U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29548869

Date: FEB. 27, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an electrical technician, seeks employment-based second preference (EB-2) classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this classification. 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 is eligible for the EB-2 exceptional ability classification or that a waiver of the job offer requirement would be in the national interest. 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. 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.[2]

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

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.

II. ANALYSIS

A. Exceptional Ability

The first issue on appeal is whether the Petitioner has established that he is eligible for the EB-2 visa classification as an individual of exceptional ability in the sciences, arts, or business.[4] This classification can only be granted to noncitizens with a degree of expertise significantly above that ordinarily encountered in their fields, where that expertise will provide a substantial prospective benefit to the national economy, cultural or educational interests, or welfare of the United States. 8 C.F.R. § 204.5(k)(2); section 203(b)(2)(A) of the Act.

The Petitioner initially claimed to qualify under all six of the initial exceptional ability evidentiary criteria at 8 C.F.R. § 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). The Director concluded that the evidence met four of the criteria:

- (A), an official academic record showing the Petitioner has a degree, certificate, or similar award from an institution of learning in his area of exceptional ability;
- (B), letters from current or former employers showing that the Petitioner has at least ten years of full-time work experience in the occupation he seeks to work in;
- (C), a license to practice the profession or certification for a particular profession or occupation; and
- (D), evidence of membership in professional associations.

Since the Director found that the Petitioner had met at least three of the criteria, the Director conducted a final merits determination and concluded that the totality of the record did not establish that the Petitioner has a degree of expertise significantly above that ordinarily encountered in his field. 8 C.F.R. § 204.5(k)(2).

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

[4] The Petitioner does not assert, and the record does not indicate, that he qualifies as a member of the professions holding an advanced degree. 8 C.F.R. § 204.5(k)(2), (3)(i).

On appeal, the Petitioner asserts that the Director overlooked evidence and imposed a stricter standard than the one in the relevant statues and regulations. Upon review, we conclude that the Petitioner does not qualify as an individual of exceptional ability, because while he does have a diploma in his specialty, he does not meet any of the other five initial criteria, for the reasons below.

1. An official academic record showing that the individual 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

To establish eligibility for this criterion, the Petitioner submitted a diploma and academic transcript showing that he completed a two-year training program for electrical technicians which was administered by a federal technological education center. We therefore conclude that the Petitioner submitted official academic records showing he has a diploma in his field from an institution of learning.

2. Evidence in the form of letter(s) from current or former employer(s) showing that the individual has at least ten years of full-time experience in the occupation in which they are seeking to work

The record includes letters from several of the Petitioner's past employers which include the name, address, and title of the writer and a specific description of the Petitioner's duties, as required by 8 C.F.R. § 204.5(g)(1), and state that he has over ten years of full-time work experience. The qualifying letters[5] relate to the following employers and positions:

- [redacted] – Technical Coordinator, January 14, 2019, to January 24, 2022;
- [redacted] – Instrumentation Technician, April 13, 2012, to December 18, 2017;
- [redacted] – Automation Technical Assistant, May 2, 2011, to April 5, 2012;
- [redacted] – Senior Implementation Technician, October 28, 2006, to January 3, 2011.

However, beyond the decision of the Director, we note that the Petitioner did not appropriately document his 10 years of qualifying work experience in his U.S. Department of Labor (DOL) Form ETA 750B, Statement of Qualifications of Alien. All petitions requesting a national interest waiver of the job offer requirement must be accompanied by two fully-executed copies of Form ETA 750B as part of their initial evidence. 8 C.F.R. § 204.5(k)(4)(ii);[6] *see also* 8 C.F.R. § 103.2(b)(1) (requiring all benefit requests to be properly completed and to include all the initial evidence required by applicable regulations and other USCIS instructions).

The instructions of Form ETA 750B require the preparer to list all jobs related to the occupation in which the noncitizen beneficiary is seeking employment. Every form submitted in connection with a benefit request must be executed in accordance with the form instructions, which carry the weight of

[5] The letter from [redacted] did not list the Petitioner's duties, and so did not meet the requirements of 8 C.F.R. § 204.5(g)(1) to be used as evidence of qualifying work experience.

[6] Alternatively, petitioners may submit two full-executed copies of DOL Form ETA 9089, Application for Permanent Employment Certification, Sections J, K, and L. *See generally* 6 *USCIS Policy Manual* F.5(D), https://www.uscis.gov/policy-manual.

regulations. 8 C.F.R. § 103.2(a)(1). The Petitioner did not do so here. Instead, he only listed his positions with [redacted] and [redacted] on the Form ETA 750B, while omitting the positions with [redacted] and [redacted] as well as other positions listed as relevant experience on his resume.

Where there are inconsistencies in the evidence, it is the Petitioner's burden to resolve these inconsistencies using independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92 (BIA 1988). The Petitioner has not provided an explanation for why his positions at [redacted] and [redacted] were not listed as related jobs on his ETA 750B if he considered them sufficiently relevant to qualify as work experience for this criterion. The positions which he did properly document on his ETA 750B comprise less than nine years of work experience, rather than the 10 years required under 8 C.F.R. § 204.5(k)(3)(ii)(B).[7] The Petitioner's evidence therefore does not establish his eligibility under this criterion.

3. A license to practice the profession or certification for a particular profession or occupation

For this criterion, the Petitioner submitted an identity card and a certificate of good standing issued by the Federal Council of Industrial Technicians, stating that the Petitioner is an electrical technician. The Director concluded that this was sufficient to meet the criterion. We disagree.

The identity card and good standing certificate were not accompanied by any supporting documentation indicating that they were required for the Petitioner to work in his occupation in Brazil. Instead, both documents state that the Petitioner registered with the council in May 2022, after he had already entered the United States and stopped working as an electrical technician.[8] The record therefore does not demonstrate that the Petitioner has a license or certificate to practice his occupation, and we will withdraw the Director's finding to the contrary.

4. Evidence that the individual has commanded a salary or other remuneration for services which demonstrates exceptional ability

For this criterion, the Petitioner submitted letters from his employers stating his past wages, as well as one instance of a bonus. However, he did not provide any documentation of the wages of other electrical technicians in his area as a basis of comparison. It is therefore not apparent that the Petitioner's wages reflected a level of expertise that is significantly above that ordinarily encountered in his field, and the Director accordingly found that the Petitioner does not meet this criterion. 8 C.F.R. § 204.5(k)(2).

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[7] We further note that the Petitioner's duties at [redacted] consisted of contract administration; budget, equipment, and vehicle management, coordinating maintenance and repair services for electrical power substations, and managing personnel and outsourcing. The Petitioner did not install, repair, or maintain electrical equipment as part of his duties. It is therefore not apparent that this position was "in the occupation" in which he seeks employment, as required for the 10 years of work experience for 8 C.F.R. § 204.5(k)(3)(ii)(B), rather than just being "related" to that occupation, as required for the ETA 750B. In any future filings in this matter, the Petitioner should address this issue.

[8] The Petitioner's stated work history ends in January 2022, when he was admitted to the United States as a B-2 nonimmigrant visitor for pleasure, a classification which does not permit the holder to engage in employment. 8 C.F.R. § 214.1(e).

On appeal, the Petitioner does not mention this criterion in his brief. Any issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). The Petitioner has not met this criterion.

5. Evidence of the individual's membership in professional associations

For this criterion, the Petitioner submitted documentation relating to the Electrical Association and to Comunidade de Eletricidade. The Director concluded that this sufficed to meet the criterion. We will withdraw this conclusion.

To establish his membership in the Electrical Association,[9] the Petitioner submitted a website printout stating that he is a "Non Mbr Indiv." He did not provide any documentation explaining why he is registered as a non-member if he is, in fact, a member of this organization. As noted above, it is the Petitioner's burden to resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The Petitioner has not done so here. The record indicates that he is not a member of the Electrical Association, and so the related evidence does not qualify him under this criterion.

The documentation regarding the Comunidade de Eletricidade indicates that it is an online bulletin board for electrical technicians to discuss their work. There is no indication that this bulletin board is an association, apart from a note presumably written by the Petitioner. The record is insufficient to establish that the Petitioner's registration with an online bulletin board constitutes a membership in an association.

Furthermore, we note that 8 C.F.R. § 204.5(k)(2) defines a "profession" as an occupation requiring at least a U.S. baccalaureate degree or its foreign equivalent for entry.[10] The record does not indicate, and the Petitioner does not claim, that the occupation of electrical technician has such an educational requirement. The Petitioner also did not provide any documentation of the membership requirements of the Electrical Association or Comunidade de Eletricidade.[11] It is therefore not apparent that either of these organizations is professional in nature. For this additional reason, the Petitioner has not met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E), and we will withdraw the Director's finding to the contrary.

[9] The Electrical Association is a trade organization that "supports electrical contractors and electricians in Minnesota and all 50 states." Elec. Ass'n, *About Us*, https://www.electricalassociation.com/Online/About_Us.aspx.

[10] The definition also encompasses the list of occupations at section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), which does not include electrical technicians.

[11] We further note that according to their website, the Electrical Association requires anyone joining as an electrical contractor to be licensed and bonded in Minnesota. Elec. Ass'n, *Member Type Descriptions*, https://www.electricalassociation.com/Online/Member_Type_Description.aspx. The Petitioner has no U.S. occupational licenses or certifications.

6. Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

To establish eligibility under this criterion, the Petitioner submitted various training certificates and recommendation letters from his former coworkers, a screen capture of an online meeting, and documentation of the Petitioner's receipt of a bonus payment and a scholarship from an employer.[12]

The certificates show that the Petitioner has completed various professional training courses, but do not provide any information indicating that this constitutes an achievement in the field, as opposed to simply fulfilling one's occupational obligations.[13] On appeal, the Petitioner claims that "his continuous learning and improvement in the field" establishes his eligibility, without further elaboration, and so we will not address the issue further. *Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (declining to address a "passing reference" to an argument in a brief that did not provide legal support).

Similar concerns apply to the letter documenting the Petitioner's bonus, which states that it was awarded "for achieving goals and results." Being a capable worker for one's employer does not, in and of itself, constitute the kind of achievement or significant contribution to the field or industry that is contemplated by this criterion. The letter regarding the company scholarship does not state any requirements for receipt of such a scholarship, which does not establish that it was awarded for an achievement or contribution. The Petitioner also has not provided any argument regarding this evidence on appeal, beyond stating that it establishes eligibility. *Id.*

Finally, while the recommendation letters speak highly of the Petitioner's abilities and work ethic, they do not sufficiently document any specific achievement or significant contribution the Petitioner has made to his industry or field. *See Matter of Chawathe*, 25 I&N Dec. at 376 (stating that a petitioner's assertions must be supported by relevant, probative, and credible evidence showing that those assertions are "probably" true).

For example, M-S-B-, the Petitioner's coworker at [redacted] states that the Petitioner once proposed a "circuit for signaling the theft of stationary battery packs" which "saved millions for the operator and for the market" and is "still in use today by several operators as a method of theft prevention." However, none of these claims are supported by any documentation indicating how much money was saved or how these savings had any significance to anyone but the client company. While M-S-B- states that the Petitioner's work is "undoubtedly important for the industry in which he operates and for society," simply being a capable employee who produces good results for one's employers and clients does not constitute the kind of achievement or significant contribution to the field that is contemplated by this criterion.

Similarly, S-J-S- states that the Petitioner's work on a solar-powered charging station for electric vehicles "became a reference in the market and served as a model for several other professionals in the engineering area," but does not state to what extent the other professionals followed the Petitioner's

[12] While we will not discuss all of the letters in detail, we have read and considered each one.

[13] *Cf.* section 203(b)(2)(C) of the Act (stating that having the education and/or licensure required for an occupation shall not by itself be considered sufficient to establish exceptional ability).

model, whether it changed or improved their work, the scale of the affected work, or any other details that would establish the scope of the Petitioner's claimed influence.

A-P-A-, the Petitioner's coworker at [redacted] states that after a cyclone interrupted cell phone service throughout the region where they worked, the Petitioner's "unique performance and his efforts to reestablish the essential service were visible" and that he "was recognized" for this work. However, this letter, the letter from A-P-I- stating that the Petitioner carried out the emergency action plan on this occasion, and the provided screen capture of the Petitioner at an online meeting regarding the storm response only indicate that the Petitioner performed his job well. They do not document how this performance rose to such a level that it constituted a contribution or achievement in his field or industry.

On the whole, the provided letters indicate that the Petitioner has had various career accomplishments which benefited his employers and clients, and is considered to be a highly capable worker. However, none of these letters or the other documentation in the record show that the Petitioner had any achievement or contribution which extended beyond those employers to the larger field or industry he was working in. The Petitioner has not established eligibility for the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

Because the Petitioner has not met at least three of the initial evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii), he does not qualify as an individual of exceptional ability. We therefore do not need to conduct a final merits determination to decide whether the totality of the evidence establishes his exceptional ability and hereby reserve this issue. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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 the applicant did not otherwise meet their burden of proof).

B. National Interest Waiver

The next issue on appeal is whether waiving the job offer requirement would be in the national interest according to the three-prong test outlined in *Matter of Dhanasar*, 26 I&N Dec. 884. The first prong, 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. Meanwhile, in determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Matter of Dhanasar*, 26 I&N Dec. at 889-90. For example, an endeavor may qualify if it has national implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances, or if it has significant potential to have a substantial economic effect, especially in an economically depressed area. *Id.*

In this instance, the Director concluded that while the Petitioner's endeavor has substantial merit, he did not describe or document it with sufficient specificity to establish what impact it would have, or how that impact would rise to the level of national importance. On appeal, the Petitioner contends that the Director made unspecified "erroneous conclusions of both law [and] fact." Upon review, he has not overcome this denial ground.

The Petitioner's appellate brief argues extensively that his endeavor will have national importance due to the importance of electrical technicians and various industries he could work in. However, when determining whether a proposed endeavor will have national importance, the relevant question is not the importance of the industry or profession where a noncitizen will work, but the specific impact of that proposed endeavor. *Id.* at 889-890. *See generally* 6 *USCIS Policy Manual* F.5(D)(1), https://www.uscis.gov/policy-manual. ("The term 'endeavor' is more specific than the general occupation; a petitioner should offer details not only as to what the occupation normally involves, but what types of work the person proposes to undertake specifically within that occupation.") Here, the Petitioner has not stated a cognizable endeavor, and so cannot establish that this endeavor's impact will have national importance.

In his "Professional Plan," the Petitioner claims that he will, among other things, install and maintain diesel generators, photovoltaic power systems, fire detection and fighting systems, electrical power substations, data transmission equipment, air conditioning systems, and natural gas pipeline instruments, because he "will be able to consult for companies from different sectors." He further states that "[t]he companies that will benefit from [his] work are basically from all segments, as electricity is present everywhere and is necessary for processes to work." To document this plan and establish its importance, he provides expert opinion letters and various recruitment emails he has received for jobs in the United States.

The recruitment materials provided are for jobs including solar electrician; heating, ventilation, and air conditioning (HVAC) technician; information technology (IT) manager; maintenance manager at a nursing home; maintenance technician for material handling equipment;[14] electro-mechanical technician at a wire products company; and various positions with unspecified employers and duties as a mechanical technician/mechanic, calibration technician, and maintenance technician. One position is for a maintenance technician apprentice, which does not appear to require the services of an individual of exceptional ability in the field. Another position requires a journeyman electrician license, which the Petitioner does not have.

The purpose of the national interest waiver is not to facilitate a petitioner's U.S. job search. While no job offer is required, anyone seeking such a waiver must identify the "specific endeavor" that they propose to undertake. *Matter of Dhanasar*, 26 I&N Dec. at 889. Here, the Petitioner has not stated how he will divide his time between the many activities listed in his professional plan, and has provided job examples which have highly varied duties and requirements, some of which the Petitioner does not appear to be qualified for. Without information about what activities the Petitioner actually intends to perform, as opposed to a menu of ones he might select from, it is not possible to determine whether the proposed endeavor has the kinds of "broader implications" we look for when assessing national importance. *Id.*

We acknowledge the appellate arguments regarding the merits of the Petitioner's occupation. However, working in an area with substantial merit does not make an endeavor nationally important. In *Dhanasar*, the noncitizen's teaching activities in science, technology, engineering, and math

[14] This job is described as centering on belts, motors, photo-eyes, and relays. There is no indication in the record that the Petitioner has experience maintaining this type of equipment.

(STEM) disciplines were found to have substantial merit, but did not qualify him under the first prong because the evidence did not show how that work would impact the field of STEM education more broadly. *Id.* at 893. Similarly, the Petitioner here has not demonstrated how his work will have any impact beyond his prospective employer, since he has not established what that work will actually be.

Furthermore, while the Petitioner contends that a national shortage of electrical technicians qualifies him under the first *Dhanasar* prong, DOL directly addresses U.S. worker shortages through the labor certification process. Therefore, a shortage of workers in an occupation is not sufficient, in and of itself, to establish that workers in that occupation should receive a waiver of the job offer requirement. *See Matter of Dhanasar*, 26 I&N Dec. at 885; *see also* 20 C.F.R. § 656.1. Nor does the Petitioner provide an explanation of how his work, in and of itself, will resolve the shortage of electrical technicians or impact it on a national level.

The record does not establish what the Petitioner's proposed endeavor will be, and so does not show that this endeavor would be nationally important. Because the Petitioner has not established his eligibility under the first prong of the *Dhanasar* test, we need not address his eligibility under the other two prongs and hereby reserve those issues. *See INS v. Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7 (BIA 2015).

III. CONCLUSION

The Petitioner has not shown that he qualifies for the EB-2 visa classification as an individual of exceptional ability, and we will withdraw the Director's conclusion that he met the classification's initial evidentiary requirements. The Petitioner also has not met the requisite first prong of the *Dhanasar* analytical framework, and so has not established that he is eligible for or otherwise merits a national interest waiver as a matter of discretion. The petition will remain denied.

ORDER: The appeal is dismissed.