "achieve professional goals," and his performance being "significantly superior to that of other technicians." However, even if we accept these assertions, these capabilities, skills, and his ability to perform his job are not clearly defined achievements or contributions to the field.

The Petitioner did not explain in detail and document his contributions to technology and information management in the field, how he enhanced performance in the industry, or how he significantly impacted organizational standards throughout the field. For instance, the letter from the IT infrastructure leader with whom the Petitioner worked stated that he "developed new techniques…unlike other technological techniques applied before" indicating these "significantly affected the field of Oracle Applications and Database, evidenced by more than 40 projects and citations of his work by the broad community in the field." The IT infrastructure leader, however, did not explain in detail the techniques developed by the Petitioner, how they were different than those applied before, how they significantly impacted the field or industry and is there no documentary support for the assertion that his work was widely cited in his field. In sum, the letters describe the Petitioner as a valued employee and co-worker, making positive contributions to his client's operations. However, these letters do not indicate that the Petitioner was recognized for his achievements and significant contributions to his industry or field.

Because the Petitioner did not show he meets the criteria under 8 C.F.R. § 204.5(k)(3)(ii)(D), (E), or (F), no purpose would be served in reviewing if he meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B). Even if he meets this criterion, he cannot meet three criteria as required.

For the reasons set forth above, the evidence does not establish that the Petitioner satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) and achieved the level of expertise required for exceptional ability classification. In addition, because he has not satisfied at least three criteria, we will not disturb the Director's final merits determination the Petitioner did not demonstrate, in the totality, that he is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. Furthermore, as the Petitioner has not met the threshold requirement for this classification, an analysis of the Director's conclusions as to the Petitioner's eligibility for a national interest waiver would also serve no meaningful purpose.

ORDER: The appeal is dismissed.