U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20232647

Date: AUG. 10, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, a [redacted] seeks classification as an individual of exceptional ability. *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 normally attached to this immigrant classification. *See* § 203(b)(2)(B)(i) of the Act. 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 that the Petitioner had satisfied at least three of six initial evidentiary criteria, as required, to establish exceptional ability. Because the Petitioner did not meet the threshold requirement of exceptional ability, the Director did not address the Petitioner's request for a national interest waiver. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter for a new decision.

I. LAW

Section 203(b) of the Act states, in pertinent part:

> (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.

(B) Waiver of job offer –

(i) National interest waiver. . . . the Attorney General[1] 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)(3)(ii) sets forth the following six criteria, at least three of which an individual must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

(A) 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;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration 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.

The regulations define "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given field. 8 C.F.R. § 204.5(k)(2). Where a petitioner meets the initial evidentiary requirements through meeting at least three of the above criteria, we then consider the totality of the material provided in a final merits determination and assess whether the record shows a degree of expertise significantly above that ordinarily encountered in the petitioner's field. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination).

[1] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

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). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, USCIS may, as a 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.[3]

II. ANALYSIS

At issue in this proceeding is the Petitioner's claim of exceptional ability. The Petitioner's initial submission included several different types of documents, but no introductory statement to explain which of the six regulatory criteria the documents address, and how the documents show that Petitioner satisfies those criteria.

In a request for evidence (RFE), the Director stated that the Petitioner had satisfied two of the regulatory criteria – specifically the first criterion, relating to academic degrees, and the fifth criterion, relating to membership in professional associations. The Director did not identify the evidence supporting those conclusions or explain how that evidence satisfied those two criteria.

In the denial notice, the Director addressed only three of the criteria. The Director determined that the Petitioner had satisfied the third criterion, relating to licensure, but not the fourth and sixth criteria, pertaining, respectively, to salary and recognition. The Director concluded that the Beneficiary had not met at least three criteria, and therefore the Director did not proceed to a final merits determination regarding the Petitioner's claim of exceptional ability. Likewise, the Director did not discuss the Petitioner's claim of eligibility for a national interest waiver.

We note that the Director has not addressed the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), regarding evidence of at least ten years of full-time experience in the occupation in which a petitioner seeks employment. In her response to the RFE, the Petitioner asserted that she meets this criterion, although she did not elaborate. We note that the Petitioner was 24 years old when she filed the petition and had documented only about three years of experience as a [redacted] before that time.

On appeal, the Petitioner does not offer further arguments regarding the individual criteria. Instead, she argues that the Director granted three of those criteria (relating to degrees, memberships, and licensure), and therefore should have proceeded to a final merits determination and a discussion of the national interest waiver.

An RFE is not a notice of decision, and the Director's statements in an RFE are not final. Nevertheless, the Petitioner's statements in response to the RFE and on appeal show that the Petitioner relied upon

[2] *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).
[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

the Director's statements in the RFE, and the Director did not revisit the criteria relating to degrees and memberships in the decision.

We are inclined to agree with the Director that the Petitioner has not satisfied at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). For example, the record does not contain any 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, to satisfy the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner states that she attended law school, but acknowledges that she did not complete the program of study. Also, the Petitioner is a [redacted], and law school does not relate to that claimed area of exceptional ability. Therefore, we cannot determine why the Director initially stated, in the RFE, that the Petitioner had satisfied this criterion. The Director did not address this criterion in the decision.

Likewise, the Petitioner initially submitted copies of letters and certificates indicating that, as a teenager, she belonged to various amateur athletic federations, but she made no affirmative claim that those federations are professional associations as specified at 8 C.F.R. § 204.5(k)(3)(ii)(E). In the RFE, the Director stated, without elaboration, that the Petitioner held qualifying memberships in unnamed professional associations. The Director did not revisit this issue in the denial notice, either to affirm or to retract this earlier statement.

Nevertheless, the Director should have addressed the previously granted criteria in the denial notice, to explain why the Director no longer considered the Petitioner to have satisfied those criteria. The Director must explain in writing the specific reasons for denial. 8 C.F.R. § 103.3(a)(1)(i). By not addressing two previously-granted criteria in the denial notice, the Director did not allow the Petitioner a meaningful opportunity to appeal the denial of the petition.

For these reasons, the denial notice is deficient, and must be withdrawn.

If appropriate, the Director may issue a Request for Evidence, or Notice of Intent to Deny. The Director must then issue a new decision, addressing all the relevant criteria and explaining why the Petitioner has or has not satisfied each of them. If the Director determines that the Petitioner has met at least three of those criteria, then the Director must proceed to a final merits determination. If the final merits determination results in a finding of exceptional ability, then the Director must also decide the merits of the Petitioner's claim of eligibility for a national interest waiver.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.