U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23069655

Date: JAN. 17, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Acting Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner is an individual of exceptional ability. She further concluded that the Petitioner did not establish that a waiver of the classification's 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

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).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] 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.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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.

I. ANALYSIS

The Petitioner states on the petition and in supporting documents that she is an entrepreneur with more than 12 years of experience providing childcare as a nanny. With the initial filing the Petitioner did not submit sufficient evidence of her eligibility for the requested EB-2 immigrant classification or a description of her proposed endeavor. The Director issued first a request for evidence (RFE) and later a notice of intent to deny (NOID) the petition, informing the Petitioner of these deficiencies and allowing an opportunity to respond.[4] After reviewing the Petitioner's responses to the RFE and the NOID, the Acting Director concluded that the Petitioner did not establish that she qualified for the requested EB-2 classification, or that a waiver of the classification's job offer requirement would be in the national interest.

For the first time on appeal, the Petitioner identifies her proposed endeavor as "seeking employment in the United States of America as an assistant teacher in the field of education." On appeal, she asserts that the record demonstrates that she is an individual of exceptional ability and is eligible for the national interest waiver.

[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/volume-6-part-f-chapter-5.

[3] *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).

[4] In this case, the Director issued the RFE and NOID and the Acting Director issued the decision.

A. Eligibility as a Member of the Professions Holding an Advanced Degree

As noted above, a petition for an advanced degree professional must include evidence that a petitioner possesses a "United States academic or professional degree or a foreign equivalent degree above that of baccalaureate [or] 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." 8 C.F.R. § 204.5(k)(2). With the initial filing the Petitioner provided a copy of a bachelor's diploma in engineering sciences issued by the [redacted] Technical University in [redacted] Georgia, in 2007. The Petitioner also provided a copy of a higher education diploma in pedagogical primary education issued by [redacted] Teaching University [redacted] in 2011.

The record does not include academic transcripts or a U.S. academic equivalency in accordance with 8 C.F.R. § 204.5(k)(3)(i) to establish the U.S. equivalency of the foreign diplomas. The Director noted this deficiency in both the RFE and NOID. In the RFE and NOID responses, the Petitioner asserted that she meets the qualifications of an advanced degree professional and "additionally and alternatively" is an individual with exceptional ability. However, the Petitioner did not submit the requested evidence to demonstrate that she is an advanced degree professional.

The Petitioner does not address this issue or submit additional evidence on appeal. Therefore, we conclude that the record does not demonstrate that the Petitioner is a member of the professions holding an advanced degree.

B. Eligibility as an Individual with Exceptional Ability

As noted above, 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). When a petitioner has satisfied at least three of the six criteria, a final merits determination concerning the petitioner's eligibility is still required per the two-part adjudication framework established in *Kazarian v. USCIS,* 596 F.3d 1115 (9th Cir. 2010). We consider the totality of the record to determine if a petitioner has demonstrated, by a preponderance of the evidence, that it has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. In the final merits analysis, the quality of the evidence must be evaluated. *Matter of Chawathe*, 25 I&N Dec. at 376.

In response to the RFE and NOID, the Petitioner claimed eligibility as an individual with exceptional ability based on the following criteria under 8 C.F.R. § 204.5(k)(3)(ii):

> *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 for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B).
>
> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C).

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).

After reviewing the evidence in the record, including evidence submitted in response to the RFE and NOID, the Acting Director determined that the Petitioner did not qualify as an individual with exceptional ability because she had not satisfied at least three of the six criteria under 8 C.F.R. § 204.5(k)(3)(ii).

The Acting Director analyzed the Petitioner's evidence for each of the criteria for eligibility as an individual with exceptional ability as follows:

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).

As noted above, the Petitioner submitted a copy of a bachelor's diploma in engineering sciences and a higher education diploma in pedagogical primary education. The Acting Director noted that the Petitioner's claimed area of exceptional ability was not specifically defined. As noted above, the petition lists the Petitioner's occupation as entrepreneur, the experience letters describe her experience as a nanny and teacher, and she did not submit a description of her proposed endeavor. The Acting Director concluded that the Petitioner's diploma in engineering sciences does not appear to be related to the Petitioner's claimed area of exceptional ability in childcare, and that the record does not include academic transcripts for either diploma. On appeal, the Petitioner identifies the field of her proposed endeavor as education but does not submit additional evidence in the form of an official academic record to demonstrate that her diplomas relate to the area of exceptional ability. We agree with the Acting Director's determination that the Petitioner has not met this criterion.

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 for which he or she is being sought. 8 C.F.R. § 204.5(k)(3)(ii)(B).

The record includes the following letters documenting the Petitioner's experience:

- An undated letter signed by [redacted] Principal of [redacted] Preschool, attesting to the Petitioner's experience as a teacher from 2017 to 2019.[5]
- A letter dated August 2019, signed by [redacted] attesting to the Petitioner's experience "from October 2013 for 1 year" caring for her child and performing housekeeping tasks.
- A letter dated August 9, 2019, from [redacted] attesting to the Petitioner's experience as a part-time nanny "for about a year."

[5] The record includes a second letter from [redacted] Preschool. The second letter is dated August 11, 2021, and is signed by [redacted] Principal. The second letter is nearly identical in content to the letter signed by [redacted]

- An undated letter from [redacted] attesting to the Petitioner's experience as a nanny from September 2008 to July 2011.
- An undated letter from [redacted] attesting to the Petitioner's experience as a full-time nanny from July 2017 to July 2019.
- A letter dated August 9, 2021, signed by [redacted] attesting to the Petitioner's experience as a nanny, no dates provided.
- A letter dated August 16, 2021, signed by [redacted] President of [redacted] attesting to the Petitioner's experience as a teacher assistant "since October 2020."

In the NOID and the decision, the Director and Acting Director only considered the letters of experience from [redacted] Preschool, and [redacted] They specifically noted that the letter from [redacted] did not provide any specific dates of employment or length of employment and the letter from [redacted] Preschool also did not provide specific dates of employment. They also noted that the letter from [redacted] documented employment that occurred after the filing of the petition. However, a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Although the Acting Director did not consider the additional letters in her decision, this error is immaterial. Even if the additional letters are considered, the total amount of experience documented is less than 10 years. Only two of the letters state specific dates of employment and only one letter states that the employment was full-time. Additionally, the letters from [redacted] Preschool provide dates of experience that overlap with the Petitioner's claimed full-time employment as a nanny for [redacted] where Ms. [redacted] states that she worked "ten hours each day." This inconsistency casts doubt on the Petitioner's claimed experience with [redacted] Preschool. Inconsistencies must be resolved with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, at 591-92.

On appeal, the Petitioner does not submit new evidence documenting her experience. The regulation at 8 C.F.R. § 204.5(g)(1) states, "Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed … or of the training received." As the record does not include this regulatory prescribed evidence of the Petitioner's qualifying experience, we cannot determine that she has at least 10 years of full-time experience in the occupation. Therefore, this criterion has not been met.

> *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 asserts that the field of endeavor does not require a license but "comparable evidence [establishing] that the [Petitioner] possesses a degree of expertise that is significantly above that ordinary [*sic*] encountered in the field should be considered." The Acting Director determined that the Petitioner did not meet this criterion and we agree. The Petitioner did not identify or describe the field of her proposed endeavor with the initial filing or in response to the RFE and NOID. Although on appeal she states that the field of her proposed endeavor is education, she does not submit evidence

demonstrating that her expertise is significantly above that encountered in the field of education. Further, she did not submit evidence to support her assertion that a license is not required for the occupation of her proposed endeavor in education. Therefore, this criterion has not been met.

> *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 has made no assertion of eligibility regarding this criterion and submitted no evidence. Therefore, this criterion has not been met.

> *Evidence of membership in professional associations.* 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Petitioner has made no assertion of eligibility regarding this criterion and submitted no evidence. Therefore, this criterion has not been met.

> *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 Acting Director considered the letters documenting the Petitioner's experience in childcare. She noted that the letters discuss the Petitioner's duties and responsibilities and commend her work, but do not offer specific examples of how her work has been recognized as a significant contribution to the field of childcare. She concluded that the Petitioner had not met this criterion to establish that she is an individual with exceptional ability.

In response to the RFE, the Petitioner provided the following certificates in support of this criterion:

- Certificate of Achievement, *Bug Busting in Early Care and Education Settings*, earned August 1, 2021,
- Certificate of Completion, *Mandated Reporter Training: Identifying and Reporting Child Abuse and Maltreatment*, earned December 12, 2020.

Although the Acting Director did not discuss these certificates, this error is immaterial. As noted above, a petitioner must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12). Both certificates were issued after the filing of the petition on June 17, 2020. Further, neither certificate demonstrates a significant contribution to the field. Rather, both appear to represent completion of mandatory requirements for employment in childcare.

On appeal, the Petitioner does not submit new evidence of her eligibility under this criterion. Therefore, this criterion has not been met.

The record demonstrates that the Petitioner is qualified and experienced in the field of childcare. However, this alone is insufficient to establish that the Petitioner qualifies as an individual of exceptional ability in the field of education. The Petitioner has not established that she possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. The Petitioner has not shown that she is as an advanced degree professional or an individual of exceptional ability. Therefore, the Petitioner has not demonstrated and the documentation in the record does not establish eligibility for the underlying EB-2 classification.

As explained in the legal framework above, 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 the Petitioner has not established this threshold issue, the remainder of the Petitioner's arguments need not be addressed. It is unnecessary to analyze any remaining independent grounds when another is dispositive of the appeal. Therefore, we decline to reach whether she meets the first prong on national importance, or the second and third prongs under the *Dhanasar* framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); *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).

Even if we had addressed the remaining issues and arguments, we still would have dismissed this appeal. As noted above, the Director requested that the Petitioner submit a detailed description of her proposed endeavor in both the RFE and NOID. Despite these two opportunities, the Petitioner did not provide the requested detailed description. On appeal, the Petitioner still does not provide a description but states for the first time that she "is seeking employment ... as an assistant teacher in the field of education." The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

III. CONCLUSION

As the Petitioner has not established that she qualifies for the underlying EB-2 classification, she has not established that she is eligible for or otherwise merits a national interest waiver. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.