



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

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

In Re: 25611422

Date: APR. 04, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in the field of distance education with a focus on information technology, seeks employment-based second preference immigrant classification as an individual of exceptional ability or, in the alternative, 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 Texas Service Center denied the petition, concluding that the Petitioner had not established that he was an individual of exceptional ability. The Director proceeded to conduct a *Dhanasar* analysis without first concluding whether the Petitioner qualifies for a second preference classification as a member of the professions holding an advanced degree. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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 individual of exceptional ability in the sciences, arts, or business, or as an advanced degree professional. 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, 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).

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). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS)

may, as matter of discretion,¹ 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.²

II. ANALYSIS

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 individual of exceptional ability or as an advanced degree professional. The Petitioner asserted that he qualifies as both an individual of exceptional ability and as a professional holding the foreign equivalent of an advanced degree. In denying the petition, the Director determined that the Petitioner had not shown that he meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii), nor had the Petitioner shown that he has qualifying post-baccalaureate experience equivalent to an advanced degree. On appeal, the Petitioner asserts that, rather than applying the governing standard of review, preponderance of the evidence,³ the Director "imposed novel substantive and evidentiary requirements beyond those set forth in regulations."

A. Eligibility as an Individual of Exceptional Ability

To establish eligibility for this classification as an individual of exceptional ability, a petitioner must satisfy at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

An official academic record showing that the alien 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 Director determined that the Petitioner met this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien 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).

The Director determined that the Petitioner did not meet this criterion. The Petitioner submitted, in part, service invoices. The Director determined that these invoices did not constitute letters from current or former employer(s), nor did they contain information to demonstrate the Petitioner's full-time employment.⁴ The Director concluded that the Petitioner did not submit letters from current or former employer(s) to establish that he has at least ten years of full-time experience in the occupation in which he seeks a waiver for employment. On appeal, the Petitioner asserts that the Director did not

¹ See also *Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

² See *Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

³ See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place).

⁴ See 8 C.F.R. § 204.5(g)(1).

give due regard to his employment verification letters, and he claims that he has twenty years of relevant business experience. As described above, the letters from his former employer and client partners do not provide sufficient information to establish that the Petitioner has a specific amount of experience in his field spanning any precise period of time. The evidence of record does not establish that the Petitioner has least ten years of full-time employment experience as an entrepreneur in the field of information technology and distance education.

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 does not dispute the Director’s conclusion regarding this criterion on appeal. Therefore, we deem this issue to be waived, and we will not address this criterion further.⁵

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

As evidence of having earned a comparably high salary in order to demonstrate exceptional ability under this criterion, the Petitioner submitted internally generated documents from his business. After reviewing the documentation, the Director requested evidence to reconcile inconsistencies between the amounts claimed as equivalent in U.S. dollars that the Petitioner earned from his work at the School of Net and the actual amounts as independently calculated by the Director. The initial evidence of record included a letter from the Petitioner’s accountant stating that the Petitioner received pay totaling R\$ 854.892,00 in 2015, equivalent to \$218,967.00 in U.S. dollars; R\$ 860.718,00 in 2016, equivalent to \$264,145.00; and R\$ 951.687,00 in 2017, equivalent to \$287,745.00. In January 2022, an online currency conversion tool, <https://themoneyconverter.com/BRL/USD>, showed these amounts in Brazilian real to be significantly less than the amounts depicted in the accountant’s letter—a difference of between approximately \$50,000 and \$100,000.

In response to the RFE, the Petitioner submitted a partially translated document from an individual identified on the document as [redacted] that depicts [redacted] as the corporation for which the following information is provided: “We now declare that the invoicing of the company identified below, according to tax records, presents the following amounts” from May 2021 through April 2022; the amounts for the months listed total R\$ 10.146.832,00. The Director determined that this evidence was insufficient to establish the Petitioner’s salary relative to others in the field because it does not show a salary or other remuneration that the Petitioner himself received for his services; the document appears to refer to the earnings of the business. The Director also noted that the Petitioner did not submit salary data for his position in the field to allow for a comparison of salaries. Finally, the Director determined that the fact that the Petitioner did not submit evidence to resolve the tax document inconsistencies cast doubt on the reliability of the remaining evidence.⁶

On appeal, the Petitioner asserts that the evidence previously submitted establishes that he “has received a significantly higher remuneration than his peers....” He points to the internally generated document from [redacted] that declares invoices totaling R\$ 10.146.832,00 from May 2021 through April 2022. The record does not include evidence

⁵ See, e.g., *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

⁶ See *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

to corroborate this claim of [redacted] earnings, nor does it include evidence of the Petitioner's earnings during his time as an executive of the company. An item of record that identifies the Petitioner's earnings—a tax document showing that he had an income of R\$ 850.250,00 in 2016—does not itself contain information demonstrating that it was filed with a tax authority, and the record does not include other documentation to establish the legitimacy of the document. Even if the record included credible documentation to establish the Petitioner's earnings during any period of his employment or entrepreneurship, which it does not, the Director concluded that the record does not contain objective evidence of salaries or remuneration typically received by other entrepreneurs in the Petitioner's field to demonstrate whether his earnings are comparably higher due to his exceptional ability. The Petitioner must support his assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. He has not done so here. The record does not support a finding that the Petitioner has commanded a salary that demonstrates exceptional ability. For the foregoing reasons, the Petitioner has not satisfied this criterion.

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

After review of the record, the Director issued an RFE requesting that the Petitioner provide objective documentary evidence that shows the organizations in which he had membership at the time were professional. In response, the Petitioner submitted documentation related to his membership with the American Marketing Association (AMA) that showed his current membership beginning in January 2019. The Director determined that, because there was no documentation of the association's "bylaws demonstrating that their association is professional" the AMA could not be considered a professional association. Regarding the Petitioner's submission of documents showing his membership with the Association of Private Enterprise Education (APEE) and the National Entrepreneurs Association, the Director determined that the evidence was inadmissible because the Petitioner's memberships occurred after the filing date⁷ of the petition.⁸ On appeal, the Petitioner reasserts his membership in these associations, although he does not provide an argument or evidence pertaining to whether the associations can be considered professional.

The record includes printouts from the AMA's "About" webpage, which includes an overview of the AMA's history and mission and links for information about AMA's membership, leadership, volunteers, code of ethics, and job opportunities. As noted above, "profession" is defined as "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."⁹ The Petitioner provided no information regarding the basis used by the organization to admit the Petitioner as a member. Similarly, the record includes a letter from the [redacted] [redacted] and a webpage from the organization describing itself as "a non-profit promoting the study and development of open, flexible, and distance education." Although the letter states that the Petitioner was a member with a paid annuity period from 2018 to 2019, there is no documentation in the record concerning considerations made by the association in determining his

⁷ The petition was filed on May 9, 2019. A receipt for the Petitioner's payment form APEE membership shows an invoice date of April 2022 and a welcome email from the National Entrepreneurs Association concerning the Petitioner's membership is dated May 2022.

⁸ *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg'l Comm'r 1971), in which the Immigration and Naturalization Service (legacy INS) held that noncitizens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

⁹ *See* 8 C.F.R. § 204.5(k)(2).

admission. Accordingly, we conclude that the Petitioner has not established that he satisfies 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).

The Petitioner submitted several letters of endorsement from colleagues, clients, and a mentor to demonstrate his contributions to the field. The Director determined that the letters “are limited to discussing the Petitioner’s work and expertise within the context of each letter writer’s business” and that there was no objective evidence in the record to support the authors’ claims. On appeal, the Petitioner maintains that the evidence “demonstrates the recognitions he received for the achievements and significant contributions in the field or industry, as a whole, that are recognized nationally or internationally.” The letters from a previous employer and from previous client partners attest to his knowledge and character and describe, in general terms, his work developing web portals and creating online courses in 2007, 2008, and 2014. The letters do not provide details concerning his roles, skills, specific achievements during his employment, or other aspects of his employment experience as an entrepreneur in the field of information technology and distance education. These letters do not demonstrate the Petitioner’s impact on the field of IT and distance learning, but are testimonials of his work on specific projects or events.

For example, a letter from an executive at [redacted]—a company whose work involves career training in computer programming—lauds the Petitioner’s involvement in setting up “one of the bigger events and capacity building for software engineering professionals in need to improve and redirect their careers to fit into large corporations.” The author states that the Petitioner “was responsible for carrying out a mentorship section for the [redacted] students, helping them to put themselves at a successful place in the technology area.” While this letter demonstrates the Petitioner’s success in this undertaking, it does not demonstrate that this success impacted the larger field. Further, a letter from a customer engineer at Google states that, through [redacted] the Petitioner “was able to create a business niche that did not exist in Brazil (training senior developers for large companies) and unite thousands of developers and large corporations in a single event, including Oracle”; the record, however, does not include documentation to corroborate that assertion. A letter of endorsement from a software engineering manager at a bank in Latin America asserts that the Petitioner’s “technology events” have “changed thousands of lives and supplied the market with new, qualified and excited professionals.” Again, the record does not include corroborating evidence to demonstrate the Petitioner’s work in this capacity. Similarly, a letter of endorsement authored by an executive from an educational organization focused on technology in Brazil states the following:

When I saw the expressiveness of the [redacted] project gaining visibility in large companies, I eventually contacted [redacted] to understand more about his growth marketing strategies focused on the education filed.... His entrepreneurial ability to create a company to help software engineers in large corporations was incredible. [redacted] [redacted] besides being the CEO of [redacted] he is also a host of the [redacted] YouTube channel with over 70,000 subscribers (something extremely difficult due to the specific niche he works in). He is responsible for technical immersions with IT professionals that have already reached over 60,000 engineers in the field. He also managed in a

very short time to adopt and incredible marketing strategy capable of reaching an extremely selected audience in software development. He got thousands of clients and earned millions of dollars with a program that had national visibility.

Although this letter describes the Petitioner's achievements in the field, it does not provide a timeframe in which the Petitioner's work took place. While the letter states that the author first met the Petitioner in 2019, it also describes the Petitioner's work with his company in 2021; it is not clear from the letter whether the Petitioner's achievements, as described above, took place prior to the filing date of his petition.¹⁰ And, again, without objective information to corroborate the information in the letters of endorsement that speak to what may be his larger impacts within the field, the Petitioner has not established that he meets this criterion. Accordingly, we conclude that the evidence does not establish the Petitioner's eligibility under this criterion.

In sum, the Petitioner has not established eligibility for this classification as an individual of exceptional ability because he has not satisfied at least three of the six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii).

B. Eligibility as a Member of the Professions Holding an Advanced Degree

To establish eligibility for this classification as a member of the professions holding an advanced degree, a petitioner must submit an official academic record of an advanced degree or an official academic record of a baccalaureate degree along with letters from current or former employers; these letters must establish that the petitioner has at least five years of progressive post-baccalaureate experience in the specialty for which the petitioner has requested classification.¹¹

The Petitioner initially submitted documentation showing that he earned a baccalaureate degree in technology and digital media from [redacted] University) in [redacted] and has earned several training certificates related to information technology and marketing. The record also shows that the Petitioner completed the [redacted] School of Management's Executive Programs in Digital Marketing and Social Media Analytics and in Entrepreneurship Development. The Petitioner also provided a certificate and transcript for his Executive Master of Business Administration in Technology and Digital Media from Instituto Brasileiro [redacted] (the Brazilian Institute of [redacted]), or [redacted] in [redacted] [redacted]. Finally, the record also included an evaluation from a professor and chairperson at the [redacted] [redacted] School of Business at [redacted] College which evaluated the Petitioner's foreign bachelor's degree, certificates, and work experience; the evaluator determined that the Petitioner had a total of twelve years in experience and training, attaining an education level of "Master of Business Administration with a concentration in Marketing."

In his decision, the Director focused on the insufficiency of the Petitioner's five years of post-baccalaureate experience, but he did not indicate whether the Petitioner had the requisite underlying baccalaureate degree. The Director's decision also did not include an analysis of the evaluation from [redacted] College that equated the Petitioner's education, training, and experience to a master's degree

¹⁰ See 8 C.F.R. § 103.2(b)(12); see also *Matter of Katigbak*, 14 I&N Dec. 45 (Reg'l Comm'r 1971).

¹¹ See 8 C.F.R. § 204.5(k)(3)(i).

in business administration,¹² nor did the decision or the evaluation analyze the Petitioner's certificate from [] that the Petitioner refers to as an "MBA in Business Management." Because the Petitioner's education is essential to a finding of whether the Petitioner qualifies as an advanced degree professional, we will remand this issue to the Director for further consideration.

III. CONCLUSION

In summary, the Petitioner has not established that he meets at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Regarding whether the Petitioner has established that he is a member of the professions holding an advanced degree, the Director did not render a sufficient finding on this issue. We are therefore remanding this matter to the Director to issue a new decision which includes a conclusion regarding the Petitioner's eligibility for the underlying EB-2 visa classification, the threshold determination in national interest waiver cases, as well as an analysis of the evidence to support that conclusion. If the Director determines the Petitioner is eligible for the classification, the Director may consider whether he is eligible for a national interest waiver under the *Dhanasar* analytical framework. The Director may request any additional evidence considered pertinent to the new determination and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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

¹² It does not appear that the experience described by the evaluator and by the Petitioner were corroborated by documentation in the record, and the evaluation does not disclose what documentation was reviewed that led to the evaluator's final assessment of the Petitioner's work, education, and experience.