U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13334499

Date: JUN. 22, 2021

Appeal of Texas Service Center Decision

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

The Petitioner, a micropigmentation professional, 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 Texas 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 submits additional documentation and a brief asserting that she is eligible as an individual of exceptional ability 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. –
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> (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.
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> (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:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
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> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

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

[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).

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 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 fulfilled only one of the regulatory criteria, a license to practice the profession at 8 C.F.R. § 204.5(k)(3)(ii)(C). On appeal, the Petitioner maintains that she satisfies two additional criteria. After reviewing the evidence, we conclude that the record does not support a finding of her eligibility for at least three criteria.

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

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).

The Petitioner argues:

> [She] has provided a certificate from the [redacted] demonstrate ding [*sic*] that on September 27, 2017 she completed a training course titled "Laser Pigment Removal." Also attached is an additional certificate from [redacted] with photo of the [Petitioner] and her professor documenting that she completed a course in "Formacao de Micropigmentadores." Both certificates are directly related to her area of exceptional ability . . . . These training certifications do not come with a [*sic*] transcripts or syllabus[es]. The certificate(s) themselves are proof that the [Petitioner] completed the training and so state that the training is concluded. The standard of proof is preponderance of the evidence and the attached certificates and those contained in the record from the [redacted] and [redacted] from 2017 and 2018 establish that it is more likely than not that the [Petitioner] completed these trainings.

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 certificates, as well as the photograph mentioned above, represent "official academic record[s]" consistent with this regulatory criterion. Furthermore, the Petitioner did not corroborate her assertions that "training certificates do not come with []transcripts or syllabus[es]." Besides the certificates, the Petitioner did not provide supporting evidence from the organizations reflecting official academic records. In addition, the Petitioner did not submit evidence demonstrating that the [redacted], [redacted], or [redacted] qualifies 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 of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Petitioner contends that her membership with the [redacted] meets this criterion. As evidence, the Petitioner submitted a photograph of a membership card indicating validity until January 2019. The record also contains a document, dated July 2018, from the [redacted] president declaring the Petitioner's approval of validation.[5] The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations."[6] However, at the time she filed her petition in July 2019, her membership had been expired for approximately six months. Thus, the Petitioner did not demonstrate her eligibility

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

[5] On appeal, the Petitioner claims "[s]ee attached July 18, 2019 letter documenting the nature of the [redacted] association and that the association closed." However, the record does not contain the letter, nor does it show that the Petitioner submitted it with her appeal.

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

at the time of filing through her membership with [redacted] Moreover, the Petitioner did not offer supporting evidence establishing that [redacted] has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association.[7]

The Petitioner also argues to meet this criterion based on membership with the [redacted] and submits a photograph of a membership card. However, as the Petitioner did not make this claim of eligibility and submit this document before the Director, either at the time she filed the petition or in response to the Director's notice of intent to deny (NOID), we will not consider this claim and document in our adjudication of this appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "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).[8] Regardless, besides that the membership card does not show her dates of membership, the Petitioner did not present evidence establishing that [redacted] qualifies as a professional association.

Accordingly, the Petitioner did not demonstrate that she fulfills 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.[9] 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.[10] 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.

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[7] The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation."

[8] Although the Director informed the Petitioner in the NOID of issues involving her membership with [redacted] and afforded her the opportunity to submit evidence of eligibility regarding other professional associations, the Petitioner did not address the membership criterion in her response, nor did she offer additional membership material.

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

[10] *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).