



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

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

In Re: 29547630

Date: JAN. 30, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an accounting professional and entrepreneur, seeks classification as an individual of exceptional ability. *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, 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.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that he qualifies as an individual of exceptional ability or that a waiver of the required job offer, and thus of the labor certification, 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

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. Section 203(b)(2)(B)(i) of the Act.

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).<sup>1</sup> Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.<sup>2</sup> 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 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,<sup>3</sup> 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

As stated above, in order to be eligible for a national interest waiver, a petitioner must first establish that they are eligible for the EB-2 classification, either as a member of the professions holding an advanced degree or as an individual of exceptional ability. Here the Petitioner asserts that he qualifies as an individual of exceptional ability. The Petitioner has not asserted that he qualifies for the EB-2 classification as an advanced degree professional.

### A. Exceptional Ability

The Petitioner contends that he meets at least three of the regulatory criteria for classification as an individual of exceptional ability. In denying the petition, the Director determined that the Petitioner fulfilled only the official academic record criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

On appeal, the Petitioner maintains that he also meets the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), which requires “[e]vidence 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,” and 8 C.F.R. § 204.5(k)(3)(ii)(D), which requires “evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.” The Petitioner does not address or contest on appeal the Director’s finding that he does not meet the license criterion under 8 C.F.R. § 204.5(k)(3)(ii)(C), the membership criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E), or the criterion relating to recognition for achievements and significant contributions

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<sup>1</sup> 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).

<sup>2</sup> 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>.

<sup>3</sup> 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).

to the field at 8 C.F.R. § 204.5(k)(3)(ii)(F). Accordingly, we deem these grounds to be waived. An 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)).

*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 claims to have worked as an accounting professional for [REDACTED] a limited liability company in Brazil, and submitted corporate registration documents for this company identifying him as a partner in the business. The Petitioner also submitted a letter from his accountant stating that the Petitioner, as managing partner of the company, withdraws a monthly salary of R\$ 12,500.

In the decision denying the petition, the Director determined that the Petitioner had not met the requirements of the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), noting that the provided documentation did not identify the Petitioner's job duties, his dates of employment, or whether the position he held in Brazil was full-time. On appeal, the Petitioner resubmits the same documentation and asserts that it is sufficient to demonstrate that he has the requisite 10 years of full-time experience in the occupation.

Upon review, we agree with the Director's determination. The Petitioner did not submit evidence in the form of letters(s) from current or former employer(s) to demonstrate that he had at least 10 years of full-time experience as an accounting professional. The letter from his foreign accountant is not sufficient evidence of employment from current or former employers because the accountant was not the Petitioner's current or former employer. Moreover, while the Petitioner's Brazilian-based business registration supports a finding that the Petitioner is a business owner, the documents do not contain sufficient details about the Petitioner's duties as a business owner such that we could assess whether he has experience as an accounting professional. Even if we concluded that he has the requisite experience based solely upon business ownership alone, these documents would not establish eligibility under this criterion, as they do not sufficiently describe the duties the Petitioner performed and provide little indication that his work was full-time. The record does not contain letters from current or former employers that address the Petitioner's experience as an accounting professional, nor does the documentation indicate that he had at least 10 years of full-time experience accrued at the time of filing the petition. Accordingly, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

*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 contends that as an accounting professional and entrepreneur, he has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. In support of this assertion, he submitted letters from his accountant attesting to his salary, along with documentation from Salario BR and GlassDoor reflecting the average salary of accounting technicians and entrepreneurs in Brazil.

To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of their claimed exceptional ability relative to others working

in the field.<sup>4</sup> Rather than submit evidence that compares his salary to those of others similarly employed, he sought to show that he earned a high salary compared to accounting technicians and entrepreneurs in his home country of Brazil. The amount of the salary, however, should reflect exceptional ability, a factor that is not contingent on an individual's country of origin. The Petitioner did not provide a basis to compare his salary to those of others similarly employed, and to establish the extent to which differences in salary were related to exceptional ability. There is no evidence in the record which would permit us to evaluate the duties an accounting professional/entrepreneur of exceptional ability would perform for their salary or remuneration as a point of comparison. Moreover, the broad job description and job title of accounting technician contained in the materials the Petitioner submitted did not readily correspond to the description of services and duties the Petitioner has described for his proposed endeavor.

We agree with the Director that the Petitioner has not met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) because we cannot evaluate from information in the record whether the Petitioner's salary or remuneration demonstrated his exceptional ability.

#### B. Final Merits Determination

The Petitioner has not established that he meets at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). As the Petitioner has not met the initial evidence requirement, a final merits determination is not required. Although he has successfully progressed in the field and earned the respect of his colleagues, the record does not establish the Petitioner's experience is beyond that which is ordinarily encountered in the occupation.

#### C. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. As previously outlined, in order to qualify for a national interest waiver, the Petitioner must first show that he qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. The Petitioner does not claim that he is an advanced degree professional and, as discussed above, has not shown that he meets the regulatory criteria for classification as an individual of exceptional ability. Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding his eligibility for a national interest waiver under the *Dhanasar* framework. 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 alternative issues on appeal where an applicant is otherwise ineligible).

### III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability.

**ORDER:** The appeal is dismissed.

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<sup>4</sup> See 6 USCIS Policy Manual, *supra*, at F.5(B)(2).