



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

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

In Re: 30231927

Date: MAR. 20, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a content creator and producer in the film industry, 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 eligibility 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. 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.

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 a petitioner does so, we will then conduct a final merits determination to decide whether the evidence

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>.

in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.⁴

We acknowledge and agree with the Petitioner that the decision incorrectly referenced individuals of extraordinary ability. However, this error was, at most, harmless. *See generally Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing cases regarding harmless or scrivener's errors). Here, the Director properly considered the evidence under the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F) and not the extraordinary ability criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), concluding that she only satisfied one criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). As the Petitioner does not address the Director's conclusions that she did not meet the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B)-(F), we consider them waived.⁵

Because the Petitioner has only met one of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii), she has not established eligibility for the underlying EB-2 classification as an individual of exceptional ability. Therefore, we need not reach a decision on whether, as a matter of discretion, the Petitioner is eligible for or otherwise merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve these 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 alternate issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.

⁴ 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.

⁵ An issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. at 336.