U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22022484

Date: AUG. 23, 2022

Appeal of Texas Service Center Decision

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

The Petitioner seeks second preference immigrant classification, 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 qualified for classification as a member of the professions holding an advanced degree, but had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that she is eligible 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 withdraw the Director's decision and remand the matter for further review of the record and issuance of a new decision.

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* (emphasis added). 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. –

(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. . . . [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.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

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.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

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 to the definition of "advanced degree" provided at 8 C.F.R. § 204.5(k)(2), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) provides that a petitioner present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

To demonstrate 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 would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *See Id.* at 888-91, for elaboration on these three prongs.

II. ANALYSIS

A. Eligibility for the Requested Classification

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability. For the reasons discussed below, we withdraw the Director's conclusion that the Petitioner has established that she is an advanced degree professional.

The record includes copies of the Petitioner's "bachelor of social communication" diploma and transcript from [redacted] in Brazil, along with an "Evaluation of Training, Education, and Experience" (evaluation), which ultimately concluded that:

> Considering that a Bachelor's Degree, followed by more than five years of full-time work experience in the field of Marketing and Management is equivalent to a Master's Degree in Marketing- Management it is my expert opinion that [the Petitioner], with a Bachelor's degree in Social Communication and 16 years of experience, has no less than the equivalent of a Master's Degree in Marketing - Management.

According to the American Association of Collegiate Registrars and Admissions Officers (AACRAO) Electronic Database for Global Education (EDGE),[3]

> The *3-year Título de Bacharel/Grau de Bacharel* represents attainment of a level of education comparable to 3 years of university study in the United States. Credit may be awarded on a course-by-course basis. The *4-* or *5-year Título de Bacharel/Grau de Bacharel* represents attainment of a level of education comparable to a bachelor's degree in the United States.

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[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*, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[3] We consider EDGE to be a reliable source of information about foreign credential equivalencies. *See Confluence Intern., Inc. v. Holder*, Civil No. 08-2665 (DSD-JJG), 2009 WL 825793 (D. Minn. Mar. 27, 2009); *Tisco Group, Inc. v. Napolitano*, No. 09-cv-10072, 2010 WL 3464314 (E.D. Mich. Aug. 30, 2010); *Sunshine Rehab Services, Inc.* No. 09-13605, 2010 WL 3325442 (E.D. Mich. Aug. 20, 2010). *See also Viraj, LLC v. Holder*, No. 2:12-CV-00127-RWS, 2013 WL 1943431 (N.D. Ga. May 18, 2013).

As an initial matter, we note a number of deficiencies with the transcript. Not only are the boxes for "Graduation Date," "Completion Date," and "Diploma Issuance Date" blank, but so is the signature section for the secretary, even though the transcript clearly states that it "is only valid with . . . the signature of its secretary." For this reason alone, we cannot conclude that this is "an official academic record" as required by 8 C.F.R. § 204.5(k)(3)(i)(B). Further, we are unable to determine the length of the program. It appears she began her university level studies in early 2001 and received her diploma on January 23, 2004.[4] In other words, the Petitioner has not established that she graduated from a four-year program. Although the evaluator claims to be a member of AACRAO, he fails to address the length of the Petitioner's program.[5] In addition, despite the evaluator's conclusion regarding the combination of the Petitioner's education and professional experience, he does not claim to have reviewed any employment letters to establish the Petitioner's work history or experience, as required by 8 C.F.R. § 204.5(k)(3)(i)(B).[6] The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In light of the above, the Director should determine anew whether the Petitioner has sufficiently demonstrated that she holds the foreign equivalent of a U.S. bachelor's degree as required by the regulations at 8 C.F.R. § 204.5(k)(2) and (3)(i)(B). If the Director determines that the Petitioner has demonstrated that she holds the foreign equivalent of a U.S. bachelor's degree, she should then consider whether Petitioner has established that she has at least five years of post-baccalaureate experience in the specialty.

The Petitioner also claims to be an individual of exceptional ability. The Director determined that she met the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A),(B), and (E), but had not established that she was an individual of exceptional ability in the final merits determination.[7] For the reasons discussed below, however, we withdraw the Director's conclusions regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

Regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E), the Petitioner provided a "certificate" that she is "affiliated" with the Radio Broadcasters Union of [redacted] She did not, however, provide any supporting evidence, such as the membership requirements and/or by-laws, which establishes that her affiliation with the union qualifies as membership in a professional association. As previously explained, profession is defined as "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

[4] According to the Petitioner's resume, she also began working as a managing partner for a Brazilian broadcasting company in December 2002. It is unclear whether this position was full-time.

[5] We may, in our discretion, use an evaluation of a person's foreign education as an advisory opinion. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we may discount or give less weight to that evaluation. *Id.*

[6] The evaluator indicated that he reviewed the Petitioner's diplomas, transcripts, and resume.

[7] If a petitioner meets at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F), we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Matter of Chawathe*, 25 I&N Dec. at 376 (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality"). *See also 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).

minimum requirement for entry in the occupation." 8 C.F.R. § 204.5(k)(2). Without more, the Petitioner has not established that she meets this criterion.

The Director should, therefore, determine whether the Petitioner meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). If the Director concludes that she does, she should then conduct a final merits determination.

B. *Dhanasar* Analysis

In *Dhanasar*, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." On the Form I-140, Immigrant Petition for Alien Worker, the Petitioner provided the following information:

> Part 5 - Additional Information About the Petitioner
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> Section 11. Occupation: Marketing Manager
>
> Part 6 - Basic Information About the Proposed Employment
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> Section 1. Job Title: Marketing Manager
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> Section 2. SOC Code: 11-2021[8]
>
> Section 3. Nontechnical Description of Job: Plan, direct, or coordinate marketing policies and programs, such as determining the demand for products and services offered by a firm.

The Petitioner's "Professional Plan & Statement" submitted with the initial filing confirmed that she intended to continue working as a marketing manager.

However, as explained in the Director's decision, in response to the request for evidence (RFE), the Petitioner indicated in a "Definitive Statement" that she intends to "develop[]and expand[] her company" and be its chief executive officer.[9] The Petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, the purpose of an RFE is to elicit 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)(1), 103.2(b)(8), 103.2(b)(12). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). If significant, material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The Director should determine whether the information submitted by the Petitioner in the RFE response provided more specificity to the proposed endeavor as initially described or added an

[8] *See* https://www.onetonline.org/link/summary/11-2021.00 (last accessed Aug.23, 2022).

[9] The Petitioner also provided a "Business Plan" dated August 21, 2021, almost two years after her initial filing date of May 23, 2019.

additional endeavor. In determining whether an individual qualifies for a national interest waiver, we must rely on the specific proposed endeavor to determine whether (1) it has both substantial merit and national importance and (2) the foreign national is well positioned to advance it under the *Dhanasar* analysis. Accordingly, the Director should determine whether the RFE response presented a new set of facts regarding the proposed endeavor, which is material to eligibility for a national interest waiver. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *see also Dhanasar*, 26 I&N Dec. at 889-90.

III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to consider whether the Petitioner 1) qualifies for EB-2 classification, the threshold determination in national interest waiver cases and 2) has provided sufficient and consistent information regarding her proposed endeavor such that she may determine whether a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Director may request any additional evidence considered pertinent to the new determination.

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