U.S. Citizenship and Immigration Services

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

In Re: 12488287

Date: APR. 15, 2021

Appeal of Texas Service Center Decision

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

The Petitioner, a software developer, seeks second preference immigrant classification 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 record did not establish that the Petitioner met the initial evidentiary requirement for an individual of exceptional ability by meeting at least three of the six evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). In addition, he concluded that the Petitioner did not establish his eligibility 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 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. 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. –
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> (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.

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.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating 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). This, however, is only the first step, and the successful submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for this classification.[1] When a petitioner submits sufficient evidence at the first step, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the beneficiary is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(i)(3)(i).

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.[2] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, 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

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*, PM-602-0005.1 (Dec. 22, 2010).

[2] 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*).

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

The Petitioner is a software developer with several years of experience working for firms abroad. He proposes to offer his IT expertise to "bring innovative results to local companies, organizations and individuals," and states that he has begun working as a software engineer for a large financial services institution in the United States in order to advance his endeavor.

### A. Exceptional Ability

In reviewing the Petitioner's eligibility for the underlying EB-2 visa classification, the Director concluded that the evidence did not establish that he met the requisite three of the six evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii) to demonstrate his eligibility as an individual of exceptional ability.[4] Specifically, while the Director stated in his decision that the Petitioner met the criteria related

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] The Petitioner also initially claimed eligibility as a member of the professions holding an advanced degree, but did not reassert this claim or offer additional evidence in his response to the Director's request for evidence (RFE) or on appeal. In general, we will not address issues that were not raised with specificity on appeal. We will therefore consider this issue to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n. 2 (BIA 2009).

to his possession of a degree, diploma or certificate and his membership in a professional association, he did not meet the requirements of three other criteria for which he submitted evidence. On appeal, the Petitioner reasserts his claim to those three additional criteria.[5] For the reasons provided below, we conclude that the Petitioner does not meet the initial evidentiary requirements for classification as an individual of exceptional ability.

> *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)

The Petitioner presented a diploma and transcripts from the [redacted] School of Technology in [redacted] Brazil, together with certified translations, which establish that he earned a "Titulo de Tecnologo"[6] in 2010 after completing 12 terms of study over three years. In addition, another diploma and set of transcripts from the same institution indicates that in 2016 he completed a "Post-Graduation Lato Sensu MIT in Software Engineering with Java" after completion of six terms over three years. Upon review we agree with the Director's conclusion that this evidence establishes that the Petitioner meets this criterion.

> *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 Director concluded in his decision that the Petitioner's Microsoft and Oracle Certified Professional certificates, were not licenses or certifications. On appeal, the Petitioner reasserts his qualification under this criterion, but does not explain why he believes these training certificates qualify under this criterion. We note that he provided bid notices from a Brazilian government agency for IT projects which require this type of certification, but also allow for equivalent training or education. Upon review we agree with the Director that the certificates provided by the Petitioner are not licenses to practice his profession, and are not certifications which are required for employment as a software developer. As such, this evidence does not establish that he meets this criterion.

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

In support of this criterion, the Petitioner submitted annual tax return documents for the calendar years 2015, 2016 and 2017 which show that he earned taxable income of R$103,674, R$106,000, and R$104,287, respectively, in those years. He also submitted a salary survey from the website salariobr.com for the position of software developer in Brazil. This survey indicates that those workers

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[5] In asserting his satisfaction of the evidentiary criteria, the Petitioner briefly refers to two of our non-precedent decisions broadly concerning eligibility as an individual of exceptional ability. These decisions were not published as a precedent and therefore do not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. The Petitioner states only that the petitioners in both cases "presented materials similar in quality and nature to that which was submitted in the present case," and does not specifically indicate why the decision in those cases has any bearing on his petition.

[6] The English translation indicates that this phrase translates to "Associate Degree," but this appears to be a judgment of academic equivalency by the translator rather than a direct translation from Portuguese to English.

employed by major organizations in the years of 2018 and 2019 and possessing eight or more years of work experience earned R$8,467 per month, or R$101,604 annually, although it does not specify whether this figure is a mean or average. Although the Petitioner pointed out in his response to the Director's RFE that he was employed by a medium-sized organization, which the salary indicates paid its most experienced software developers R$6,513 per month, or R$78,156 per year, the appropriate basis for comparison for purposes of this criterion is all software developers. In addition, the evidence provided considers salaries for this position from across Brazil, and therefore does not take local or regional differences into account. For these reasons, and because the Petitioner's salary was shown to be only marginally higher than that of other software developers with similar experience on a national scale, we agree with the Director and find that this evidence does not establish that he commanded a salary which demonstrates exceptional ability.

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

The Petitioner submitted evidence in the form of a card from the Brazilian Society of Computing showing his membership for one year, as well as a letter from an official confirming his membership. We therefore agree with the Director that the Petitioner has established that he meets this criterion.

*Evidence of recognition for achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations*

In support of this criterion, the Petitioner submitted several reference letters from his former employers, as well as a certificate from [redacted] of Brazil dated December 22, 2009 which recognizes his "excellent work" on a project for the company. These letters provide details about his work on specific projects for his employers, and are very complimentary. However, neither they nor the certificate constitute or describe significant contributions beyond those employers and clients to the broader industry or field of software development, as required by the plain language of this criterion. Accordingly, we agree with the Director and conclude that this evidence does not establish that the Petitioner meets this criterion.

Per the above analysis, the Petitioner has not established that he meets the initial evidentiary requirements by satisfying at least three of the six criteria under 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we need not conduct a final merits determination of whether he has demonstrated a degree of expertise significantly above that ordinarily encountered in the field. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the expertise required for the classification sought.

B. National Interest Waiver

In addition to concluding that the Petitioner did not establish his qualification for the underlying EB-2 classification, the Director also found that he had not established eligibility for a national interest waiver. Specifically, while the Director determined that the Petitioner's proposed endeavor had the required substantial merit, it was not of national importance due to its limited scope and lack of impact on the broader field of information technology. Further, the Director concluded that the Petitioner was not well positioned to advance his proposed endeavor, as the record did not show a record of success or progress in achieving the proposed endeavor. While we have already determined that the Petitioner

has not established his eligibility under the EB-2 classification, we will briefly address his eligibility for a national interest waiver under the *Dhanasar* framework.

We agree that the record includes sufficient evidence to establish the substantial merit of the provision of software development services. Regarding the national importance of his proposed endeavor, the Petitioner asserts on appeal that the "ripple effects" of his proposed endeavor will provide substantially positive economic effects. He states that his work includes supporting small and large businesses "by developing and adapting web and desktop applications to satisfy business requirements," and argues that his endeavor is not limited to one particular corporation and its clients. Rather, he asserts, it will "offer innovations of broad implications to the U.S. business market, particularly through the implementation of tech-fused platforms that allow for an improved business ecosystem." Further, he insists that the Director misunderstood the mechanics of the dissemination of innovations in business, which he asserts occurs through "business events, symposia, conferences, the word of mouth, companies' merging and acquisitions, new hiring of experts, private consultancy, etc."

In addressing the national importance in the first prong of the framework, the *Dhanasar* decision sets out that the focus is on the specific endeavor being proposed. As such, we do not consider the broader implications of a particular field or industry in which an endeavor will be conducted, or the indirect consequences of a petitioner's activity. The Petitioner makes clear in his "Professional Plan and Statement" that he intends to continue to provide his expertise in software development to "local companies, organizations and individuals" through his current employer and potentially others. Although he suggests on appeal that the impact of this work will be felt more broadly in business through various methods, these assertions are not supported by documentary evidence in the record. Nor does he indicate that his proposed endeavor includes participation in symposia or conferences or that he will otherwise have any direct involvement in software implementation and innovations beyond those of the specific projects and clients to which he is assigned. Similar to the petitioner's proposed teaching activities in the *Dhanasar* decision, here the Petitioner has not established that he would be engaged in activities that would impact the field of software development more broadly. We therefore conclude that he has not established that his proposed endeavor is of national importance.

Regarding the second prong, the Director found that the Petitioner was not well positioned to advance his proposed endeavor because he had not shown progress in achieving the proposed endeavor and had not sufficiently documented a record of success in his previous efforts. Upon review, we note that he possesses sufficient education and training in software development, and the reference letters from his former employers and colleagues indicate that he has successfully provided services to clients for several years. Therefore, as he proposes to "bring innovative results to local companies, organizations and individuals" and continue to be employed by firms offering software development services, we disagree with the Director and conclude that the Petitioner has established that he is well positioned to advance his limited proposed endeavor.

In addressing the third prong of the *Dhanasar* framework on appeal, the Petitioner stresses the importance of the field of IT services to the national economy, and refers to evidence of a future "global talent shortage." However, the importance of the overall field in which the Petitioner is employed is not a relevant consideration when balancing the national interest in protection of the domestic labor force with any national interests presented in his specific proposed endeavor. Further, the labor certification process is well suited to identify positions for which there are a lack of qualified,

willing, and available United States workers, and the evidence does not support the Petitioner's assertion that the urgent need for his specific services justifies the granting of a waiver to bypass that process. Therefore, we conclude that he has not established 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.

As the Petitioner has not established that he meets the first and third prongs of the *Dhanasar* framework, we conclude that he is not eligible for a national interest waiver.

## III. CONCLUSION

The evidence does not establish that the Petitioner is eligible for classification as an individual of exceptional ability, or for a national interest waiver of the job offer requirement.

**ORDER:** The appeal is dismissed.