U.S. Citizenship and Immigration Services

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

In Re: 15921855

Date: AUG. 12, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree and 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 that the Petitioner had not established he qualifies as an individual of exceptional ability and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that he is eligible as member of the professions holding an advanced degree and as an individual of exceptional ability, as well as for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further review of the record and issuance of a new decision.

## 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. 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.

Section 203(b) of the Act sets out this sequential framework:

> (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.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General 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.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

*Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition to the definition of "advanced degree" provided at 8 C.F.R. § 204.5(k)(2), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) provides that a petitioner present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

To demonstrate eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while 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*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (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.

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 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

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability. At initial filing, the Petitioner indicated in his cover letter that he "is filing for EB2 classification based upon his advanced degree in Business Administration and exceptional abilities in the field of sales," and his "endeavor in the U.S. is to work for a top IT company

[1] 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*).
[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).
[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

as a Sales Manager / Customer Experience Representative performing B2B sales and support services for his prospective employer." The Petitioner also discussed and submitted documentation relating to his claims of eligibility relating to an advanced degree professional and an individual of exceptional ability. The Director's decision, however, does not reflect that he made a determination whether the Petitioner qualified as an advanced degree professional. Instead, the Director only addressed his eligibility as it pertained to an individual of exceptional ability in the sciences, arts, or business.

A. Member of the Professions Holding an Advanced Degree

In order to qualify as a member of the professions, an individual must meet "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. 204.5(k)(2).[4] Further, in order to show an individual holds an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Director's decision does not determine whether the Petitioner's occupation, "Sales Manager / Customer Experience Representative," qualifies as a member of the professions. In addition, the Director does not conclude whether the Petitioner's "Lato Sensu Graduate Course – MBA in Business Management" from the [redacted] and the [redacted] is a foreign equivalent degree above that of baccalaureate degree. Further, the Director did not decide whether the Petitioner's "Higher Education Course of Technology in Data Processing" and title of "Technologist in Data Processing" from [redacted] University, School of Technology meets the foreign equivalent of a baccalaureate degree followed by at least five years of progressive experience in the specialty.

We note that the Petitioner provided a "Credential Evaluation Report" from [redacted], who claimed that the Petitioner's "MBA in Business Management" is equivalent to a "Master in Business Administration in Business Management" in the United States.[5] According to the American Association of Collegiate Registrars and Admissions Officers (AACRAO) Electronic Database for Global Education (EDGE)[6], however, "[p]rofessional development and specialization programs are considered *lato sensus* (wide sense graduate-level programs) and follow independent legislation. Such programs lead toward professional certificates, not graduate degrees." It also states

[4] Section 101(a)(32) of the Act states "[t]he term 'profession' shall include but not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

[5] We may, in our discretion, use an evaluation of a person's foreign education as an advisory opinion. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we may discount or give less weight to that evaluation. *Id.*

[6] We consider EDGE to be a reliable source of information about foreign credential equivalencies. *See Confluence Intern., Inc. v. Holder,* Civil No. 08-2665 (DSD-JJG), 2009 WL 825793 (D. Minn. Mar. 27, 2009); *Tisco Group, Inc. v. Napolitano,* No. 09-cv-10072, 2010 WL 3464314 (E.D. Mich. Aug. 30, 2010); *Sunshine Rehab Services, Inc.* No. 09-13605, 2010 WL 3325442 (E.D. Mich. Aug. 20, 2010). *See also Viraj, LLC v. Holder,* No. 2:12-CV-00127-RWS, 2013 WL 1943431 (N.D. Ga. May 18, 2013).

that "[c]redits earned in *lato sensu* graduate programs may later be transferred into a master's degree program given that institutional requirements are met and institutional approval is granted."[7]

Although the evaluator claims to be a member of AACRAO, he fails to address the discrepancies between EDGE's conclusions and his own in his evaluation. The Petitioner must resolve the above inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

We further note that the record does not contain a credential evaluation regarding whether the Petitioner's "Technologist in Data Processing" meets the foreign equivalency of a baccalaureate degree. According to AACRAO, the title of technologist is "awarded following 2 to 3 years of university study, depending on entrance qualifications and the field of study" and "represents attainment of a level of education comparable to 2 to 3 years of university study in the United States," appearing to indicate that it is not a foreign equivalent of baccalaureate degree.[8]

In light of the above, the Director should first determine whether the Petitioner's occupation as a "Sales Manager / Customer Experience Representative" is a member of the professions. If so, the Director should consider whether the Petitioner's "Lato Sensu Graduate Course – MBA in Business Management" qualifies as the foreign equivalent above that of a baccalaureate degree. If not, the Director should then decide whether the Petitioner's "Technologist in Data Processing" meets the foreign equivalent of a baccalaureate degree followed by at least five years of progressive experience in the specialty. If the Director concludes that the Petitioner is not an advanced degree professional, he should then determine whether the Petitioner qualifies as an individual of exceptional ability, discussed below.

B. Exceptional Ability

The Petitioner asserted eligibility and submitted documentation for five of the regulatory criteria under 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F).[9] Although the Director issued a request for evidence relating to the national interest portion, he did not request additional documentation or inform the Petitioner of any deficiencies in his claims of exceptional ability. In denying the petition, the Director determined that the Petitioner met only two of the categories, official academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A) and ten-year employment at 8 C.F.R. § 204.5(k)(3)(ii)(B). On appeal, the Petitioner contends that he satisfies three additional criteria.

On remand, the Director should review the Petitioner's arguments made on appeal and decide whether any additional criteria have been met. If so, the Director should then conduct a final merits determination to conclude whether the Petitioner has achieved the level of expertise significantly above that ordinarily encountered for exceptional ability classification.

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[7] *See* https://www.aacrao.org/edge/country/brazil for information regarding the education system in Brazil and credential equivalencies (last accessed August 12, 2021).

[8] *See* https://www.aacrao.org/edge/country/credentials/credential/brazil/título-de-tecnólogo-(title-of-technologist) (last accessed August 12, 2021).

[9] The Petitioner did not claim eligibility for the license criterion under 8 C.F.R. § 204.5(k)(3)(ii)(C).

C. National Interest Waiver

The Director did determine that, although the Petitioner did not meet the first and third prongs of *Dhanasar*, he had met the second prong. However, as the Director's determination appears to be based, at least in part, on the Petitioner's education, we must also withdraw the Director's conclusion that the Petitioner is well positioned to advance the proposed endeavor. In addition, the Director did not sufficiently conduct an analysis of the third prong. Instead, the Director stated that since the Petitioner had not met the first prong, "further discussion of the balancing factors under this prong will serve no meaningful purpose."

The Director should conduct a proper *Dhanasar* analysis under all three prongs, including the arguments made on appeal.

## III. CONCLUSION

To meet the requirements for a national interest waiver, an individual must first qualify for the underlying EB-2 visa classification. We are therefore remanding the petition for the Director to consider whether the Petitioner has satisfied the eligibility requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. In addition, the Director should properly apply all three prongs of the *Dhanasar* analytical framework to make a determination as to whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. As such, we will remand the matter for further consideration of the record, including claims on appeal, and entry of a new decision.[10]

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision which, if adverse, shall be certified to us for review.

[10] We have the authority to withdraw a decision and remand the case for further action, with an order that it be certified back to us if the new decision is adverse to the affected party. 1 *USCIS Policy Manual* F, https://www.uscis.gov/policymanual. This order is not meant to compel approval of the remanded case, but is designed to preserve the affected party's ability to seek appellate review without payment of a second appeal fee. *Id.*