U.S. Citizenship and Immigration Services

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

In Re: 33667937

Date: SEP. 30, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a nurse, seeks classification as an individual of exceptional ability in the sciences, arts or business. *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.

The Director of the Nebraska Service Center denied the petition, concluding that the record does not establish that the Petitioner qualifies for classification as an individual of exceptional ability. The Director further concluded that the Petitioner 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 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 a member of the professions holding an advanced degree or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2) of the Act. For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii) for an elaboration of these criteria. Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[1] We then conduct a final merits

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

determination to decide whether the evidence in its totality shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. *See* 8 C.F.R. § 204.5(k)(2).

If a petitioner demonstrates eligibility for the underlying EB-2 classification, 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, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that 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.

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

## II. ANALYSIS

The Director determined that the Petitioner did not establish that he is an individual of exceptional ability, and as such did not establish that he qualifies for the underlying EB-2 classification.[3] The Director further determined that the Petitioner did not establish eligibility under the first, second, and third prongs of the *Dhanasar* framework and therefore concluded that he is not eligible for a national interest waiver.

The Director concluded that the Petitioner submitted evidence that met four of the six exceptional ability criteria[4] at 8 C.F.R. § 204.5(k)(3)(ii):

- (A) An official academic record showing that the individual has an academic degree related to the area of exceptional ability.
- (B) Evidence in the form of letter(s) from current or former employer(s) showing that the individual has at least ten years of full-time experience in the occupation for which he or she is being sought.
- (C) A license to practice the profession or certification for a particular profession or occupation.
- (E) Evidence of membership in professional associations.

Accordingly, the Director proceeded to a final merits analysis in which he determined that, because the Petitioner did not have a degree of expertise significantly above that ordinarily encountered in the field, he did not qualify for the exceptional ability classification. 8 C.F.R. § 204.5(k)(2). On appeal, the Petitioner asserts, without further explanation, that the Director applied a stricter standard of proof

[2] *See also 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).

[3] The record does not establish, and the Petitioner does not claim, that he qualifies as an advanced degree professional.

[4] The Director also found that the Petitioner did not meet the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D) or (F).

than that of preponderance of the evidence[5] and "did not give due regard" to the evidence submitted. The Petitioner also asserts that USCIS "erroneously denied" the petition and "imposed novel substantive and evidentiary requirements beyond those set forth in the regulations." The Petitioner, however, does not identify any unusual requirements imposed, nor does the Petitioner specify how the Director erred or what factors in the decision were erroneous. This alone is grounds for dismissal. An appeal must specifically identify any erroneous conclusion of law or statement of fact in the unfavorable decision. 8 C.F.R. § 103.3(a)(1)(v). Nevertheless, while we disagree with parts of the Director's analysis, for the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated that he qualifies for the EB-2 classification as an individual of exceptional ability.

One of the aspects of the Director's analysis with which we disagree is the determination that the Petitioner has at least ten years of employment in his field. The record includes several letters listing the dates of the Petitioner's employment from various employers; however, only two of these letters describe his job duties and affirm his full-time employment, which, together, establish that he was employed full-time in his field for a period of about three years. Although the total time referenced in the submitted letters exceeds ten years, the remaining letters merely list purported dates of employment and do not specify whether he was employed full- or part-time or what his job duties entailed.[6] The Petitioner has not shown that the length of his employment experience in his field demonstrates that he has acquired a degree of expertise exceeding that of others in the field. We withdraw the Director's conclusion concerning the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

We also disagree with the Director's determination that the Petitioner established his membership in professional associations. The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Accordingly, a professional association is one which requires its members to be members of a profession as defined in the regulation. While the record includes documentation of his membership with an organization called the Federal Nursing Council, it does not include evidence showing that membership requires at least a bachelor's degree or its foreign equivalent. Further, as stated previously, the record shows that the Petitioner has obtained only a two-year degree. The Petitioner also submitted documentation showing that he has been a member of the National Association of Healthcare Assistants since May 2023. As this latter membership post-dates the filing date of his petition, which was filed in November 2022, we will not consider this evidence.[7] Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1). Even if his membership pre-dated the filing date of his petition, the documentation of the association's mission and history does not reference any requirements related to attainment of a bachelor's degree or its foreign equivalent, and the record shows that the Petitioner has obtained only a two-year degree. The record does not establish that either of these organizations qualifies as a professional association for EB-2 classification purposes and, therefore, evidence of the Petitioner's membership does not serve

[5] *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place).

[6] *See* 8 C.F.R. § 204.5(g)(1) (stating that evidence relating to qualifying experience shall be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties).

[7] *See Matter of Izummi*, 22 I&N Dec. at 175 (stating that a petition cannot be approved at a future date after the self-petitioner becomes eligible under a new set of facts).

to demonstrate a level of expertise in his field. We withdraw the Director's conclusion concerning the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

Because the Petitioner has not established that he meets at least three of the evidentiary categories under 8 C.F.R. 204.5(k)(3)(ii), he has not met the initial requirement to demonstrate his eligibility as an individual of exceptional ability. Even if he had established his eligibility under three of the criteria—which he has not—he has not established that he has a degree of expertise significantly above that ordinarily encountered in the field.

The Petitioner seeks to operate a nursing home facility in the United States as an individual of exceptional ability. On appeal, the Petitioner submits a brief in which he asserts that he has established his eligibility for the underlying EB-2 classification as well as a national interest waiver. His argument for his eligibility includes the following:

> [The Director's] assessment fails to recognize the cumulative impact of his educational background combined with his professional experience and specialized training. The Appellant's educational achievements, when viewed in conjunction with his professional accomplishments, contribute to a depth of expertise that is significantly above the standard encountered in the field.
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> . . .
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> The certificate from the Regional Nursing Council and [his] professional memberships are indicative of his recognized competence and ongoing commitment to professional development within his field. These credentials support the assertion of his exceptional ability by demonstrating his engagement with advanced practices and standards in nursing and healthcare management.

The Petitioner's assertions here are not sufficiently corroborated by the evidence of record. The Petitioner submitted documentation demonstrating that he has two-year technical nursing degree from the [redacted], a diploma for a nurse specialization course from the [redacted], a Nurse Technician Certificate from the [redacted], and additional certificates showing that he completed training related to topics such as first-aid and the application of medical treatment in aquatic environments. This documentation, however, does not demonstrate "educational achievements" or "professional accomplishments" beyond those normally expected of a nurse, as the Petitioner claims on appeal. Although the record shows that the Petitioner has at least two years of formal education in nursing, which is the minimum required for his occupation in Brazil, the record does not contain an explanation of how the Petitioner's additional course completion and certificates for training related to nursing demonstrate education beyond what would ordinarily be expected in his field.

The Petitioner also submitted letters of recommendation from former employers and colleagues describing him, for example, as "calm," "professional," and "dedicated." Again, this documentation does not sufficiently demonstrate particular "educational achievements" or "professional accomplishments" that would be expected of an individual of exceptional ability in his field. Certain letters generally reference the Petitioner's "exceptional qualities" and "unique skills and methods,"

but they do not detail any qualities he has exhibited that are considered exceptional in his field, nor do they describe specific skills or methods that the Petitioner has utilized or developed that would set him apart from other nurses. While these letters provide overviews of how the Petitioner has competently performed his jobs, they were not accompanied by corroborative evidence showing the impact of the Petitioner's work in the field, such as examples of the implementation of his methodologies or innovations or how the Petitioner's work has otherwise been recognized outside of organizations where he has been employed or associated. The Petitioner has not demonstrated that he has a level of expertise or has achieved specific accomplishments indicative of an individual possessing exceptional ability in the field of nursing.

On appeal, the Petitioner has not adequately explained how his education, training, experience, or specific work in the field of nursing are atypical for others in his field or otherwise demonstrate a level of expertise in his field that would demonstrate that he is an individual of exceptional ability. Assertions made by the Petitioner and in letters of support were not corroborated by relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 376. The Petitioner does not sufficiently address the final merits determination of his EB-2 eligibility or adequately explain how the Director erred in his analysis. The Petitioner has not established by a preponderance of the evidence that he has achieved a degree of expertise that is significantly above that ordinarily encountered in the sciences, arts, or business. *See* 8 C.F.R. § 204.5(k)(2).

## III. CONCLUSION

The Petitioner has not demonstrated his eligibility for the exceptional ability classification. Because this issue is dispositive of the petition, we need not address the Petitioner's qualifications for a national interest waiver and hereby reserve the issue. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

**ORDER:** The appeal is dismissed.