



**U.S. Citizenship
and Immigration
Services**

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

In Re: 22221609

Date: SEPT. 14, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, a director and producer, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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 Nebraska Service Center denied the petition, concluding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but had not established 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 he is eligible 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; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). 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* (emphasis added). 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.”

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 discretion², 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. *See Id.* at 888-91, for elaboration on these three prongs.

II. ANALYSIS

A. Eligibility for the Requested Classification

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.³ While we may ultimately agree with the Director that the Petitioner has not established eligibility for a national interest waiver under the *Dhanasar* analysis, for the reasons discussed below, the Petitioner has also not demonstrated that he is an advanced degree professional.

The Petitioner has established that he holds the equivalent of a U.S. bachelor’s degree. The issue here is whether he has demonstrated five years of post-baccalaureate experience as required by the regulations at 8 C.F.R. § 204.5(k)(2) and (3)(i)(B).

The Petitioner provided a variety of documents as evidence that he meets the above regulations, including two letters, an education and experience evaluation, his resume, and a copy of his “Labor and Social Security” document from the Ministry of Labor and Employment. Regarding the letters, one is from an outside accountant for one of the Petitioner’s businesses and the other is from his business partner, who is the co-owner of the company with the Petitioner.⁴ However, the regulation requires “letters from current or former employer(s)” and the Petitioner has not established how the signatory of either letter qualifies as an “employer.” *Id.* Further, neither one addresses whether the position was full-time. This is particularly relevant given the project-oriented nature of the Petitioner’s work in advertising and video production.

Regarding the evaluation, the evaluator concludes that based upon a combination of the Petitioner’s foreign bachelor’s degree and professional experience, he holds the equivalent of a U.S. Master of Fine Arts degree in directing. The evaluator, however, does not claim to have reviewed any employment letters to establish the Petitioner’s work history or experience, as required by 8 C.F.R. § 204.5(k)(3)(i)(B).⁵ Where an opinion is not in accord with other information, or is in any way

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) (*NYS DOT*).

² *See also Poursina v. USCIS*, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS’ decision to grant or deny a national interest waiver to be discretionary in nature).

³ As the Petitioner does not claim to be an individual of exceptional ability, we will not address it further.

⁴ The signatory of the letter is the co-owner of the business who is also his mother.

⁵ The evaluator indicated that he reviewed the Petitioner’s diploma and resume.

questionable, we may discount or give less weight to that evaluation. *See Matter of Sea, Inc.*, 19 I&N Dec. at 820.

We also note a number of discrepancies between information in the letter from his business partner and co-owner and other documents in the record. For example, the letter lists his dates of employment as April 2002 until January 2010. However, his resume lists his end date as January 2009 and the “National Registry of Legal Entities” document from the Federal Republic of Brazil confirms that the company was closed as of January 27, 2009. In addition, his resume and the “Labor and Social Security” document indicate that the Petitioner was also working for two different companies at various times between April 2002 and May 2007 (although his resume indicates it was three other companies), and the letter makes no mention of this other employment.⁶ It is also unclear why the “Labor and Social Security” document does not include any employment after May 2, 2007. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

For all of the above reasons, the record does not establish that the Petitioner has at least five years of post-baccalaureate experience in the specialty and, thus, we cannot conclude that he qualifies for the underlying EB-2 visa classification as an advanced degree professional. Since this issue is dispositive of the Petitioner’s appeal, we decline to reach and hereby reserve the appellate arguments regarding the remaining issues. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (“courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach”); *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.

⁶ According to the “Labor and Social Security” document, the Petitioner held the positions of “assembly auxiliary” and “finalization assistant.”