U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29546963

Date: FEB. 6, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in information technology, seeks employment-based second preference (EB-2) immigrant classification 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 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 did not establish he was eligible for, and merited as a matter of discretion, a national interest waiver. 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. An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

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

[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.

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 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 discretion,[3] 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.

Id.

II. ANALYSIS

The Petitioner claimed eligibility for the EB-2 classification as both a member of the professions holding an advanced degree and as an individual of exceptional ability. The Director considered the Petitioner's eligibility for both and determined that neither was established. On appeal, the Petitioner asserts the Director erred because he is an individual of exceptional ability. The Petitioner does not contest the Director's determination that he is not an advanced degree professional, as such the issue is waived. *See, e.g.*, *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

A. Regulatory Criteria for Exceptional Ability

The Petitioner claims to meet five of the six evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii) to show that he is an individual of exceptional ability. He also asserts that comparable evidence establishes he is an individual of exceptional ability. Per the analysis below, we conclude that he does not meet the initial evidence requirement of at least three of the criteria, and that he has not shown the regulatory criteria are not readily applicable to his occupation for purposes of considering comparable evidence of exceptional ability.

> *An official academic record showing that the [noncitizen] 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)

We agree with the Director that the Petitioner's technologist degree, issued by the [redacted] [redacted] Brazil in 2014 meets this criterion.

[3] *See Poursina v. USCIS*, 936 F.3d 868, 872 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

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 is being sought; 8 C.F.R. § 204.5(k)(3)(ii)(B)

Initially, the Petitioner relied upon letters from his former employers [redacted] that verified his status as an employee, the title of his position, and dates of employment. However, the letters omitted whether he worked full-time and his duties. In response to the Director's request for evidence (RFE), the Petitioner submitted new letters from [redacted], verifying that his work for these companies was full-time. However, the Director determined that the letters were insufficient because no details of his duties were included, and the job title alone was insufficient.

Because the plain language of the criterion requires the Petitioner to establish that his 10 years of full-time experience in the occupation in which he is being sought, here, software development, we agree that the lack of details regarding his positions at [redacted] are insufficient to meet his burden under this criterion. *Matter of Chawathe*, 25 I&N Dec. at 375-76. We note that other evidence in the record, specifically the letter from [redacted] letterhead is insufficient to establish his duties because [redacted] does not appear to have the authority to verify the Petitioner's duties. [redacted] describes meeting the Petitioner when he was a Process Analyst at [redacted] and the Petitioner worked as an Information Technology Analyst at [redacted] The letter does not explain if [redacted] was the Petitioner's supervisor or has authority to verify his role at [redacted] The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

For these reasons, we conclude that the Petitioner has not established that he meets this criterion.

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

To satisfy this criterion, the evidence must show that a petitioner has commanded a salary or remuneration for services that is indicative of his claimed exceptional ability relative to others working in the field. *See generally*, 6 *USCIS Policy Manual* F.5(B)(2), www.uscis.gov/policy-manual. In support, the Petitioner provided tax and income documentation from Brazilian authorities to establish he earned:

- R$49,275.85 in 2019/2020
- R$62,983.33 in 2018/2019
- R$63,295.36 in 2017/2018

In his RFE response, he asserted that because Brazil's gross domestic product per capita in 2019 was R$31,833.31, his income demonstrates that he is a high-income professional of exceptional ability. For comparison, he submitted information from vagas.com, showing that the average software developer salary in Brazil is R$3,455 per month (gross income), which is R$41,460 per year.

While this evidence shows that the Petitioner's earnings in those years exceeded the average salary of software developers in Brazil at the time of filing, it does not show how his earnings compared with those of top earners in the software development field. In addition, the evidence provided considers

salaries for this position from across Brazil, and therefore does not take local or regional differences into account. In addition, because the letters from his employers did not list his job duties, it is unclear whether a software developer is a proper basis for comparison; the employment letters provided stated the Petitioner worked as an Information Technology Analyst. For these reasons, we agree with the Director's conclusion that this evidence does not establish that he commanded a salary indicative of his claimed exceptional ability relative to others working in the field.

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

The Petitioner asserts his eligibility under this criterion based on his affiliations with the [redacted] [redacted] [redacted] Brazil (the Union). A profession as defined at section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), includes but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries. The Petitioner asserts that these organizations are professional associations within the meaning of this criterion. The record indicates he joined [redacted] in 2022 and that he became a member of the Union in May 2011. [redacted] have varying levels of membership, including student membership. As such, and because the Petitioner's evidence is insufficient to determine his level of membership, he does not meet this criterion based on his membership in these two organizations. *Matter of Chawathe*, 25 I&N Dec. at 375-76. Public source information indicates that [redacted] is a pre-professional organization dedicated to certifying IT professionals. *See* https://www.[redacted]org/home. As such, it does not meet the definition of a professional association as required under this criterion. Finally, the Petitioner's evidence verifying his membership in the Union does not explain, with any specificity, the purpose of the organization and the Petitioner's assertions are not sufficient to meet his burden. *Id.* For these reasons, we agree with the Director's conclusion that this evidence does not establish 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)

In support of this criterion, the Petitioner submitted five reference letters and an expert opinion letter. We note that letters, written for the purpose of supporting a petition for immigration benefits, are generally less probative than evidence which contemporaneously recognizes a petitioner for their achievements and contributions. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), www.uscis.gov/policy-manual. Overall, the five reference letters provide positive reviews of the Petitioner's professional endeavors, however they do not provide sufficient details of his achievements and significant contributions to the field as required by the plain language of the criterion. The first letter is from a former colleague at [redacted], who describes when they met, and then provides a list of the Petitioner's contributions to his employer, such as developing and implementing software that made production more efficient at the company. The author describes the Petitioner as being "far above the average I'm used to seeing in the industry . . .," however he does not provide any specific details to understand the basis for this opinion or explain what contributions the Petitioner made to the industry, outside of his employer. The second letter is from a former colleague at [redacted] who claims to have

met the Petitioner in 2016, and attests to his work on the "migration of [redacted] servers to [redacted] . . . at implementation of the [Service Level Agreement] control and monitoring system at [redacted] His letter describes additional professional endeavors carried out by the Petitioner, and that based on this work, he "recognize[d] . . . all of his logical and reasoning abilities, which are far beyond the ordinary, especially in terms of identifying strengths and weaknesses in order to propose alternative solutions, conclusions or approaches to problems [that] are not conventional." While the writer lauds the Petitioner's work performance for this company, the letter does not indicate that he received recognition for achievements and significant contributions to his industry or profession.

The third letter, from an individual with 10 years of corporate professional experience in software development and information technology consulting, describes meeting the Petitioner in 2008, and him as the "most capable professionals [he] ever met." The author explains how the Petitioner's skills allow him to solve business problems such as supply chain problems between [redacted] and its suppliers. He also explains that when they worked together, he could "clearly see that [the Petitioner] has strong critical thinking and solved complex problems. . . . I could see that he knows how to evaluate the performance of his entire system with great efficiency." Finally, he concludes that the Petitioner's focus in cloud software is cutting edge, and that he was an "incredible train[er] to users and the entire team . . .." The fourth writer describes his background and his current position as an information technology infrastructure specialist in the Brazilian Army. He explains that he worked with the Petitioner at [redacted] designing and implementing software. He described the Petitioner as "a born entrepreneur," a "great trend predicter," and "capable of understanding documents related to his work, clearly identifying the points to be better detailed and attended to," and "a brilliant mind in the area of hard sciences . . . as a software and web developer." The last letter is from a former colleague who worked with the Petitioner from 2005 until 2014. He describes the Petitioner's work which involved "more than 50 equipment including computers, servers, network equipment, computer equipment . . .." He also describes the Petitioner as a "high-level professional in his analysis criteria, especially for mastering the entire technical apparatus in Software Development."

These letters demonstrate that the Petitioner is highly regarded by several of his peers, however they do not describe specific achievements or contributions to his field or industry, as opposed to his work performance on behalf of his employers. As such, the letters do not establish this criterion.

In addition to the above, the Petitioner provides an expert letter by [redacted] professor of computer science, information systems, and cyber security at [redacted] In the professor's discussion of prong two of the *Dhanasar* framework, he recites the Petitioner's education, work history, certifications in English language, web development, and cloud computing, and his memberships in the organizations discussed above. He also quotes extensively from the above referenced letters to conclude that the Petitioner is well-positioned to advance the proposed endeavor. The letter, however, does not provide any more specificity or details to conclude the Petitioner's expertise is significantly above that ordinarily encountered in his field as required by 8 C.F.R. § 204.5(k)(2). For these reasons, we conclude that the Petitioner does not meet this criterion.

B. Comparable Evidence

Under 8 C.F.R. § 204.5(k)(3)(iii), a petitioner may submit comparable evidence to establish eligibility, if USCIS determines that the evidentiary criteria described in the regulations do not readily apply to

the occupation. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), www.uscis.gov/policy-manual. When evaluating such comparable evidence, USCIS must consider whether the regulatory criteria are readily applicable to the occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation. *Id.* However, general assertions that the listed regulatory criterion does not readily apply to an occupation are not acceptable. *Id.* Similarly, general claims that USCIS should accept comparable evidence are not persuasive. *Id.* A petitioner must explain why the evidence submitted is comparable. *Id.* Here, the Petitioner provides no explanation or details for us to understand how the evidentiary criteria do not apply, thus we decline to consider the comparable evidence he provides.

C. Final Merits Determination

The Petitioner has not demonstrated that he meets the initial evidentiary requirements for classification as an individual of exceptional ability by meeting at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). We thus need not conduct a final merits determination of whether the totality of the evidence establishes that he is recognized for having a degree of expertise significantly above that ordinarily encountered in the information technology field. Nevertheless, we have reviewed the evidence, in its totality, and conclude that it does not establish that he possesses the heightened level of expertise required for the requested classification. While he has completed relevant education and training and has experience working in his field, the evidence does not reflect that he has been recognized as standing above his peers to a significant extent. The evidence shows that the Petitioner has taken on responsibilities and duties commensurate with his education and experience in the field of information technology, but not that his level of expertise has been recognized as significantly above that ordinarily held by an experienced information technology analyst. As such, he has not established that he is an individual of exceptional ability.

D. National Interest Waiver

The Petitioner has not established his eligibility as a member of the professions holding an advanced degree or an individual of exceptional ability, and he therefore does not qualify for the EB-2 classification. Because of this, he is not eligible for a national interest waiver of that classification's job offer requirement. We will nevertheless briefly review his proposed endeavor under the first prong of the *Dhanasar* analytical framework.

The Petitioner's proposed endeavor is to own and operate a web and mobile systems development and ideation service provider, [redacted] region. According to his business plan, his company aims to provide application programming interface services through cloud architecture, and business intelligence services, using various information technology tools and data science in general. In addition, he asserts his company may also provide information technology consulting services depending on demand. He plans to hire additional staff to include an intelligence analyst, software quality assurance analyst and tester, tutor, receptionist and information clerk, and a desktop publisher.

The first prong of the *Dhanasar* framework, substantial merit and national importance, focuses on the specific endeavor that the individual 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. *Dhanasar*, 26 I&N Dec. at 889.

In their decision, the Director concluded that the evidence was sufficient to show that the Petitioner's proposed endeavor is of substantial merit. Based upon the evidence concerning the information technology industry and the importance of small businesses, information technology, and entrepreneurialism to the U.S. economy, both of which are directly tied to the Petitioner's proposed endeavor, we agree that his endeavor is of substantial merit.

Turning to the national importance of the Petitioner's proposed endeavor, the Director determined that the Petitioner had not established how his proposed business would have broader implications on the field, or that it would have a potential prospective impact on the national economy. On appeal, the Petitioner makes the same arguments as he did when responding to the Director's RFE. He stresses that because he will be starting his own company, the impact of his services will not be limited to a single employer and that he will locate his business in the greater [redacted] area where technology innovation is expanding and he will be contributing to the "entrepreneurial ecosystem, promoting economic growth, and job creation in the region."

He outlines that the major impacts stemming from his endeavor include economic impact, job creation, professional development and collaboration, advancements in the field of information technology through the development of software and by participating in conferences, workshops and industry events, as well as the payment of taxes. He also claims that because his business will be committed to sustainable business practices and social responsibility, he will "implement measures to reduce environmental impact, promote diversity and inclusion, and adopt good corporate governance practices." He further asserts that his endeavor is aligned with USCIS' STEM policy[4] as it relates to waivers of national interest, and with government efforts to bolster cybersecurity, which is tied to our national defense. He argues that many of the technologies his company will focus on will support U.S. government priorities such as pandemic readiness and prevention, climate change, research and innovation in critical and emerging technologies, innovation for equity, and national security and economic resilience. Finally, he argues there is a shortage of STEM workers, and specifically software developers like himself, and that there is a growing need for these workers.

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement we look to evidence documenting the "potential prospective impact" of his work. We recognize the overall value of the IT industry, attracting STEM talent, and strengthening our nation's cybersecurity and information technology infrastructure to maintain U.S. competitiveness. However, the evidence does not demonstrate that the Petitioner's specific undertaking stands to have an impact beyond the organization and clients he would serve, or that his proposed work would otherwise have broader implications for the IT industry or U.S. cybersecurity initiatives. For example, he does not claim, and the record does not establish, that he plans to introduce novel technologies or IT advancements that may be disseminated to or adopted by others operating in the field or industry, or otherwise articulate how he will contribute to development of our nation's cybersecurity. For example, he notes that his company will advance national security and economic resilience in the United States because there

[4] USCIS' STEM policy provides specific considerations when adjudicating a national interest waiver. *See* 6 *USCIS Policy Manual* F.5(D)(2), https://www.uscis.gov/policy-manual.

are a "lack of professional[s] with [his] skills [in] . . . biosafety and biosecurity . . .," however a lack of professionals is an insufficient reason to conclude his endeavor is of national importance to our national or cyber security. Overall, his assertions speak to the substantial merit of his endeavor, however they are insufficient to conclude it will have the kind of broad impact contemplated under *Dhanasar*.

In *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of national importance because they would not impact his field more broadly. *Id.* at 893. Here, we conclude the Petitioner has not shown that his proposed endeavor stands to sufficiently extend beyond his future clientele to impact the information technology industry or U.S. economy more broadly at a level commensurate with national importance. Moreover, the Petitioner has not demonstrated that the specific endeavor he proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for our nation. Without sufficient information or evidence regarding any projected U.S. economic impact or job creation attributable to his future work, the Petitioner has not shown that the benefits to the regional or national economy resulting from his projects would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890. In sum, the Petitioner has not shown that his business and the information technology he intends to provide would raise the potential prospective impact of his endeavor to that of national interest, because he has not demonstrated that this would have broader implications for the U.S. economy or the software development or information technology field.

III. CONCLUSION

The Petitioner has not demonstrated their eligibility for EB-2 permanent immigrant classification. And the record contains insufficient evidence to establish they met the first prong of the *Dhanasar* analytical framework. Because the Petitioner has not established that the proposed endeavor has national importance, as required by the first *Dhanasar* prong, they are not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or third *Dhanasar* prong. *See INS v Bagamasbad*, 429 U.S. 24, 25 (1976) (noting "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 alternative issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.