



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

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

In Re: 23069401

Date: MAR. 15, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an industrial technician, 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 record did not establish that the Petitioner was eligible as an individual of exceptional ability. 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

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).¹ Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.² If 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

¹ 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).

² 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>.

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 discretion³, 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

The Petitioner holds a diploma as a technician in metallurgy and materials from the Federal Institute of Education, Science and Technology of [REDACTED]⁴ and has worked in this capacity since 2006. She did not initially indicate the nature of her proposed endeavor on Form I-140 or in documentary evidence, but included an expert opinion letter in which the writer indicated that she intended to continue working as an industrial technician in the metallurgical industry in the United States.

In response to the Director’s request for evidence (RFE), the Petitioner submitted a statement as well as a business plan for a company she would found and manage as CEO. She proposed “to provide client-focused and result driven project management consulting in the metallurgy industry,” and states that the company would offer services such as project planning, economic assessments, compliance management, contract administration, and quality management assessment. As CEO and lead consultant, the business plan indicates that the Petitioner’s responsibilities would include:

- Recruiting, hiring, and training managers;
- Leading the development and implementation of the business’ strategy;
- Preparing financial reports, budgets, and financial statements for the business;
- Developing and managing financial systems and policies;
- Signing checks and documents on the company’s behalf, and;
- Administering the payroll.

A. Evidentiary Criteria

In his decision, the Director concluded that the Petitioner met the requisite three criteria under 8 C.F.R. § 204.5(k)(3)(ii), but did not establish that she possesses a degree of expertise significantly above that ordinarily encountered in the field. On appeal, the Petitioner asserts that she meets all six of the evidentiary criteria, but does not address the Director’s conclusion in the final merits determination. After review, we disagree with the Director’s conclusions regarding two of the evidentiary criteria, and conclude that the Petitioner has not established that she meets the initial evidence requirement for eligibility as an individual of exceptional ability.

³ See also *Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS’ decision to grant or deny a national interest waiver to be discretionary in nature).

⁴ We note that although transcripts indicate that the Petitioner completed this course in 2005, another document titled “Certificate of Conclusion of Professional Qualifications” was issued in 2009, and the diploma was issued in 2013 but noted that the course was completed in 2011. These varying dates are not explained in the record.

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)

As noted above, the evidence shows that the Petitioner holds a diploma as a technician in metallurgy and materials. Because this diploma relates to her claimed area of exceptional ability as an industrial technician, we agree with the Director that the Petitioner meets 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)

This criterion focuses on evidence of experience in the occupation which a petitioner intends to pursue in the United States. The Petitioner submitted a letter from a human resources official at [REDACTED] [REDACTED] which states that she was employed with the company from 2006 to 2017, and lists the duties of her last job with the company, control room operator. However, this is not the occupation in which she proposes to work in the United States. Rather, she intends to work as the CEO of her own company, performing duties such as those listed above which have no relation to the duties listed in [REDACTED] letter. Because the record lacks evidence of the Petitioner's experience in her proposed endeavor, we withdraw the Director's determination and conclude that she does not meet 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)

In support of this criterion, the Petitioner submitted a copy of a professional identity card issued by the Federal Council of Industrial Technicians (Brazil), as well as information that this organization was created in 2018. However, we initially note that the card is stamped as a provisional license, and without further evidence of the Petitioner's licensing status we cannot conclude that she meets this criterion. In addition, we note that she does not intend to work as an industrial technician in the United States. Accordingly, we withdraw the Director's determination and conclude that she does not meet this criterion.

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)

The Petitioner initially submitted copies of several monthly wage statements from [REDACTED] from 2016 and 2017, but in responding to the Director's RFE she did not claim this criterion or submit evidence that her wage demonstrates exceptional ability. For the first time on appeal, she includes a screenshot from a Brazilian website as well as a link, which she asserts represents the average salary for a metallurgical technician. However, we first note that this evidence is in Portuguese, and that the English translation included in the brief has not been certified by the translator in accordance with the regulation at 8 C.F.R. 103.2(b)(3). In addition, the screenshot does not provide any information regarding the date or source of the data presented, details about the occupation represented, or the geographical range of the survey from which the data originated. It is therefore insufficient to show

that the Petitioner's salary at [] demonstrated exceptional ability, and we conclude that she does not meet this criterion.

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

The Petitioner submitted a letter from the [] [] which states that she is affiliated with them since 2019 as a "holder." However, we note that this criterion requires evidence of membership in a *professional* association, and that the regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation having a minimum requirement of a United States bachelor's degree or foreign equivalent for entry into the occupation. The record does not show that the Petitioner's diploma is the equivalent of a United States bachelor's degree, or that [] requires its members at the Petitioner's level of membership to hold the equivalent of a bachelor's degree. Since [] does not require its members to be professionals as defined in the regulations, it does not qualify as a professional association. The evidence of the Petitioner's membership in [] therefore does not establish that she meets this criterion.

B. Final Merits Determination

Per the analysis above, the Petitioner has established that she meets only one of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii). While she claims on appeal to also meet the sixth criterion relating to recognition for achievements and significant contributions, we need not reach these additional grounds. As the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii), we reserve these issues.⁵ Accordingly, we need not provide a final merits determination. 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 that she possesses the degree of expertise required for this classification.

Specifically, the evidence demonstrates that the Petitioner has education, training, and experience as an industrial technician in the metallurgical industry, but she proposes to work as the CEO of a project and management consulting company. The record does not include evidence that she has education or training as a project or management consultant, entrepreneur, or manager or executive of a small business, nor does she have experience in these areas of her proposed endeavor. We therefore conclude that she has not established that she has a degree of expertise significantly above that ordinarily encountered in the field of her proposed endeavor as the CEO of a small project and management consulting company.

III. CONCLUSION

The Petitioner has not established that she meets the initial evidentiary requirements for the underlying EB-2 classification. We therefore need not address whether she is eligible for, and merits as a matter of discretion, a waiver of that classification's job offer requirement, and thus of a labor certification. The petition remains denied.

⁵ See *INS v. Bagambashad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).

ORDER: The appeal is dismissed.