U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28650308

Date: NOV. 17, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a human resources generalist, seeks classification as a member of the professions holding an advanced degree or of exceptional ability, 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 employment based second preference (EB-2) classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). 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. *See 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).

The Director of the Nebraska Service Center denied the petition, concluding the recorddid not establish that the Petitioner qualified for classification as an individual of exceptional ability and a discretionary waiver of the job offer requirement, and thus a labor certification, was not required upon application of the analytical framework we first explicated in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). 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

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, but only if a petitioner categorically establishes eligibility in the EB-2 classification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." To demonstrate exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

> (A) 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;
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> (B) 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;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; or
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> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

But meeting at least three criteria does not, in and of itself, establish eligibility for this classification. 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 we conclude that a petitioner has an advanced degree or is of exceptional ability such that they have established their eligibility for classification as an immigrant in the EB-2 classification, we evaluate the national interest in waiving the requirement of a job offer and thus a labor certification.

Whilst 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*, *see supra*. *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen 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.

II. ANALYSIS

The Petitioner is a human resources generalist seeking to demonstrate eligibility in the EB-2 classification based on their exceptional ability. A Petitioner must demonstrate expertise significantly above that ordinarily encountered to show that they are of exceptional ability. In support, the record contains a certificate issued to them by [redacted] to memorialize completion of a graduate specialization in strategic people management in the major of business administration, letters purporting to evidence their work experience, evidence of membership in the Society for Human Resource Management (SHRM) and Academy of Human Resource Development (AHRD), professional identity cards issued by a regional administrative council in the Petitioner's home country, letters of recommendation, letters from individuals interested in engaging the Petitioner's services, professional certificates, articles from publications, personal statement, business plan, and an expert opinion letter.

We agree with the Director's ultimate decision that the Petitioner is not of exceptional ability and therefore categorically ineligible for the EB-2 classification. The Director concluded that the Petitioner met one of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). Specifically, the Director concluded that the Petitioner demonstrated they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(A) but did not meet any of the remaining criteria.[1] Upon de novo review, we agree with the director and conclude that the Petitioner has demonstrated that they met the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(A) but did not meet any two of the remaining criteria contained at 8 C.F.R. § 204.5(k)(3)(ii) for the reasons set forth below.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the noncitizen 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 Petitioner initially submitted a letter from [redacted] attesting that they were employed from March 21, 2011 to May 10, 2018, a period of less than 10 years, in the full-time position of human resources analyst, performing the human resources generalist duties they intend to perform in their proposed endeavor.

In response to the Director's notice of intent to deny (NOID), the Petitioner submitted two additional letters from previous employers to demonstrate 10 years of full-time experience in a human resources generalist or substantially similar position. We held in *Chawathe* that the standard of proof in immigration proceedings is the preponderance of the evidence, the burden of proof is always on the petitioner. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *also see* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). A petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits.

[1] The Petitioner did not submit evidence of commanding a salary, or other remuneration for services, which demonstrates exceptional ability to meet the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(D) or evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations to meet the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(F).

The additional letters the Petitioner submitted are not sufficient evidence to establish they had at least 10 years of full-time experience as a human resources generalist. The letter from [redacted] where the Petitioner worked from January 2004 to December 2006, is not sufficient evidence of employment from current or former employers because the Petitioner's employment with [redacted] was not in a human resources generalist or substantially similar position. The Petitioner served as an executive secretary and "was responsible for receiving customer requests," "mak[ing] reservations", and 'issu[ing] travel and tax documents."

The Petitioner also submitted a letter from a purported former co-worker at their former employer [redacted] The letter writer has since changed employment to work at [redacted] The letter writer and purported former co-worker wrote their letter on [redacted] letterhead attesting to the Petitioner's full-time employment from May 2007 to May 2010 in the human resources department at [redacted] performing duties similar to those expected of a human resources generalist, such as recruitment, selection, and training. A letter from a former co-worker on the letterhead of an employer for whom the Petitioner has never worked is not primary evidence of a letter from a current or former employer with whom the Petitioner had full-time employment in the occupation they seek to pursue as part of their proposed endeavor in the United States. It is, at best, secondary evidence. The regulations permit us to accept secondary evidence only upon demonstration of the unavailability of primary evidence. *See* 8 C.F.R. § 103.2(b)(2). The record does not contain any evidence supporting why primary evidence in the form of a letter from the former employer either did not exist or could not be obtained. Moreover, there is no relevant, material, or probative evidence in the record to support that the letter writer is a former co-worker of the Petitioner. Consequently, the presumption of ineligibility inherent when required evidence is not presented remains unrebutted by the letter of the Petitioner's purported former co-worker. So the Petitioner's evidence did not meet the minimum requirements of the regulation to reliably document the 10 years of full-time experience as an entrepreneur.

When, as here, a petitioner has not met the burden of persuasion by a preponderance of the evidence because their evidence is not material, relevant, or probative it follows that they have failed to demonstrate eligibility for the benefit that they seek. For all the foregoing reasons, we conclude that the Petitioner has not demonstrated that they have at least 10 years of full-time experience in the occupation of financial analyst. So the Petitioner did not and cannot satisfy the regulatory requirements to meet this criterion to demonstrate their exceptional ability.

> *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 submitted a professional identity card from [redacted] identifying them as a manager restricted to the actuation area of tourism. The Petitioner asserts that this is evidence of a license to practice their profession of human resources generalist. Licenses and certifications show that a person has the specific knowledge or skill needed to do a job. A license, generally conferred by an official government body, confers legal authority to work in an occupation. A certification, whilst not always required to work in an occupation, generally requires demonstrating competency to do a specific job. The Petitioner's professional identify card reflects registration, not licensure, as a manager in the actuation area of tourism. It appears to relate to a broad category of

individuals working in the area of "administration" but does not relate to any particular profession or occupation. The evidence in the record does not demonstrate the registration is related to performing the overarching duties of the Petitioner's profession or occupation. And the evidence in the record does not describe how the registration demonstrates the Petitioner's competency to perform their proposed human resources generalist job duties. The record does not indicate what standards the registration reflects the Petitioner met. Nor does the record indicate whether the registration must be periodically refreshed or renewed to ensure the individual holding the registration maintains the competency or standards the registration purports to reflect. So we cannot conclude the Petitioner has a license to practice the profession or certification for a particular profession or occupation.

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

The Petitioner's membership in the Society for Human Resource Management (SHRM) and the Academy of Human Resource Development (AHRD) is not sufficient evidence of membership in a professional association. The occupation of human resources generalist does not appear in the list of professions contained at section 101(a)(32) of the Act, and it is not included as an occupation that customarily requires a bachelor's or higher degree. *See* Update to Appendix A to the Preamble-Education and Training Categories by O*NET-SOC Occupations; Labor Certification for Permanent Employment of Immigrants in the United States and Procedures To Establish Job Zone Values When O*NET Job Zone Data Are Unavailable, 86 Fed. Reg. 63070 (Nov. 15, 2021). The record does not adequately describe the criteria for membership in these organizations and consequently we are unable to conclude that membership in SHRM or AHRD is reserved for professionals. Consequently, the record does not convincingly describe the Petitioner's membership in SHRM or AHRD as membership in professional associations as that term is contemplated in the regulations, and we conclude the Petitioner has not met this criterion.

III. CONCLUSION

The Petitioner has not established eligibility in at least three of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). So they cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). And we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. In addition 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). The appeal is dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.