U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18038657

Date: AUG. 19, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a direct care worker, seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner had not established her eligibility as an individual of exceptional ability and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that she is eligible for exceptional ability classification and for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. 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.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
>
> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

> who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of job offer –
>
> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating 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).

Furthermore, while 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*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national 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.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national 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.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).
[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate 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. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate 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.[3]

II. ANALYSIS

Because she has not indicated or established that she qualifies as a member of the professions holding an advanced degree, the Petitioner must meet at least three of the regulatory criteria for classification as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). In denying the petition, the Director determined that the Petitioner did not fulfill any of the regulatory criteria. On appeal, the Petitioner maintains that she satisfies three criteria. After reviewing the evidence, we conclude that the record does not support a finding of her eligibility for at least three criteria.

> *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).

At initial filing, the Petitioner presented a document entitled, "Diploma," reflecting that she "entered in 1986 to the [redacted] named after academician [redacted] and in 1988 completed the full course of studies at [redacted] having specialized in Nursing" and "[b]y the decision fo the State Examination Commission of July 9, 1995 she is qualified as a hosptial nurse." In addition, the Petitioner offered a document entitled, "Certificate," showing that "[t]his is to certify that [the Petitioner] finished training course 'DOTS-strategy of tuberculosis-fighting' organized by Scientific Research Institute of phthisiology of prophylaxis and Project HOPE, under financial support of USAID."

The Director issued a request for evidence (RFE), acknowledged the submission of the evidence, and stated that "it does not appear to be from a college, university, school, or other institution of learning." In addition, the Director requested the Petitioner to "submit evidence to establish that the granting entity is recognized as a college, university, school, or other institution of learning" and provided definitions of the entities. In response, the Petitioner provided an "Evaluation Report of Academic Records" from Evaluation Services, Inc. opining that the "diploma is the academic equivalent of an associate of applied science degree in nursing from a regionally accreddited community/junior college in the United States."

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

The Petitioner did not offer evidence regarding "DOTS-strategy of turberculosis-fighting" training course.

In denying the petition, the Director determined that the Petitioner did not submit the requested evidence. Specifically, the Petitioner offered an academic evaluation report rather than "evidence to establish that the granting entity is recognized as a college, university, school, or other institution of learning." On appeal, the Petitioner submits screenshots from [redacted] relating to [redacted] However, we will not consider this evidence for the first time on appeal as it was not presented before the Director. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose" and that "we will adjudicate the appeal based on the record of proceedings" before the Chief); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Furthermore, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) requires "[a]n official academic record."[4] The Petitioner, however, did not establish how the presented "Diploma" and "Certificate" represent "official academic record[s]" consistent with this regulatory criterion. Here, the Petitioner did not show that she provided official academic records from the organizations, nor did she demonstrate that the entities qualify as "a college, university, school, or other institution of learning" pursuant to this regulatory criterion.

Without evidence of official academic records from a college, university, school, or other institution of learning, the Petitioner has not sufficiently shown that she meets 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).

At initial filing, the Petitioner provided a document entitled, "Employment Book." The Director informed the Petitioner in the RFE that the document "is insufficient because it is not an official letter from the [Petitioner's] past employer, it does not include the [Petitioner's] duties, part-time or full-time status or the start and end date of employment." In addition, the Director instructed the Petitioner to submit "[e]mployment verification letters on official employer letterhead from the Human Resources Department, or other equivalent department authorized by the employer to verify employment" stating the "[d]ates of employment" and "[s]tatement of the duties performed while in the position."

In response, the Petitioner offered a letter from [redacted], Manager, and [redacted], Human Resources. In denying the petition, the Director determined:

> This letter is insufficient because it does not establish a full ten years of employment or state the dates of employment such as start and end dates, it does not state if the job is a full-time or part-time status, it does not describe the [Petitioner's] duties and is not of official employer letterhead.

[4] *See also* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual.

On appeal, the brief claims that "[p]lease be advised that [the Petitioner] has well over 10 years experience in her field of endeavor" and "[b]ased on documentation in the record, the [Petitioner] established that this criterion has been met, and US CIS erred in finding otherwise." The Petitioner, however, does not identify specifically any erroneous conclusion of law or statement of fact in the Director's decision regarding this criterion. For the reasons articulated, we agree with the Director that the letter does not demonstrate probative evidence to show that the Petitioner has at least ten years of full-time experience in the occupation for which he or she is being sought consistent with the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B).[5]

Accordingly, the Petitioner did not show that she meets this regulatory 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).

The Petitioner did not provide any evidence for this criterion at initial filing. In response to the RFE, the Petitioner provided two recommendation letters. The Director determined:

> The authors of the petitioner's letters do speak highly of her work ethnic and contribution to her employer and client, but they do not describe the type of significant contribution required by this criterion. This type of evidence does not describe the type of widespread influence or impact that would indicate that the petitioner's contribution has been significant. To successfully meet this criterion, the petitioner should submit documentary evidence that shows that her contribution is significant, and that it is felt beyond the confines of her immediate employment.

The appeal brief contends that "[t]he [Petitioner] has provided recommendation letters clearly establishing recognition for her achievements and significant contributions to her field of endeavor by her peers." The Petitioner, however, does not identify those achievements and contributions, and explain how they have been recognized and significant. The record contains a letter from [redacted] who stated:

> I have known [the Petitioner] since January 2020. Over the course of this period she has demonstrated that she is a very honest, reliable, and kind person. [The Petitioner] occasionally assists me with my housework, including cooking, cleaning, and doing laundry. She has a very kind, outgoing personality, a great sense of compassion and goodwill. In the time she has worked with me we have become very close and I have a lot of trust and confidence in her abilities. It is a great pleasure to be acquainted with [the Petitioner]. She makes my life a lot easier and is a very important part of my team.

The letter from [redacted] stated:

> [The Petitioner] has been employed at [redacted] since January 2020. During this time, she has shown herself to be a hard worker, reliable, and conscientious. [The Petitioner] can be counted on to provide quality care consistently and lovingly for our seniors. Her compassion and dedication to those she cares for is much appreciated and is

[5] 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

> much needed in this line of work. She has received many compliments from our consumers and their family members, as well as supervisors and peers. I am continually impressed by [the Petitioner].

We note that both letters indicate events occurring after the filing of the petition. Eligibility, however, must be established at the time of filing. *See* 8 C.F.R. § 103.2(b)(1). Moreover, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires "[e]vidence of recognition for achievements and significant contributions to the industry or field."[6] While the letters praise the Petitioner's personal and professional characteristics, they do not identify her achievements and contributions to the industry or field. Moreover, the letters do not show that the Petitioner has been recognized for her achievements and that her contributions have risen to the level of significance as required by this regulatory criterion.

Without sufficient evidence demonstrating that the Petitioner has been recognized for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations, she has not established that she meets this criterion.

III. CONCLUSION

The Petitioner did not establish that she satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). As a result, 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.[7] In addition, we need not reach a decision whether, as a matter of discretion, she he is eligible for or otherwise merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve these issues.[8] The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[6] 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).
[7] 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).
[8] *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, n.7 (declining to reach alternate issues on appeal where an applicant is otherwise ineligible).