U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28809986

Date: MAR 4, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a violinist and music instructor, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the arts, 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 Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for EB-2 classification as an alien of exceptional ability or that the Petitioner was eligible for the requested national interest waiver. 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

[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).

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]

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[4], 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

The Petitioner has not asserted that she is a member of the professions holding an advance degree, nor does the record contain evidence that the Petitioner previously earned a U.S. baccalaureate degree or its foreign equivalent. Further, she has not established that she meets the definition of a professional. *See* 8 C.F.R. § 204.5(k)(2) (defining a "profession" as one of the occupations listed in section 101(a)(32) of the Act or one whose minimum requirement for entry is a U.S. baccalaureate degree or its foreign equivalent.) Therefore, to qualify for EB-2 immigrant classification, the Petitioner must establish she is an individual with exceptional ability in the sciences, arts, or business.

A. Individual of Exceptional Ability

The Director concluded that the Petitioner was not an individual of exceptional ability as she did not meet at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Upon de novo review of the record, we agree with the Director's ultimate conclusion. While we do not discuss each piece of evidence contained in the record individually, we have reviewed and considered each one.[5]

---

[2] 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.

[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 Flores v. Garland,* 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[5] *Osuchukwu v. INS*, 744 F.2d 1136, 1142-43 (5th Cir. 1984) ("[The Board of Immigration Appeals] has no duty to write an exegesis on every contention"). *See also Ren v. USCIS*, 60 F.4th 89, 97 (4th Cir. 2023) ("[S]o long as [USCIS] has given reasoned consideration to the petition, and made adequate findings, we will not require that it address specifically each claim the petitioner made or each piece of evidence the petitioner presented." (cleaned up)).

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)

The Director concluded without explanation that the record established the Petitioner met this criterion. We disagree.

The Petitioner claims "more than 22 years of full-time professional career [sic] within the field of orchestral music working as a violinist, concertmaster, trainer and music professor." However, to satisfy the plain language of this criterion, the evidence must (1) be in the form of letter(s), (2) be from current or former employer(s), and (3) establish at least ten years of full-time experience. Further, and as acknowledged by the Petitioner, such letters "shall include a specific description of the duties performed." 8 C.F.R. § 204.5(g)(1). Therefore, we will not consider evidence such as her curriculum vitae, concert programs, or counsel's statements. The unsubstantiated assertions of counsel do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

Upon review of the record, the only document which is a letter from a current or former employer is from the [redacted][6] Although it confirms her role as the Director of the [redacted] from 2006 until 2018, it does not provide any description of her duties or indicate how many hours she worked per week. Without such critical information, we cannot conclude that the Petitioner has established at least ten years of full-time experience and withdraw the Director's determination that the Petitioner meets this criterion.

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

The Director concluded without explanation that the record established the Petitioner met this criterion. We disagree.

To establish her membership in professional associations, the Petitioner provided evidence of membership in [redacted] along with evidence of her participation in the [redacted] and a letter from the founding director of the [redacted] a nonprofit organization in Florida dedicated to fostering social change and providing transformative experiences for children through music education. These organizations do not appear to be professional organizations.

As previously explained, the regulation at 8 C.F.R. § 204.5(k)(2) defines a "profession" as an occupation listed at section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32)[7], or an occupation whose minimum requirement for entry is a U.S. baccalaureate degree or its foreign equivalent. The record does not establish that the [redacted], the [redacted], or [redacted] restrict its membership to members of the professions, as defined in the regulation. In contrast, these organizations appear to be primarily focused on music performance, or music instruction which do not require a baccalaureate degree or

[6] While we acknowledge that the Petitioner also submitted a letter from the Acting Director of the [redacted] the letter only confirms she "studied at our institution [and] was a member of the Youth Orchestra . . . from 1993 to 1998," without mention of employment.

[7] The occupations listed in this section are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

its foreign equivalent. Moreover, the letter from the founder of [redacted] simply states that they are extending an offer to the Petitioner to serve in a teaching role, it does not establish her existing membership at the time of filing this petition. A petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak* 14 I&N Dec. 45, 49 (Comm'r 1971). Therefore, the Petitioner has not demonstrated her membership in a professional association under this criterion, and we withdraw the Director's determination that the Petitioner meets this 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).

To satisfy this criterion, the Petitioner submitted letters of support from leaders in the orchestral field, including founders and directors of organizations dedicated to music education, as well as music directors of national orchestras. We agree with the Director's conclusion that, while the letters provide recognition for the Petitioner's talent as a violinist and her passion for training the next generation of musicians, they do not establish that she has made significant contributions to the field. For example, R-C-, Music Director of the [redacted] commends the Petitioner for her talent and expertise, noting that during her time as a staff conductor of the [redacted] she "developed one of the children's orchestras of the [redacted] into a highly integrated orchestra . . . while developing her students confidence, discipline, and love for orchestra music," and also received support from the parents of her students and the local community. Likewise, R-B-, Orchestra Conductor and Violinist [redacted] notes that the Petitioner "innovates with integral pedagogy that provides a bigger development in the technical, artistic, creative, spiritual and human subjects. She is committed to guiding her students to reach their maximum potential . . . [and] provides courses and training to teachers. . ." While these letters praise the Petitioner's talent as a violinist and her dedication to her students, as well as confirming that she provides trainings to teachers, they do not establish that she has been acknowledged for significant contributions to the field. Therefore, the Petitioner has not demonstrated eligibility under this criterion.

Comparable Evidence. 8 C.F.R. § 204.5(k)(3)(iii).

The Petitioner asserts that the Director disregarded her submission of comparable evidence. However, the Director informed the Petitioner that to rely on comparable evidence, she must explain *why* a particular regulatory evidentiary criterion does not apply to her occupation *and* provide an explanation as to *how* the evidence submitted is comparable to that regulatory criterion. *See, generally* 6 *USCIS Policy Manual* F.5(B)(2). General assertions that any of the six objective criteria do not readily apply to her occupation are not sufficient. *Id.* Despite acknowledging this on appeal, the Petitioner still does not explain which, if any, of the three remaining criteria at 8 C.F.R. §§ 204.5(k)(3)(i)(A), (C), and (D) do not apply to her occupation, nor is it readily apparent. Where an individual is simply unable to meet or submit sufficient documentary evidence of at least three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(iii) does not allow for the submission of comparable evidence. As the Petitioner has not attempted to demonstrate that any of the regulatory criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (C), and (D) do not readily apply to her occupation, she may not rely on comparable evidence to qualify for this immigrant classification. Further, we also note that the Petitioner asserts that the referenced documents are comparable evidence for criteria relating to

individuals of extraordinary ability at 8 C.F.R. § 204.5(h)(3), which is not the classification she is requesting. For all these reasons, we cannot consider the Petitioner's claims regarding comparable evidence.

While we acknowledge the Petitioner has had a successful career as a violinist and music instructor, the record does not establish that she meets at least three of the evidentiary criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(A) through (F). Since the Petitioner did not satisfy the initial evidence requirements, 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 the Petitioner has not established the recognition required for classification as an individual of exceptional ability.

B. 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. Here, the Petitioner has not established eligibility for the underlying EB-2 immigrant classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding the Petitioner's eligibility for a national interest waiver under the *Dhanasar* analytical 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 she satisfies the regulatory requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. 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.