U.S. Citizenship and Immigration Services

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

In Re: 28786191

Date: FEB. 16, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, seeks classification as an individual of exceptional ability in the sciences, arts or business. *See* 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 EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act. 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.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for: (1) classification as an individual exceptional ability; and (2) the 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 qualify for a national interest waiver, a petitioner must first show eligibility 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. Section 203(b)(2)(B)(i) of the Act.

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] USCIS will then conduct a final merits determination to decide whether the evidence as a whole shows

[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 individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

Once a petitioner demonstrates EB-2 eligibility, 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 USCIS may, as matter of discretion,[3] grant a national interest waiver if the petitioner demonstrates that: (1) the proposed endeavor has both substantial merit and national importance; (2) the individual is well positioned to advance their proposed endeavor; and (3) on balance, waiving the job offer requirement would benefit the United States.

## II. ANALYSIS

In his native Brazil, the Petitioner worked as a sector manager for a manufacturer of automobile parts from 2008 to 2013, and then as a customer service supervisor for a farm machinery dealer from 2013 to 2015. The Petitioner has been in the United States since he entered in June 2016 as a B-2 nonimmigrant visitor. The Petitioner initially stated that, since 2016, he has been an "investor" in a cleaning service in Florida. He later asserted that he had also served as the cleaning company's general manager.

The Petitioner claimed eligibility for EB-2 classification as an individual of exceptional ability. The Petitioner did not claim to qualify as a member of the professions holding an advanced degree, and therefore we need not address the separate requirements for that classification.

To establish 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), summarized below:

(A) An academic degree relating to the area of claimed exceptional ability;
(B) Ten years of full-time experience in the occupation;
(C) A license or certification for the profession or occupation;
(D) A salary or other remuneration that demonstrates exceptional ability;
(E) Membership in professional associations; and
(F) Recognition for achievements and significant contributions to the industry or field.

If an individual meets at least three of the regulatory criteria, we then consider the totality of the material provided in a final merits determination and assess whether the record shows a degree of expertise significantly above that ordinarily encountered in the individual's field. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits

[3] *See also Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts, and Third in an unpublished decision, in concluding that USCIS' decision to grant or deny a national interest waiver is discretionary in nature).

determination). *See also, generally,* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

The Petitioner claims to have submitted evidence to satisfy four of the six regulatory criteria, as discussed below.

> *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).

We agree with the Director that academic records and certificates showing the Petitioner's completion of college-level education in management satisfy 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 concluded that the Petitioner had satisfied this criterion. We disagree.

The wording of the regulation does not merely require ten years of full-time employment experience. That experience must be "in the occupation for which [the individual] is being sought." The Petitioner claims "13 years of experience . . . in the areas of entrepreneurship, business management, business development, industrial production, [and] project management." These varied activities are not all the same occupation described in the petition. For example, the Petitioner does not establish the relevance of "industrial production" to the work he intends to pursue in the United States.

Throughout this proceeding, the Petitioner has called himself an entrepreneur. An "entrepreneur" is defined as "one who organizes, manages, and assumes the risks of a business or enterprise."[4] The record does not show that the Petitioner has at least ten years of full-time experience that meets this definition.

The Petitioner has been an entrepreneur in the United States as an investor and partner in the cleaning service in Florida. This experience, however, began in June 2016, about five years before he filed the petition in October 2021. Therefore, the Petitioner's work in the United States is not sufficient, by itself, to establish ten years of experience in the occupation of an entrepreneur.

Letters from the Petitioner's former employers in Brazil attest to his employment from February 2008 to November 2015. But the letters do not indicate that he owned the companies or otherwise organized, managed, and assumed the risks of the businesses. Rather, the letters describe lower-level management over aspects of the automobile parts manufacturer and the farm equipment dealer. The Petitioner does not seek to work in the United States as either a service supervisor or as a sector manager, and therefore the letters do not establish experience in the occupation that the Petitioner seeks in the United States.

[4] *Entrepreneur*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/entrepreneur.

The Petitioner has not met his burden of proof to establish at least ten years of full-time experience in the occupation of an entrepreneur. We withdraw the Director's contrary determination.

> *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 initially submitted copies of a "Professional Identity Card" and a "Certificate of Professional Regularity," indicating that he was registered with the [redacted] Brazil, as a "Technologist" in the area of "Industrial Production." The Petitioner submitted background information about the regional body that issued the documents, but did not establish that registration constitutes licensure or certification.

In a request for evidence (RFE), the Director requested "[d]ocumentary evidence to establish that the occupation requires the license or certification" and "[a]ny other relevant evidence." In response, the Petitioner submitted copies of the same documents, which added no new information to the record.

The Director concluded that the Petitioner had not satisfied the criterion. On appeal, the Petitioner asserts: "This license explicitly states the **appellant's qualifications as a technologist in industrial production**" (emphasis in original).

The Petitioner has not submitted information about the requirements to obtain documentation of the type he has submitted. For example, the record does not establish whether the issuing authority verifies an individual's qualifications, or simply issues documents based on self-reported information. We note that the Petitioner had been outside of Brazil for several years when the Brazilian regional authority issued the documents in 2020 and 2021.

Furthermore, the Petitioner does not seek employment in the United States as a "technologist in industrial production." He filed the petition as the general manager of a cleaning company, and has since asserted that he intends to run a grocery store. The Petitioner has not explained how his registration as a "technologist" is relevant to his claim of exceptional ability as an entrepreneur.

The Petitioner has not established that he holds a license or certification in the occupation in which he claims exceptional ability.

As explained above, the Petitioner has met one claimed criterion, but has not met his burden of proof to satisfy two additional claimed exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii). In light of the above conclusions, detailed discussion of the remaining claimed criterion cannot change the outcome of this appeal. Therefore, we reserve argument on the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), relating to evidence of recognition for achievements and significant contributions to the industry or field.[5]

[5] *See INS v. Bagamasbad*, 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); *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).

The Petitioner has not satisfied at least three of the initial criteria at 8 C.F.R. § 204.5(k)(3)(ii). As a result, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Nevertheless, the record in the aggregate does not support a conclusion that the Petitioner has established exceptional ability in business as an entrepreneur as claimed. The submitted evidence indicates that the Petitioner has worked as a supervisor and manager for different businesses, but his experience as an entrepreneur appears to be limited to his investment in the cleaning company in Florida. The record does not establish that the Petitioner possesses a degree of expertise significantly above that ordinarily encountered as an entrepreneur.

Because the petition cannot be approved without an underlying determination that the Petitioner qualifies for EB-2 classification, we also reserve discussion of the Petitioner's national interest waiver claim under the *Dhanasar* framework. Nevertheless, outside the specific *Dhanasar* prongs, a particular issue warrants comment.

When he filed the petition in October 2021, the Petitioner stated: "My proposed endeavor in the United States will be to manage and expand my current business in the American market." The Petitioner identified that company by name. Elsewhere in the record, the Petitioner described his company as a "commercial and residential cleaning service" with four employees. Thus, at the time of filing, the Petitioner specifically tied his proposed endeavor to that cleaning company, with no indication that the endeavor would encompass other businesses.

In the RFE, the Director asked for more information and evidence about the Petitioner's proposed endeavor. In response, the Petitioner submitted a business plan for a different proposed endeavor, "to develop a retail supermarket company . . . [that] will specialize in . . . American, Brazilian, and Spanish products." The business plan projected that the grocery store would hire 44 employees in its first five years of operation.

The proposed endeavor that the Petitioner described in response to the RFE is entirely different from what he described when he first filed the petition. The new proposed endeavor, therefore, represents a very substantial material change to a factor that is fundamental to the petition. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). In a statement submitted with the RFE response, the Petitioner did not explain the change to the proposed endeavor, or even acknowledge that he had changed it.

## III. CONCLUSION

The Petitioner has not established eligibility as an individual of exceptional ability in business. Therefore, the Petitioner not shown that he is eligible to apply for the national interest waiver. We will therefore dismiss the appeal.

**ORDER:** The appeal is dismissed.