U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22678735

Date: OCT. 27, 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 a member of the professions holding an advanced degree, 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 a member of the professions holding an advanced degree or as 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 Applicant's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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) [Individuals] 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 [individual'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 definition:

> *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 [individual] must have a United States doctorate or a foreign equivalent degree* (emphasis added).
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> *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) further provides six criteria, at least three of which must be satisfied, for an individual to establish 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). This, however, is only the first step, and the successful submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for this classification. If a petitioner satisfies these initial requirements, 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. *See also* 5 *USCIS Policy Manual* F.5, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

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 individual's proposed endeavor has both substantial merit and national importance; (2) that the individual 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 a preliminary matter, the Petitioner alleges on appeal that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, and erroneously applied the law, to [her] detriment." Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing immigration benefit requests.[4] Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions.[5] While the Petitioner asserts on appeal that she has provided evidence sufficient to demonstrate her eligibility for the immigration benefits sought, she does not further explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

A. Material Change of Occupation and Proposed Endeavor

Collectively considering the evidence in the record, we conclude that the Petitioner has materially changed the nature of the occupation in which she will be employed and the proposed endeavor that she intends to pursue, should this petition be approved. This is important because to show eligibility for the EB-2 classification as an advanced degreed professional, the Petitioner must demonstrate, among other things, that the occupation qualifies as a profession, and that she has five years of progressive post-baccalaureate of experience within this occupation. To qualify for the EB-2 classification as an individual of exceptional ability, the Petitioner must submit evidence within the context of her profession or occupation to show that she satisfies at least three of six regulatory criteria to meet the initial evidence requirement, and ultimately to demonstrate that she has a degree of expertise significantly above that ordinarily encountered in her field. *See* Section 203(b)(2) of the Act, and 8 C.F.R. § 204.5(k); *See also* 5 *USCIS Policy Manual* F.5, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

Further, in order to demonstrate that the Petitioner is eligible for a national interest waiver she must, among other things, provide evidence sufficient to show that her specific proposed endeavor (1) it has both substantial merit and national importance and (2) the foreign national is well positioned to advance it under the *Dhanasar* analysis.[6] In *Dhanasar*, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." *Dhanasar* at 889.

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[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.

[4] *See Matter of Chawathe*, 25 I&N Dec. at 375 (AAO 2010); *see also Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965).

[5] *See 1 USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-manual.

[6] *See* 5 *USCIS Policy Manual* F.5, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

The Petitioner initially indicated that she was coming to the United States to be employed as a medical and health services manager in the field of dentistry, and that in this position she will "plan, direct, or coordinate medical and health services in hospitals, clinics, managed care organizations, [and] public health agencies." She stated that she would "help U.S. dental clinics, public health agencies, public health agencies, or similar organizations improve their adminstrative effiency and quality of services," indicating that she intends to seek employment with an existing U.S. employer. Later, in reponse to the Director's request for evidence (RFE) she presented a revised statement and a business plan indicating that she will alternatively focus her endeavor on "developing and expanding my own business in the nation,

In Part 7 of the appeal form the Petitioner states that she will be employed as a dentist, asserting that "her endeavor has the potential of broadly impacting as a Dentist General." Yet she also maintains in her December 2021 statement provided in support of the appeal that she will be employed as a medical and health services manager. Here, the Petitioner has presented inconsistent evidence regarding how she will be employed in the United States. First, she indicates that she will be employed as a medical and health services manager helping U.S. businesses to "improve their adminstrative efficiency and quality of services." Later, in the RFE response she asserts that she will focus her services as the manager of her own business. On appeal, she newly states that she will be employed as a dentist. The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to an RFE or thereafter, the Petitioner cannot materially change aspects of the proffered position including the occupation in which she will be employed, and the nature of the proposed endeavor that she intends to pursue. The Petitioner must meet eligibility requirements at the time of filing the petition, but she has not done so here. 8 C.F.R. § 103.2(b)(1). For instance, the Petitioner's change of her occupation from manager to dentist after the filing date cannot retroactively establish eligibility. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which requires that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. For these reasons, the petition will remain denied.

B. Advanced Degree Professional

As noted above, the Director concluded that the Petitioner did not qualify for EB-2 classification as a member of the professions holding an advanced degree. Specifically, the Director raised concerns with the submitted employment letters and ultimately concluded that they did not establish that the Petitioner had at least five years of progressive post-baccalaureate experience. While we may agree with the Director's determination that the letters did not establish the progressive nature of her experience, the record indicates that the Petitioner intends to be employed as a dentist, which as we will explain is a profession that customarily requires a doctoral degree in the United States.

As discussed, the Petitioner asserted that she will prospectively be employed as a dentist on the appeal form. She also states in her December 2021 letter submitted on appeal that she has "already completed the first and second phase of the U.S. Board of Dentistry, a very important step in validating my diploma

in the United States," which suggests that she intends to, but has yet to, obtain the requisite occupational credentials to practice as a dentist in the United States.

We also observe that *prior* to the filing of the instant appeal in April 2022, the Petitioner filed a second Form I-140 national interest waiver petition (in December 2021).[7] She states that she will be employed as a dentist in part 6 of the second petition, noting that in this position she will "examine, diagnose and treat diseases, injuries, and malformations of teeth and gums…." In support of that petition, she provided a November 2021 statement in which she asserts that she "intend[s] to continue using my expertise and knowledge to work as a Dentist in the United States." We therefore conclude that the Petitioner intends to be prospectively employed as a dentist, not as a medical and health services manager - as alternatively asserted on appeal.

As stated above, the definition at 8 C.F.R. § 204.5(k)(2) clearly states, in pertinent part, that "[i]f a doctoral degree is customarily required by the specialty, the [individual] 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."

The original filing includes an "Evaluation of Training, Education, and Experience" from [redacted] written by [redacted], senior evaluator at [redacted], who states:

> Considering that a Bachelor's Degree, followed by more than five years of full-time work experience in the field of Dentistry is equivalent to a Doctor of Dental Surgery, it is my expert opinion that [the Petitioner], with a Dental Surgery Degree, a Specialization in Restorative Dentistry, a Specialization in Implant Dentistry, and 23 years of experience, has no less than the equivalent of a Doctor of Dental Surgery."

The evaluator does not claim that the Petitioner holds the foreign equivalent of a doctoral degree, nor does he address the information below.

According to the "How to Become a Dentist" section of the *Occupational Outlook Handbook* (*OOH*) entry for Dentists (SOC code 29-1020):[8]

> Dentists must be licensed in the state in which they work. Licensure requirements vary by state, although *candidates usually must have a Doctor of Dental Surgery (DDS) or Doctor of Medicine in Dentistry/Doctor of Dental Medicine (DMD) degree from an accredited dental program and pass written and clinical exams. Dentists who practice in a specialty area must complete postdoctoral training* (emphasis added).
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> . . . .
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> All dental specialties require dentists to complete additional training before practicing that specialty. This training is usually a 2- to 4-year residency in a CODA-accredited program

[7] *See* [redacted], which remains pending before USCIS as of October 27, 2022.
[8] *See* https://www.bls.gov/ooh/healthcare/dentists.htm#tab-4.

> related to the specialty, which often culminates in a postdoctoral certificate or master's degree. Oral and maxillofacial surgery programs typically take 4 to 6 years and may result in candidates earning a joint Medical Doctor (M.D.) degree.

For these reasons, the Petitioner has not demonstrated that she holds the foreign equivalent degree of a DDS or DMD degree and has not established that she is a member of the professions holding an advanced degree consistent with the regulatory definition at 8 C.F.R. § 204.5(k)(2). Therefore, she is ineligible for the EB-2 classification as a member of the professions holding an advanced degree.

C. Individual of Exceptional Ability

The Director concluded in the denial that the Petitioner did not satisfy the plain language requirements of at least three criteria at 8 C.F.R. § 204.5(k)(3)(ii). Specifically, the Director determined that the Petitioner fulfilled only the degree criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A) and the membership in professional associations criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

When dismissing an appeal, we generally do not address issues that are not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be "waived." If the Petitioner fails to address a specific issue raised by the Director, and that issue is dispositive of the case, the appeal may be dismissed based on that "waived" issue.[9] On appeal, the Petitioner does not challenge the Director's determination that she does not meet any of the other regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we consider the issue of whether the Petitioner qualifies as an individual of exceptional ability waived. We will not disturb the Director's determination regarding the Petitioner's ineligibility for the EB-2 classification as an individual of exceptional ability.

D. National Interest Waiver

The remaining issue raised by the Petitioner on appeal is whether she has established her eligibility for a national interest waiver. As discussed, in order to qualify for a national interest waiver, the Petitioner must first show that she qualifies for the EB-2 classification as either an advanced degree professional or an individual of exceptional ability. 203(b)(2)(A) of the Act. As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot.[10]

Nonetheless, we note that regarding the Petitioner's remaining claims of eligibility under the *Dhanasar* analysis, we agree with the Director's ultimate conclusions. For example, regarding the national

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[9] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). The courts' view of issue waiver varies from circuit to circuit. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (finding that an issue referred to in an affected party's statement of the case but not discussed in the body of the brief is deemed waived); *but see Hoxha v. Holder*, 559 F.3d 157, 163 (3d Cir. 2009) (issue raised in notice of appeal form is not waived, despite failure to address in the brief).

[10] It is unnecessary and would be an unwise use of the government's time and resources to analyze the remaining independent grounds when another is dispositive of the appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); *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).

importance portion of the first prong, although the Petitioner's statements reflect her intention to continue working in her field in the United States, she has not offered sufficient information and evidence to demonstrate that the prospective impact of her proposed endeavor rises to the level of national importance. In *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893. Similarly, the record in this matter does not demonstrate that the Petitioner's proposed endeavor stands to sufficiently impact U.S. interests or the dental industry more broadly at a level commensurate with national importance. In addition, she has not demonstrated that her specific proposed endeavor has significant potential to employ U.S. workers or otherwise offer substantial positive economic effects for the United States.

III. CONCLUSION

The Petitioner has not established that she satisfies the regulatory requirements for the EB-2 classification as an advanced degree professional or 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.