U.S. Citizenship and Immigration Services

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

In Re: 30626198

Date: APR. 30, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a financial clerk, seeks classification as a member of the professions holding an advanced degree or in the alternative 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. 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 Texas Service Center denied the petition in January 2023, concluding that the record did not establish that the Petitioner qualifies for the national interest waiver. The Petitioner filed a combined motion to reopen and reconsider. The Director dismissed the motion in September 2023, stating that the filing did not meet the requirements for either type of motion. The matter is now before us on appeal under 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 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. Section 203(b)(2)(B)(i) of the Act.

Once a petitioner demonstrates EB-2 eligibility, 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,[1] 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.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that the prior decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

## II. ANALYSIS

The decision before us on appeal is not the January 2023 denial of the petition, but rather the September 2023 dismissal of the Petitioner's motion. Therefore, the question before us is whether the Director should have granted the motion. But we will also discuss certain aspects of the underlying petition and evidence in order to provide context for the motion and the Director's dismissal of that motion.

The Petitioner's motion to reopen included hundreds of pages of exhibits, but nearly all of the material specific to the Petitioner consisted of copies of materials submitted previously. The sole exception is a February 2023 letter from the owner of a business in Florida who praised the Petitioner's "essential accounting knowledge" and who expressed a desire "to offer her an opportunity at our company." However, this letter describes work the Petitioner undertook after the petition's filing date and does not establish eligibility at the time of filing as required by 8 C.F.R. § 103.2(b)(1).

The Petitioner identified other newly submitted materials as "Industry Reports," but they consist primarily of articles about business consulting and government communications about the U.S. economy. These materials provide general background information but no new facts specific to the Petitioner's proposed endeavor.

For the above reasons, we agree with the Director that the motion to reopen did not include new facts, supported by documentary evidence, that would warrant reopening the petition. The Director properly dismissed the motion to reopen.

We now turn to the dismissal of the Petitioner's motion to reconsider. In the January 2023 denial notice, the Director concluded that the Petitioner had not shown "that the proposed endeavor will impact the field more broadly at a level commensurate with national importance," and had "not provided consistent information regarding her proposed endeavor." But the Director did not discuss the proposed endeavor, or the Petitioner's evidence regarding it, in any detail.

[1] *See 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 is discretionary in nature).

On motion to reconsider, the Petitioner submitted a 64-page brief alleging "multiple errors in procedure and fact." Specifically, the Petitioner asserted:

- The Director "did not address all the relevant evidence" in the record;
- The Director did not explain why the Petitioner's evidence was insufficient;
- The Director did not explain why the Petitioner's information about her proposed endeavor was inconsistent;
- The Director cited incorrect information regarding the Petitioner's bachelor's degree, raising concerns about how thoroughly and carefully the Director reviewed the record; and
- The Director did not address the second and third prongs of the *Dhanasar* national interest framework.

The Petitioner cited case law establishing the importance of fully considering all the available evidence, and discussed aspects of the Petitioner's proposed endeavor that, the Petitioner asserted, the Director had overlooked when denying the petition.

We agree with the Petitioner that the Director's January 2023 decision did not adequately detail and explain the grounds for denial of the petition. When denying a petition, the Director must explain the specific reasons for denial. *See* 8 C.F.R. § 103.3(a)(1)(i). The Director's January 2023 decision did not conform to this requirement. The lack of detail in the denial notice limited the Petitioner's opportunity to address specific deficiencies on appeal or motion.

Although the Petitioner's motion brief discussed the Director's alleged errors at some length, supported by cited USCIS precedent, binding court decisions, and other authorities, the Director did not address these issues in the September 2023 decision dismissing the motion. Instead, the Director summarily asserted that the "motion does not . . . give reasons for reconsideration supported by any pertinent precedent decisions." We will therefore remand the matter in order for the Director to issue a more thorough decision on the merits of the underlying petition.

The Director's new decision should take into account important issues concerning the Petitioner's eligibility for the underlying EB-2 classification.

One of the factual errors that the Petitioner alleges on motion is that the Director provided incorrect information about the Petitioner's educational background. Specifically, the Director concluded: "Evidence in the record reflects that the petitioner is an advanced degree professional based on his receipt of a Bachelor's degree in Accounting on July 10, 2005 from [redacted] and his more than five years of post-baccalaureate experience." On motion, the Petitioner observes that she earned a bachelor's degree in *business administration* in *2016* from a university in *Brazil*. These errors are particularly significant because they are practically the only specific facts cited in the original denial notice.

But in acknowledging this error, a more fundamental question presents itself. While the Director's discussion of the national interest waiver was minimal, the only reason that the Director engaged in that discussion at all was because the Director had determined that the Petitioner is eligible for the underlying EB-2 classification. That determination, however, is based on a set of facts that the Petitioner agrees is incorrect. The erroneous determination is particularly significant because if the

Petitioner does not establish eligibility for the EB-2 classification, then she cannot qualify for the national interest waiver.

The Petitioner initially claimed eligibility as a member of the professions holding an advanced degree. An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2). "Profession" is defined as of the occupations listed in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32),[2] 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).

In an October 2022 request for evidence (RFE), the Director observed that the Petitioner had documented less than the required five years of post-baccalaureate employment experience between 2016 and 2019. Later, on motion, the Petitioner submitted a printout from the U.S. Bureau of Labor Statistics' *Occupational Outlook Handbook*, indicating that "[a] high school diploma is typically required for most financial clerk positions." This information appears to be directly relevant to the Petitioner's eligibility for classification as a member of the professions holding an advanced degree.

Also in the RFE, the Director asked "if the petitioner can qualify for the national interest waiver as an alien of exceptional ability." To establish exceptional ability, a petitioner must initially submit documentation that satisfies at least three of six evidentiary criteria. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[3] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[4] USCIS must then conduct a final merits determination to decide whether the evidence as a whole shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

The Director discussed the six evidentiary criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii):

(A) An academic degree relating to the area of claimed exceptional ability;
(B) Ten years of full-time experience in the occupation;
(C) A license or certification for the profession or occupation;
(D) A salary or other remuneration that demonstrates exceptional ability;
(E) Membership in professional associations; and
(F) Recognition for achievements and significant contributions to the industry or field.

The Director concluded that the Petitioner had satisfied only one of the criteria, through her academic degree in business administration.

[2] The listed occupations are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.
[3] 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).
[4] 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.

In response to the RFE, the Petitioner claimed to satisfy three further regulatory exceptional ability criteria, relating to experience, licensure or certification, and recognition. The Director must consider the Petitioner's evidence and arguments and make an initial determination as to whether the Petitioner has established exceptional ability in the sciences, arts, or business. In making that determination, the Director should consider several issues.

8 C.F.R. § 204.5(k)(3)(ii)(B) requires at least ten years of full-time experience in the occupation sought. In this instance, the Petitioner seeks employment as a financial clerk, and must therefore document ten years of experience as a financial clerk before the petition's filing date. The Petitioner has submitted employment letters spanning a period of over ten years, from April 2009[5] to October 2019, but the Director should not simply look at the range of dates. The Director must determine whether there were interruptions in the employment that would reduce the total length of employment below ten years; whether the letters specify that the employment was full-time; and whether the experience was in the occupation sought, i.e., financial clerk, rather than in other occupations.

In the RFE, the Director stated that "the letters do not effectively document if the petitioner has the required ten years of full-time experience in the occupation she seeks." The Director did not discuss the Petitioner's response to that RFE, because the issue was seemingly foreclosed by the Director's conclusion in the decision that the Petitioner qualifies as a member of the professions holding an advanced degree. As discussed above and acknowledged by the Petitioner, that conclusion was erroneously based on a fact pattern that does not apply to this case.

The Petitioner claims a license to practice the profession or certification for a particular profession or occupation, as described at 8 C.F.R. § 204.5(k)(3)(ii)(C). In the RFE, the Director stated that the Petitioner must establish that the license or certification is required for the occupation the Petitioner seeks. The Director did not cite any source for the provision that a license or certification must be required for the specific profession or occupation. The regulation, as worded, imposes no specific requirements regarding the circumstances of the licensure or certification. The Director should only consider the circumstances of that license or certification in the context of a final merits determination. A final merits determination, in turn, would only occur if the Director concludes that the Petitioner has satisfied three or more exceptional ability criteria.

Furthermore, the regulations define "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). In the event that the discussion of exceptional ability reaches a final merits determination, the Director should then consider factors such as the requirements to obtain a given license or certification. A credential that is universally held, or nearly so, within a given occupation or profession would tend to have less weight than a more selective credential based on achievement or ability, because a credential that all or most individuals have in a given occupation or profession would not serve to distinguish exceptional individuals from others.

The Petitioner also submitted letters from former employers, stating that these letters constitute evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations under 8 C.F.R. § 204.5(k)(3)(ii)(F). In

[5] The Petitioner was 14 years old in April 2009.

the RFE, the Director generally stated that "support letters which discuss the petitioner's accomplishments over the years . . . [do] not establish that she meets this criterion." The Petitioner disputed this characterization in the RFE response.

In considering the letters, the Director should bear in mind that the language of the regulation calls for "evidence of recognition for achievements *and* significant contributions to the industry or field." As such, materials that identify an individual's achievements but not significant contributions to the industry or field cannot suffice to satisfy the regulatory requirements. *See Matter of Echeverria*, 25 I&N Dec. 512, 518 (BIA 2011) (holding that the use of the conjunction "and" in a series of regulatory requirements "is a clear indication" that one "must satisfy each of the [listed] requirements"). The burden is on the Petitioner to establish that benefit to her former employers constituted significant contributions to the industry or field.

## III. CONCLUSION

On motion, the Petitioner correctly raised concerns about the lack of detail in the Director's denial notice, and the Director dismissed the Petitioner's motion without addressing those concerns. The Director's initial determination regarding the Petitioner's eligibility for EB-2 classification relied on an incorrect fact pattern, and contradicted information in the RFE that more accurately reflected the facts in the record. The Director must issue a new decision taking these factors fully into account.

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