U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 33948218

Date: SEP. 23, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a software engineer, 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 immigrant 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 that the Petitioner did not qualify for the underlying EB-2 classification as an individual of exceptional ability and he had not established 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

## 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.

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).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must initially submit documentation that satisfies at least three of six categories of evidence listed at 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

[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).

eligibility for this classification. *See* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual. In the second part of the analysis, officers should conduct a final merits determination to decide whether the evidence in its totality shows that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. *Id.*

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884 (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 the proposed endeavor; and
- On balance, waiving the requirements of a job offer and a labor certification would benefit the United States.

*Id.* at 889.

## II. ANALYSIS

The Petitioner is a software engineer with an associate degree in information technology. He proposes to bring his company, [redacted] and his management system software, created to facilitate logistics of vehicle repair shops, to the United States. The Petitioner explains that "the system developed by [the Petitioner] will be the connection between the insurer and the customers, managing the process from budgeting, scheduling, repairing, and all processes until the delivery of the vehicle to the final customer."

### A. Eligibility for EB-2 Classification

Because the Petitioner has not indicated or established that he qualifies as a member of the professions holding an advanced degree, he 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). The Director concluded that the Petitioner fulfilled four out of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F),[3] but in the final merits determination, he did not show a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

After reviewing the evidence in the record, we will withdraw the Director's conclusions relating to the license criterion under 8 C.F.R. § 204.5(k)(3)(ii)(C) and the evidence of recognition and significant contributions to the industry or field criterion under 8 C.F.R. § 204.5(k)(3)(ii)(F).

[2] *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Third, Ninth, Eleventh, and D.C. Circuit Courts to conclude that the national interest waiver determination is discretionary in nature).

[3] The Director's determinations regarding these specific criteria are found in the request for evidence (RFE) issued on December 28, 2023.

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) requires "[a] license to practice the profession or certification for a particular profession or occupation." The Director indicated in the RFE that the Petitioner submitted a copy of the "IT company registration, along with the Certidao Nacional de Pessoa Juridica [National Registry of Legal Entities]." However, the Director did not analyze how these documents, despite demonstrating that the Petitioner's company is registered in Brazil, qualify as a license to practice the profession as a software engineer or as an entrepreneur.

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires "evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." Here, the Director concluded that this criterion has been met without analyzing any evidence.

We further note that, in response to the Director's RFE, the Petitioner submitted evidence for the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) regarding how he has commanded a salary that demonstrates his exceptional ability. However, the Director did not analyze the evidence or make a determination under this criterion.

An officer must fully explain the reasons for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

As the Director did not discuss these evidentiary deficiencies in the RFE and the Petitioner had not the opportunity to address them, we will remand this matter to the Director for further evaluation on whether the Petitioner meets at least three of the required six criteria. On remand, the Director should analyze the evidence in the record and provide sufficient explanation on whether the Petitioner has satisfied the criteria mentioned above.

B. National Interest Waiver

The Director determined that the Petitioner did not establish that he satisfied any of the three prongs set forth in the analytical framework established in *Dhanasar*. On appeal, the Petitioner asserts that the Director incorrectly identified his proposed endeavor, contrary to the evidence of record. We agree with the Petitioner and withdraw the Director's decision regarding the Petitioner's eligibility for the national interest waiver as it is insufficient for review.

In addressing the endeavor's national importance, the Director incorrectly observed that the Petitioner's endeavor as "a Corporate Lawyer Specialized in the Finance and Stock Market Regulations." The Director's mischaracterization of the Petitioner's endeavor as a corporate lawyer continued throughout the first prong analysis. For example, the Director misquoted the Petitioner's professional plan as championing "[his] experience and track record as a corporate lawyer" and evaluated "the importance of corporate lawyers in contributing toward economic growth and international competitiveness." Similarly, in adjudicating the *Dhanasar*'s second prong, the Director erroneously referred to the field of endeavor as "the airline industry," which is unrelated to the Petitioner's filing.

Therefore, we conclude that the Director erred in identifying the proposed endeavor and did not consider the Petitioner's evidence as submitted in the record. On remand, the Director should apply the first and second prong factors in *Dhanasar* to the facts contained in the record to determine whether the Petitioner's proposed endeavor as a software engineer and an entrepreneur of his own company, has national importance and whether he is well positioned to carry out such endeavor.

As to the third prong of *Dhanasar*, the Director stated the law and the relevant considerations in performing the third prong's balancing analysis but did not sufficiently identify or discuss the evidence they weighed in balancing those considerations or meaningfully address the Petitioner's specific claims regarding his eligibility under the third prong. On remand, the Director should re-evaluate the Petitioner's claims and evidence under the third prong of the *Dhanasar* framework in light of the revised analysis of the first two prongs per the discussion above.

Overall, the erroneous references to the nature of the Petitioner's proposed endeavor and the lack of discussion of the specific evidence in the record, make it unclear whether the Director fully analyzed the evidence submitted by the Petitioner and based the decision solely on that evidence. Therefore, we will withdraw the decision and remand the matter to the Director to review the entire record and determine whether the Petitioner has sufficiently identified his proposed endeavor and whether he has established eligibility under the *Dhanasar*'s three prongs.

## III. CONCLUSION

This matter will be remanded to the Director to determine if the Petitioner has met at least three of the regulatory criteria for the underlying EB-2 classification as an individual of exceptional ability and has established his eligibility set forth in the *Dhansar* framework. The Director may request any additional evidence considered pertinent to the new decision.

**ORDER:** The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.