U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19805494

Date: FEB. 28, 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 either a member of the professions holding an advanced degree or 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, concluding that the Petitioner did not qualify for classification as either a member of the professions holding an advanced degree or an individual of exceptional ability, nor had she 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 submits additional documentation and a brief asserting her eligibility 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 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* (emphasis added), 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.

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 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* (emphasis added), U.S. Citizenship and Immigration

[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*).

Services (USCIS) may, as a matter of discretion,[2] grant a national interest waiver if a 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 Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

On the Part 6 of the Form I-140, Immigrant Petition for Alien Worker, the Petitioner provided the folowing:

1. Job Title: Medical Researcher
2. SOC Code: 19-1042
3. Nontechnical Description of Job: Conduct research dealing with the understanding of human diseases and the improvement of health.

The Petitioner confirmed this information in Item 9 of the Form ETA 750 Part B, U.S. Department of Labor, Employment and Training Administration, Application for Alien Employment Certification (Form ETA 750B), indicating that the "Occupation in Which Alien is Seeking Work" is "Medical Researcher." In addition, the Petitioner stated in her August 29, 2018 "Professional Plan and Statement" that she intends to continue working as a medical researcher.

> My career plan in the United States is to work, making substantial contributions in the Medical field and Healthcare industry through advanced medical research. My extensive career working in steep research capacities within the biology and microbiology sectors will be beneficial to the U.S.'s healthcare and medical environment, which is currently experiencing severe shortages of Medical Researchers. I will be able to work in research and development, at colleges or universities, professional schools, hospitals, pharmaceutical, and medicine manufacturing companies, and even physician offices. Medical research is at the forefront of clinical advances, and I will dedicate myself towards making advances of major significance.

A. Advanced Degree

The Petitioner holds a "Licenciada em Ciencias Biologicas" from the [redacted] in Brazil. According to the American Association of Collegiate Registrars and Admissions Officers (AACRAO) Electronic Database for Global Education (EDGE),[3] this "is the professional license to teach at a designated level of instruction (pre-school through upper secondary education)" and is equivalent to a U.S. bachelor's degree.

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[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 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 noted above, the regulation at 8 C.F.R. § 204.5(k)(2) indicates that "[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."[4]

In response to the Director's request for evidence (RFE), the Petitioner provided two letters verifying her employment. The first letter, from [redacted] indicates that the Petitioner was employed as a "Pedagogical Consultant In Biology Teaching" on a part-time basis from February 1, 2007 until December 3, 2012 and provided six bullet point discussing her job duties. The letter does not, however, specify the number of hours the Petitioner worked per week. Further, not only do these dates contradict the information the Petitioner provided on her resume (which lists the dates of employment as "2009-2012"), but she did not include this position on the Form ETA 750B[5]. The second letter, from [redacted] states that the Petitioner was a part-time Educational Coordinator of Biology for 20 hours per week from January 16, 2012 until December 3, 2017 and included a list of seven duties. The Petitioner, however, indicated on the Form ETA 750B, that she worked 40 hours per week in this position. Notably, the Form ETA 750B also indicates that the Petitioner worked 40 hours per week for each of three separate employers between November 4, 2013 and December 30, 2017. 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).

We also acknowledge the Petitioner's submission on appeal of a letter from [redacted] regarding part-time employment as an "Elementary and Middle School Teacher."[6] However, when a Petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we need not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the Petitioner wanted the letter to be considered, she should have provided it in response to the RFE. *Id.*

For all of these reasons, the Petitioner has not provided sufficient and consistent information to establish that she is a member of the professions holding an advanced degree.[7]

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[4] The Petitioner completed her degree on January 16, 2008. Therefore, we cannot consider experience which occurred before this date to meet this requirement.

[5] The regulation at 8 C.F.R. § 103.2(a)(1) states, in pertinent part:

> Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

The Form ETA 750B, which the Petitioner signed under penalty of perjury, instructs the preparer to "list any other jobs related to the occupation for which the alien is seeking certification, as indicated in Item 9."

[6] Although the Petitioner included this position on the Form ETA 750B, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) states that a petition for an advanced degree professional must be accompanied by "[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." We would further note that, although the letter states that the position was part-time, the Petitioner indicated on the Form ETA 750B that it was full-time i.e., 40 hours per week.

[7] We would also note that according to the submitted "How to Become a Medical Scientist" section of the *Occupational*

B. Exceptional Ability

On appeal, the Petitioner asserts that she meets the four criteria addressed below.[8]

> *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.* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Director concluded that the Petitioner meets this criterion and we agree. However, we note that section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university, school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D)

The record contains information such as the Petitioner's salary for her part-time positions, income from her business in Brazil, tax records, and bank statements. While we may agree with the Petitioner that she "should be evaluated based on the wage statistics or comparable evidence in" her home country, that does not relieve her from providing evidence which establishes that such payments were a result of, or otherwise demonstrates, exceptional ability. Without more, we cannot conclude that she meets this criterion.

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

The Petitioner asserts that her membership in the Association of Southeastern Biologists meets this criterion.[9] As explained by the Director, however, the provided information "does not indicate the date of membership." 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). Without evidence which demonstrates that she was a member at the time of filing, we cannot conclude that she has met this criterion.

Outlook Handbook (*OOH*) entry for Medical Scientists, which corresponds to the provided SOC code 19-1042, they "typically have a Ph.D., usually in biology or a related life science. Some medical scientists get a medical degree instead of, or in addition to, a Ph.D." While not a basis for our decision, the Petitioner has not established that her teaching degree qualifies her for the position of medical researcher. Further, we note that the definition at 8 C.F.R. § 204.5(k)(2) states, in pertinent part, that "[i]f a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." In other words, the regulation does not allow for a combination of education and experience if "a doctoral degree is customarily required by the specialty."

[8] As the Petitioner does not address the remaining criteria, we consider them abandoned. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-2731201 1, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

[9] The Petitioner did not claim to meet this criterion in the initial filing.

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).

As explained by the Director, the submitted evidence does not establish that the Petitioner has been recognized for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations as required by the plain language of the regulation. For example, while the letters are complimentary, they do not sufficiently establish the Petitioner's significant contributions to the field. Regarding the submitted certificates and/or awards, the Petitioner has not demonstrated the requirements to receive them or that they are the result of her achievements and significant contributions such that we may conclude that she meets this criterion.

For the reasons set forth above, the evidence does not establish that the Petitioner satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification. As the Petitioner has not met the threshold requirement for this classification, further analysis of her eligibility for a national interest waiver would serve no meaningful purpose.

We will, however, note that in response to the Director's RFE, the Petitioner provided a new "Professional Plan & Statement" dated January 5, 2021, in which she added "entrepreneur" to her proposed endeavor and indicated that she will "serve as a Biologist, Researcher, and Entrepreneur for [her] company." In addition, she submitted a business plan which describes the company as follows:

> This company will operate in the online trade of vitamin and supplement[] products, among others, but those of organic origin, either in natural form or with some complexity in packaging and encapsulation.
>
> The company's first products will be mixed dried plants, natural juices, and supplement capsules of organic origin.
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> The company will also . . . publish[] recipes for the preparation of organic products, as well as online and in-person training for current or future producers of organic products, as a way to expand the offer of products on the marketing portal and to offer consumers with these new products, selling them online or through points of sale in agreed establishments.

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), (8), and (12). Here, the Petitioner did not clarify her specific proposed endeavor, but rather added the role of "entrepreneur." 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.

ORDER: The appeal is dismissed.