U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21362027

Date: JUN. 17, 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 ballet instructor, 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, concluding that the Petitioner 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 requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon 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. 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.
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> (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.[3]

II. ANALYSIS

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification. While we may agree with the Director's ultimate conclusion that the Petitioner had not established that a waiver of the required job offer would be in the national interest, it is appropriate to remand the matter because the Director did not make an initial determination as to whether the Petitioner qualifies as an individual of exceptional ability.[4]

Regarding the Petitioner's claim that she is an individual of exceptional ability, the Director should first determine whether the Petitioner meets at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii), and if so, should then conduct a final merits determination. As part of the review, the Director may want to consider the following regarding the claimed criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) and (E).

> *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 plain language of the regulation requires that letter(s) 1) be from current or former employers[5] and 2) establish ten years of *full-time* experience *in the occupation* (emphasis added).

As explained in the Director's request for evidence (RFE), based upon the information initially submitted, it appeared that the Petitioner did not begin working as a ballet instructor until 2016, and, thus, had not established ten years of full-time experience in the occupation. For example, the Petitioner's "Business Plan" indicated that "she began her career as a classical ballet teacher" in 2016, a statement echoed in the initial support letter. The Petitioner's initial filing also included a letter and class schedule from the [redacted] The letter stated that the Petitioner "taught classes" beginning on February 1, 2016. According to the accompanying "Active Classes 2017" schedule, she

[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*, 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] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.
[4] The Petitioner did not claim, and the record did not establish, that the Petitioner is an advanced degree professional. For example, the Petitioner's stated endeavor/occupation is ballet instructor at her own ballet studio. The Petitioner has not established that a ballet instructor is a profession as defined by section 101(a)(32) of the Act and 8 C.F.R. § 204.5(k)(2).
[5] Should the Director decide to consider the Petitioner's work as a physical therapist as evidence of experience in the occupation of ballet instructor, they should determine whether the submitted letter is from a "former employer" as required by the regulation.

taught ballet classes for three hours a day (on Mondays, Wednesdays, and Fridays from 4:30pm to 6:00pm and 6:00pm to 7:30pm, and on Tuesdays and Thursdays from 8:30am to 9:30am, 6:00pm to 7:00pm, and 7:00pm to 8:00pm). In response to the Director's RFE, the Petitioner provided a new letter indicating that she worked for [redacted] "from February 1, 2016 through July 18, 2019 and taught classical ballet full time (40 hours per week)," which appears to contradict the information provided in the 2017 class schedule. She also submitted a letter from [redacted] which stated that the Petitioner was "a ballet dancer and a dance instructor" whose "functions included dancing on television programs, participating in television shows, assisting the television host, and creating and teaching dance choreographies." It is, therefore, unclear how much time, if any, was spent as a ballet instructor. In addition, in her initial business plan, the Petitioner described her work at [redacted] as "being invited to participate in a great program," explaining that she "participat[ed] in several scenes" of a television show. The Petitioner must resolve the above 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 whether the Petitioner has sufficiently established "at least ten years of full-time experience in the occupation" of ballet instructor as required by the regulation.

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

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 minimum requirement for entry in the occupation." 8 C.F.R. § 204.5(k)(2). The Director should consider whether the Petitioner's submission of a membership card for the "Union of Professional Dancers of the State of Rio de Janeiro," without any supporting evidence, such as the membership requirements, is sufficient to establish that it is a professional organization.

III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to consider whether the Petitioner qualifies for EB-2 classification. 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.