U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 19821504

Date: DEC. 9, 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 an individual of exceptional ability, 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 and dismissed a subsequent combined motion to reopen and reconsider, concluding that the Petitioner did not qualify for classification as an individual of exceptional ability, and that she had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.[1]

On appeal, the Petitioner submits a brief asserting that she qualifies for the EB-2 classification as an individual of exceptional ability and that she is eligible for a national interest waiver. Her appeal brief includes a statement indicating that "[t]he underlying decision is not currently the subject of a judicial proceeding." *See* 8 C.F.R. § 103.5(a)(1)(iii)(C).

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 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

[1] The Director also dismissed the subsequent motion because it was not accompanied by a statement about whether or not the unfavorable decision has been the subject of any judicial proceeding. *See* 8 C.F.R. § 103.5(a)(1)(iii)(C). The required statement on judicial proceedings under 8 C.F.R. § 103.5(a)(1)(iii)(C) is a procedural rule that helps U.S. Citizenship and Immigration Services identify those cases involving judicial proceedings so they can be held in abeyance pending the outcome of litigation involving the originally filed petition. *See, e.g.* Memorandum from Richard E. Norton, Assoc. Comm'r for Examinations, Immigration and Naturalization Service, *Adjudication of Petitions and Applications which are in Litigation or Pending Appeal* (Feb. 8, 1989). The brief accompanying the Petitioner's appeal addresses the Director's ground for dismissal by confirming that her petition is not the subject of any judicial proceeding.

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. –
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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.
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> (B) Waiver of job offer –
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> (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.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." In addition, 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).

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). *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.[3]

[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.

## II. ANALYSIS

### A. Exceptional Ability

The Petitioner does not claim to meet any of the six regulatory criteria listed at 8 C.F.R. § 204.5(k)(3)(ii).[4] Instead, she contends that she has offered comparable evidence of her exceptional ability pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(iii). This regulation allows for the submission of "comparable evidence" if the standards at 8 C.F.R. § 204.5(k)(3)(ii) "do not readily apply to the beneficiary's occupation." *See* 8 C.F.R. § 204.5(k)(3)(iii). A petitioner should explain why the regulatory criteria do not readily apply to her occupation, as well as why the evidence she has submitted is "comparable" to that required under 8 C.F.R. 204.5(k)(3)(ii).[5]

The Petitioner argues that she is an individual of exceptional ability in the sciences because of her participation in studies with the National Institutes of Health (NIH) based on her status as a carrier of [redacted] The record includes a February 2021 letter from [redacted] Chief of the [redacted] Section, Laboratory of [redacted] National Institute of Allergy and Infectious Diseases, NIH, stating:

> In [redacted] 2009 NIH recruited [the Petitioner] to participate in a research protocol which is studying the long-term outcome of [redacted] Studies of [redacted] is a very long term project at the NIH and is expected to continue for decades more time because it is very important to know how these patients fare medically as they age. [The Petitioner] has been faithfully participating in this study since 2009.

The Petitioner asserts that she "has not offered any evidence on any of the six criteria because the criteria are demonstrably not applicable to the exceptional and exceptionally rare ability the Petitioner does possess to advance the medical research of the NIH, namely her genes."[6] She further states:

> In this case, the Petitioner is responding to the request of the NIH that she continue serving as a subject in a long-term, important scientific protocol precisely and solely because of her exceptional ability: She is one of a small number of identified [redacted]

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[4] A petitioner seeking classification as an individual of exceptional ability must present documentation that satisfies at least three of the six categories of initial evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). Additionally, if these types of evidence do not readily apply to a petitioner's occupation, she may submit comparable evidence to establish her eligibility. *See* 8 C.F.R. § 204.5(k)(3)(iii). However, objectively meeting the regulatory criteria alone does not establish that a petitioner in fact meets the requirements for exceptional ability classification. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. The officer must determine whether or not the petitioner, by a preponderance of the evidence, has demonstrated that she has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See generally* 6 *USCIS Policy Manual* F.5(B), https://www.uscis.gov/policy-manual.

[5] If the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to a petitioner's occupation, she may submit comparable evidence to establish her eligibility. When evaluating such comparable evidence, officers consider whether the criteria are readily applicable to a petitioner's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in the regulation. *See generally* 6 *USCIS Policy Manual* F.5(B), *supra*.

[6] General assertions that any of the six objective criteria do not readily apply to a petitioner's occupation are not acceptable. *See generally* 6 *USCIS Policy Manual* F.5(B), *supra*.

[redacted] and she is among an even smaller cohort of subjects who have been part of the study since 2009 and who can contribute to the achievement of the NIH's endeavor because no new subjects are being added to the study.

In addition to two letters from [redacted] (dated July 2020 and February 2021), the record includes letters of support from [redacted] Head of the [redacted] Unit, Laboratory of [redacted], National Institute of Allergy and Infectious Diseases, NIH, and [redacted], Professor and Chair of the Department of Pediatrics at University [redacted] School of Medicine. These three individuals' letters all indicate that the Petitioner is a research subject in a protocol designed by NIH investigators to monitor mothers of patients [redacted]

The Petitioner argues that the aforementioned letters of support discussing her "rare" genetic trait as an [redacted] and her research study participation are comparable evidence of her exceptional ability. The language of regulation at 8 C.F.R. § 204.5(k)(3)(iii), however, specifically requires the Petitioner to demonstrate that the six criteria "do not readily apply to [her] *occupation*" [emphasis added]. The Petitioner has not shown that being a [redacted] is an "occupation" rather than a biological characteristic.[7] Moreover, the Petitioner has not demonstrated that possessing a [redacted] and participating in a research study are indicative of "a degree of expertise significantly above that ordinarily encountered in the sciences." *See* 8 C.F.R. § 204.5(k)(2). Additionally, the Petitioner does not identify the specific criteria at 8 C.F.R. § 204.5(k)(3)(ii) for which her evidence is truly comparable.[8] Here, the Petitioner has not shown that carrying or being capable of passing on a [redacted] and involvement in a research study render her an individual of exceptional ability in the sciences.

In summary, the evidence does not establish that the Petitioner satisfies any of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) or meets the comparable evidence requirements at 8 C.F.R. § 204.5(k)(3)(iii), and has achieved the level of expertise required for exceptional ability classification.

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. As previously outlined, in order to qualify for a national interest waiver, the Petitioner must first show that she qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. The Petitioner has not shown that she is an advanced degree professional or that she has satisfied the regulatory criteria and achieved the level of expertise required for exceptional ability classification. Accordingly, 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 her 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

[7] Further, the introductory language of section 203(b) of the Act indicates that this classification is reserved "for Employment-Based Immigrants."

[8] Claims that USCIS should accept witness letters as comparable evidence are not persuasive. A petitioner should explain why the evidence it has submitted is comparable. *See generally* 6 *USCIS Policy Manual* F.5(B), *supra*.

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 an 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.