U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28536874

Date: APR. 8, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a general and operations manager and entrepreneur in the electronic management of documents field, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this 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 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 qualify for a national interest waiver, a petitioner must first show eligibility 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.[1] Section 203(b)(2)(B)(i) of the Act.

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).[2] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[3] If

[1] As the Petitioner has not claimed to qualify as a member of the professions holding an advanced degree, we need not address the separate requirements for that classification.

[2] 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).

[3] U.S. Citizenship and Immigration Services (USCIS) has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

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 U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[4] 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.

II. ANALYSIS

A. Regulatory Criteria for Exceptional Ability

On appeal, the Petitioner asserts that he fits "the determinations and criteria of the Exceptional Ability" as a "[p]rofessional with a specialized higher education course for the position of General Manager of Operations and Entrepreneur, classified as Exceptional Ability to work in the USA in the area of technology and document management systems" and contends that he meets the criteria discussed below.[5]

An official academic record showing that the individual has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(A).

To establish eligibility for this criterion, the Petitioner submitted evidence including a diploma and academic transcript showing that he completed a two-year higher education course in Brazil. Upon review, we conclude that the Petitioner has met this criterion.

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. 8 C.F.R. § 204.5(k)(3)(ii)(B).

To meet this criterion, the Petitioner relies on a variety of documents, including his resume, a letter from his accountant, and documents for his photocopying company in Brazil. However, the plain language of this criterion states the evidence must (1) be in the form of letter(s), (2) be from current

[4] *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).

[5] The Director stated, without any analysis, that the Petitioner qualifies for the EB-2 classification as an individual of exceptional ability. For the reasons discussed, we disagree.

or former employer(s), and (3) establish at least ten years of full-time experience. Upon review of the record, the only letter is from the Petitioner's foreign accountant, who was not the Petitioner's employer. Further, it does not provide any description of his duties.[6] Without more, we cannot conclude that the Petitioner has met the required elements of this criterion to establish at least ten years of full-time experience in the occupation.

A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(ii)(C).

The Petitioner provides a statement and letter from [redacted] indicating he is a union member and asserts that this proves he is a "licensed professional to work in the Brazilian market as an Industrial Graphic Designer." Specifically, the letter states that the Petitioner is among the nine unionized professionals in his company. The letter also explains that [redacted] "represents the interests of the workers and maintains a close relationship with employers to promote fair contractual relationships between parties." Beyond the Petitioner's unsubstantiated assertion however, there is no evidence that being a union member of [redacted] is either a license to practice the profession or a certification for a particular profession or occupation as required by the plain language of the regulation. As such, the Petitioner has not established eligibility under this criterion.

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

On appeal, the Petitioner asserts that he "was paid well above the market average" for a general and operations manager." The Petitioner provided a copy of his 2019 income tax return, which shows that his taxable income was R$35,796 and that he has R$78,800 of capital shares (assets/rights) for his own company, which, according to the "Articles of Incorporation for the Conversion of a Company," he has had since at least June 2015. The Petitioner states that "the average gross monthly salary in 2021 for an Operations Manager in Brazil is R$5,072.01 or R$60,864.12 per year" and provides a snippet from catho.com, an employment search website in Brazil, for the position of general manager.

Here, the Petitioner incorrectly relies on the combination of his capital shares and his taxable income to claim that his salary/income totaled R$114,569 which is "almost 90% above the average income of the Brazilian market." However, according to the "Simplified Certificate," the R$78,800 was "paid-in capital," not money that the Petitioner received as a salary or other remuneration for services, which is the focus of this criterion. The Petitioner's taxable income of R$35,796 is significantly less than the R$60,864.12 average salary indicated by catho.com.

We further note that the catho.com website screenshot does not offer sufficient information or details to verify the applicability and accuracy of the stated salary information. For instance, the screenshot lacks such critical information as the job duties it reflects, the year or date range to which the data refers, how the data was compiled, the statistical significance of the data, the geographic location to

[6] The regulation at 8 C.F.R. § 204.5(g) states, in pertinent part, that "[e]vidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed."

which the data pertains, and other indications of the reliability and comparability of this data to the Petitioner's occupation.

For the foregoing reasons, the Petitioner has not established eligibility under this criterion.

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

The regulation at 8 C.F.R. § 204.5(k)(2) defines a "profession" as an occupation listed at section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32),[7] or an occupation whose minimum requirement for entry is a U.S. baccalaureate degree or its foreign equivalent.

In support of the criterion, the Petitioner relies on his union membership with [redacted] However, without evidence of the membership requirements, we cannot conclude that [redacted] is a *professional* association consistent with the regulatory definition at 8 C.F.R. § 204.5(k)(2). Therefore, the Petitioner has not established eligibility for this criterion.

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

In support of this criterion, the Petitioner submitted recommendation letters written by the Petitioner's previous clients. However, the letters do not document that the Petitioner has received recognition for achievements and significant contributions to the industry or field, as opposed to being held in high regard by his clients.

For example, a letter from A-M- states that the Petitioner was "responsible for the electronic management of documents, images, photographs and documents relating to the historical archives of the cultural and documentary heritage of the State of Espirito Santo" and that "[a]ll services provided by [the Petitioner], his pursuit of quality and customer satisfaction is notorious, making him a reference in the market." Further, a letter from L-F-M-N- states that the Petitioner "coordinated, with extreme responsibility, the contracted activities of his company during the construction of the largest steel coke production plant in the world at the time" and "[h]is management has always sought to provide the best possible services, ensuring efficiency, effectiveness and sustainability throughout the process." While the recommendation letters speak highly of the Petitioner's management abilities and personal attributes, they do not sufficiently document any specific achievement or significant contribution the Petitioner has made to his industry or field. *See Matter of Chawathe*, 25 I&N Dec. at 376 (stating that a petitioner's assertions must be supported by relevant, probative, and credible evidence showing that those assertions are "probably" true). As such, the Petitioner has not established this criterion.

B. Comparable Evidence

Under 8 C.F.R. § 204.5(k)(3)(iii), a petitioner may submit comparable evidence to establish eligibility, if USCIS determines that the evidentiary criteria described in the regulations do not readily apply to

[7] The occupations listed in this section are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

the occupation. *See generally 6 USCIS Policy Manual* F.5(B)(2). When evaluating such comparable evidence, USCIS must consider whether the regulatory criteria are readily applicable to the occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation. *Id.* However, general assertions that the listed regulatory criterion does not readily apply to an occupation are not acceptable. *Id.* Similarly, general claims that USCIS should accept comparable evidence are not persuasive. *Id.* A petitioner must explain why the evidence submitted is comparable. *Id.* Here, while we acknowledge that the Petitioner's brief includes a section for "other evidence," he does not claim that any of the evidentiary criteria do not apply or how the evidence is comparable. As such, we cannot consider the additional evidence he provides.

C. Final Merits Determination

The Petitioner has had a successful career as a business owner in Brazil. But the record does not establish that he meets at least three of the evidentiary criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(A) through (F). We, therefore, withdraw the Director's determination to the contrary. Further, since the Petitioner did not satisfy the initial evidence requirements, we need not conduct a final merits analysis to determine whether the evidence in its totality shows that he is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).

D. National Interest Waiver

The Petitioner proposes to establish "a company dedicated to the electronic management of documents." The Petitioner further states that the company will "develop a specialized platform for Electronic Document Management, which will allow managers of small and medium-sized companies to have greater control of their business, given that continuous access to their data, regardless of where they are located, will help to obtain valuable insights and to take better business decisions."

The first prong of the *Dhanasar* framework, substantial merit and national importance, focuses on the specific endeavor that the individual 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. *Dhanasar*, 26 I&N Dec. at 889.

The Director determined that the Petitioner's proposed endeavor is of substantial merit, and we agree. Turning to the national importance of his endeavor, the Director concluded that the Petitioner did not establish that his proposed endeavor has national importance.

On appeal, the Petitioner asserts that his proposed endeavor has "national or even global implications within a particular field (Small Business and Technology) and impacts a matter that a government entity has described as having national importance or is the subject of national initiatives" and, therefore, he qualifies for a national interest waiver. The Petitioner references his business plan and an opinion letter in support of his assertions.

In determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on the "the specific endeavor that the

foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. We further indicated that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Id.* We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890.

Upon review of the business plan, we observe that the Petitioner has not shown how the electronic document management services he intends to provide to small businesses in Florida would have broader implications in the IT industry. He broadly states that his "venture with technology and innovation will be a transforming and empowering agent for American Small Businesses" and it has "national scope for the increase in the local market and prosperity for the national economy," but the record does not provide adequate support for a determination that his specific proposed endeavor will have such a wide-reaching impact. In *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893. Here, the Petitioner has similarly not established that the benefits of the services he intends to provide will extend beyond his clients. Nor has he demonstrated that his work would broadly enhance societal welfare at a level commensurate with national importance.

Moreover, the Petitioner has not demonstrated that his proposed endeavor has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for the nation. Specifically, he has not shown that his company's business activity stands to provide substantial economic benefits to Florida or to the United States. The business plan does not demonstrate that the benefits to the regional or national economy resulting from the Petitioner's endeavor would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890. In addition, although the Petitioner asserts that his company will hire U.S. employees, he has not provided evidence to establish that the area in which the company will operate is economically depressed, that he would employ a significant population of workers in that area, or that his endeavor would offer the region or its population a substantial economic benefit through employment levels, business activity, or tax revenue. While the business plan indicates that the Petitioner's company will hire U.S. employees and generate a revenue of over $5 million within ten years, the plan does not sufficiently detail the basis for the revenue and staffing projections depicted. The Petitioner's unsupported statements are insufficient to meet his burden of proof. A petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

In addition, the Petitioner relies on his more than 23 years of experience in business operations management. However, the Petitioner's expertise and record of success are considerations under *Dhanasar*'s second prong, which "shifts the focus from the proposed endeavor to the foreign national." *Id.* at 890. The issue here is whether the Petitioner has demonstrated, by a preponderance of the evidence, the national importance of his proposed work.

Finally, we acknowledge that the Petitioner provided an expert opinion letter from an adjunct associate professor at [redacted] In addressing the first prong of the *Dhanasar* framework, the author emphasizes that the Petitioner will "greatly contribute to American small businesses by participating as a speaker in important events in the United States, such as congresses, seminars, fairs, workshops, lectures in universities and colleges and many others." However, the expert opinion letter is very

general, significantly focuses on the importance of small businesses and entrepreneurship, and does not address the Petitioner's business plan, the specific proposed endeavor described therein, its prospective substantial economic impact, or any broader implications of the Petitioner's intended electronic document management services business.

Because the Petitioner has not established eligibility under the first prong of the *Dhanasar* test, we need not address his eligibility under the remaining prongs, and we hereby reserve them.[8] The burden of proof is on the Petitioner to establish that he meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-376. The Petitioner has not done so here and, therefore, we conclude that he has not established eligibility for a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

[8] *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 alternate issues on appeal where an applicant is otherwise ineligible).