U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28787634

Date: JAN. 10, 2024

Appeal of Texas Service Center Decision

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

The Petitioner seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business. 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 record did not establish the Petitioner qualifies for classification as an individual of exceptional ability or merits a discretionary waiver of the job offer requirement "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. 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.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations provide six criteria, at least three of which

must be satisfied, for an individual to establish exceptional ability:

> (A) An official academic record showing that the [noncitizen] 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;
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> (B) 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;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the [noncitizen] has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) 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).[1]

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] 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.[3]

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, the petitioner must then establish eligibility for 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 USCIS may, as matter of discretion[4], grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;

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[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish 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.

[3] See Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); see generally 6 USCIS Policy Manual, supra, at F.5(B)(2).

[4] See also Poursina v. USC1S, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

- 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

The Petitioner indicates she intends to work as an entrepreneur in the field of freight packing and logistics. She claims to have met four of the six exceptional ability criteria, specifically 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (E), and (F). The Director found that the Petitioner satisfied only one criterion, official academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A). However, as discussed below, we find the record does not support the conclusion that the Petitioner meets this criterion.

In denying the petition, the Director concluded that the record does not establish that the Petitioner qualifies for classification as an individual of exceptional ability since she did not satisfy at least three of the six criteria. The Director further found that the record did not demonstrate that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner reasserts that she satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B), (E), and (F), and that she provided sufficient evidence showing she merits the national interest waiver. As explained below, the record does not show that the Petitioner satisfies at least three of the six exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii).[5] Upon de novo review, the record does not demonstrate the Petitioner is eligible for the underlying EB-2 classification as an individual of exceptional ability.

> An official academic record showing that the [noncitizen] 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 Director relied on the Petitioner's diploma from [redacted] in Venezuela, academic transcripts, and an academic evaluation to determine she met this criterion. However, the record does not indicate that the diploma relates to the Petitioner's area of exceptional ability, an entrepreneur in the field of freight packing and logistics. The diploma, transcripts, and evaluation indicate that the Petitioner earned the title of higher university technician in the school of tourism with a major in hospitality. Since the record lacks evidence demonstrating how the Petitioner's degree in tourism and hospitality relates to her area of exceptional ability, entrepreneurialism, freight packing, or logistics, she has not met the plain language of the criterion.

As such, the Petitioner has not established eligibility under this criterion. We therefore withdraw the Director's finding that the Petitioner has met this criterion.

[5] While we do not discuss each piece of evidence in the record individually, we have reviewed and considered each one.

> 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).

This criterion focuses on evidence of experience in the occupation which a petitioner intends to pursue in the United States, which in this case would be the Petitioner's employment experience as an entrepreneur in the field of freight packing and logistics. We agree with the Director that the record does not demonstrate that the Petitioner has at least ten years of full-time experience in her relevant occupation.

In support of this criterion, the Petitioner submitted letters relating to her previous work experience with [redacted] from September 21, 2017, to August 28, 2020, and relating to her current work with [redacted] since October 5, 2020. She also submitted letters from her accountant and herself relating to her current work with her freight packing and logistics business, [redacted], which was established in 2016. Based on the letters, the Petitioner claims she has experience in her occupation from 2016 until the time of filing the petition in 2022.[6] The seven years of claimed work experience is less than the ten years of work experience required under the criterion. The record does not include evidence explaining how the evidence submitted shows ten years of full-time experience.

Also, the letter from [redacted] does not show the Petitioner's experience in her occupation. The letter explains that the Petitioner's job responsibilities relate to the Petitioner managing a business in the field of real estate, instead of her indicated field. The Petitioner has not submitted evidence explaining how her work as a manager in the field of real estate qualifies as experience in the occupation for which she is being sought, an entrepreneur in freight packing and logistics.

As pointed out by the Director, although the letters from [redacted] and [redacted] indicate that the Petitioner worked forty hours per week, the record includes evidence contradicting the number of hours worked by the Petitioner. The record includes the Petitioner's Form ETA 750 Part B, U.S. Department of Labor Employment and Training Administration Application for Alien Employment Certification, signed by the Petitioner on December 20, 2021. The application indicates that the Petitioner worked 20 hours per week for each of these two employers. The Petitioner's appeal does not provide an explanation or evidence to resolve these inconsistencies in the record. These unresolved inconsistencies in the record cast doubt on the credibility of the documents submitted. See Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988) (a petitioner must resolve discrepancies in the record with independent, objective evidence pointing to where the truth lies).

The Petitioner also submitted her own letter and a letter from her accountant indicating that she has worked full time as a partner and chief executive officer for her current freight packing and logistics business. Although the record indicates that the business was incorporated in Florida in 2016, the letters do not indicate when the Petitioner started her job responsibilities with the business. On appeal, the Petitioner indicates that she has been working full-time for her business since 2016. However, the

[6] Since a petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed, we only consider the Petitioner's work experience up until this petition's filing date, February 22, 2022. See 8 C.F.R. § 103.2(b)(l). Evidence of work experience after the filing of the petition cannot be used to establish eligibility.

Petitioner has not submitted evidence or documentation to support her claims regarding her full-time employment with her own business. Also, the Petitioner's full-time work for her business since 2016 is at the same time she claims to have worked full-time for [redacted]. The Petitioner has also not provided independent and objective evidence to resolve the apparent discrepancies in claiming that she worked two full-time jobs simultaneously. Furthermore, the record contradicts the Petitioner's assertions that she has worked full time for her business. Her Form ETA 750 Part B indicates that she worked 20 hours per week for her business. These unresolved inconsistencies in the record cast doubt on the credibility of the documents submitted. See Matter of Ho, 19 I&N Dec. at 591-92.

The record does not establish that the Petitioner has ten years of full-time work in her indicated occupation as an entrepreneur in the field of freight packing and logistics, as required by the plain language of the criterion. Because the record lacks evidence that the Petitioner has at least ten years of full-time employment in the occupation in which she seeks to provide her services in the United States, she has not satisfied that she meets this criterion.

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

To meet this criterion, the Petitioner submitted an undated letter from the [redacted] stating, ". . . [the Petitioner] is an active member of our association since August 20, 2021." The letter further explains that the association provides members "with a positive platform to help them grow in their businesses or any kind of initiative that helps [sic] them achieve a better future." The record also includes a copy of a receipt for the Petitioner's donation to [redacted] and the articles of incorporation for [redacted], Inc.

The Director found that the record did not demonstrate that [redacted] membership comprised professional individuals. The Director reasoned that the evidence did not show that [redacted] required the minimum of a baccalaureate degree for entry into the association or that the Petitioner has a U.S. baccalaureate degree or the foreign equivalent. On appeal, the Petitioner asserts that she has an active membership with [redacted] and that the documents submitted show her membership with the letter from [redacted] showing that the Petitioner "is a member of a professional association that requires her to be in the profession in order to hold the membership."

This criterion requires evidence of membership in a professional association. The term "profession" is defined as one of the occupations listed in section 101(a)(32) of the Act[7], as well as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. 8 C.F.R. § 204.5(k)(2).

Although the letter shows the Petitioner's membership in [redacted], it does not show admission requirements in a statutorily defined occupation or that admission requires a minimum of a U.S. baccalaureate degree or its foreign equivalent. The membership requirements for [redacted] are also not shown in the articles of incorporation or the Petitioner's donation. The Petitioner has not

[7] Profession shall include, but not be limited to, architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) of the Act.

established that [redacted] is a professional association since the record lacks evidence showing [redacted] members must be in a profession as defined by 8 C.F.R. § 204.5(k)(2). Therefore, the Petitioner has not demonstrated her membership in a professional association under the criterion.

Because the record does not otherwise satisfy at least two of the criteria at 8 C.F.R. § 204.5(k)(3)(ii), we need not determine whether it satisfies the Petitioner's additional claimed criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), in order to satisfy at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we reserve our opinion regarding whether the record satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). 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).

Since the Petitioner has not established that she meets at least three of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F), we need not conduct a final merits analysis to determine whether the evidence in its totality shows that she is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). Nevertheless, we advise that we have reviewed the record in the aggregate and conclude that it does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability.

The Petitioner has not established her qualification for the underlying EB-2 classification as an individual of exceptional ability in the sciences, arts, or business, and is therefore ineligible for a national interest waiver. While the Petitioner asserts on appeal that she meets all three of the prongs under the Dhanasar analytical framework, we reserve our opinion regarding these issues. See INS v. Bagamasbad, 429 U.S. at 25-26; see also Matter of L-A-C-, 26 I&N Dec. at 526 n.7.

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an individual of exceptional ability. Therefore, we find that the Petitioner has not established eligibility for the immigration benefit sought. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.