U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25786557

Date: APR. 05, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a nurse, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and/or an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this 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 the record did not establish the Petitioner's eligibility for a national interest waiver under the Dhanasar framework. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's*, Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). 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. Section 203(b)(2)(B)(i) of the Act.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] We will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," Matter of Dhanasar, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. Dhanasar states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[3], grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

II. EB-2 CLASSIFICATION

We withdraw the Director's determination that the Petitioner qualifies as a member of the professions holding an advanced degree. Upon de novo review, we conclude the Petitioner has not established eligibility for the EB-2 classification either as a member of the professions holding an advanced degree or as an individual of exceptional ability.

A. Member of the Professions Holding an Advanced Degree

In order to show that a petitioner holds a qualifying advanced degree, the petition must be accompanied by "[a]n official academic record showing that the [individual] has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, a petitioner may present "[a]n official academic record showing that the [individual] 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 [individual] has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Director determined the Petitioner has the equivalent of an advanced degree based on the Petitioner's foreign equivalent of a U.S. bachelor's degree combined with at least five years of progressive post-baccalaureate experience.[4] The Director determined the Petitioner possessed the

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. See generally 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

[3] 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).

[4] The Director concluded the Petitioner has the equivalent of a U.S. bachelor's degree in nursing; however, in the Notice of Intent to Deny (NOID), the Director explained that the Petitioner had not established she holds an advanced degree. Although the Petitioner may have completed a graduate program in which she received graduate credits leading to a professional certificate, she has not established that a lato sensu is a graduate degree. Therefore, we agree with the Director's conclusion that the Petitioner's foreign lato sensu is not the equivalent of a U.S. master's degree.

requisite experience; however, we withdraw that finding. For the reasons discussed below, we conclude the Petitioner has not established she has the requisite five years or more of post-baccalaureate experience.

The Petitioner initially submitted employer letters which contain no explanation of her duties or experience as a nurse or any indication about whether the Petitioner worked full-time or part-time in her past positions. In response to the NOID, the Petitioner provided new letters of experience from prior employers. The updated letters include a brief summary of the Petitioner's duties and a statement that she worked full-time in her prior positions. The letters submitted in her NOID response feature the same format, font, and page layout, which suggests that each individual employer did not independently write a letter, but perhaps one individual or entity created all the letters. Multiple letters contain the same punctuation and spacing errors, which further supports a conclusion that they were not independently written.

In addition, the information contained in the letters conflicts with other information in the record. For instance, the Petitioner initially submitted a document stating that she worked at the [redacted] from July 14, 2003 to October 10, 2003. In her NOID response, the updated letter states that she worked at this same job from October 1, 2007 to April 1, 2008. Many of the letters state the Petitioner worked as a registered nurse; however, the Petitioner's résumé states that she worked in those same positions as a nursing assistant. Another letter states the Petitioner worked as a registered nurse, while the Petitioner's résumé states she worked as a nursing assistant and a nursing director. The duties listed in the résumé also differ from the duties listed in the letters. To illustrate, the letter from the [redacted] Association for the Development of Medicine states that she provided pediatric care as part of her duties whereas her résumé does not state that she provided pediatric care, rather, only adult care. Another letter from the [redacted] Association for the Development of Medicine states that she worked as a registered nurse, while her résumé states that she worked as a manager of a health unit for this employer during the same time period. Further, the duties provided in this letter differ from the duties provided in the résumé. Specifically, the letter in response to the NOID includes patient care duties, while her résumé does not list such work.

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). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id. Here, the Petitioner has not explained the changes in her employment titles, dates, and duties. As such, these inconsistencies undermine the credibility of the letters. The inconsistencies, combined with details suggesting the letters were not independently written, lead us to conclude the Petitioner has not sufficiently established she has at least five years of post-baccalaureate experience. Moreover, even considering the duties from all the letters together, we cannot determine how the Petitioner's experience is progressive. Many of the duties appear to be the same across multiple jobs, which does not sufficiently demonstrate they are progressive nature.

We conclude the record does not support a finding that the Petitioner possesses the requisite five years of progressive post-baccalaureate experience. For the foregoing reasons, the Petitioner has not established she is a member of the professions holding an advanced degree.

B. Evidentiary Criteria for Exceptional Ability

Upon de novo review, we conclude the Petitioner has not established eligibility under at least three of the six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).

> 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 record establishes the Petitioner meets this criterion.

> 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)

For the same reasons explained in the prior section concerning eligibility as a member of the professions holding an advanced degree, we conclude the evidence of the Petitioner's employment is inconsistent and does not appear to be independent and objective. Accordingly, the Petitioner has not established that she meets this criterion.

> A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(ii)(C)

The Director's NOID stated:

> [T]he record includes a certified English translation of the petitioner's professional identity card issued by the Federal Nursing Council in 1986 which shows that at that time, she was both a licensed and registered nurse in Brazil as of the priority date. However, the petitioner's Diploma of Nursing shows that she attended a nursing program from 1993 through 1996 which is several years after the issuance of the petitioner's professional identity card in 1986.

Because the Federal Nursing Council issued the Petitioner an identity card when she was age fourteen and about seven years prior to her beginning nursing school, we cannot conclude that this document is a license to practice the profession. Additionally, the Petitioner provided certificates of completion; however, these evidence the Petitioner's training in particular nursing topics, not certifications to practice the profession. Accordingly, the Petitioner has not established eligibility under this criterion.

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 Petitioner did not submit evidence for consideration under this criterion. Therefore, the Petitioner has not established eligibility under this criterion.

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

The Petitioner provided a copy of the professional identity card the Federal Nursing Council issued her in 1986 to evidence her membership in a professional association. The Petitioner submitted a website printout about the Federal Nursing Council and its various regional councils. We acknowledge the statements in the printout, including that the council disciplines and supervises the professional practice of nursing, issues identity cards which are "indispensable for practicing the profession," ensures the quality of nursing services provided, and deliberates on membership. Nevertheless, the Petitioner has not explained how her identity card evidences her membership in a professional association. While the printout provides information about the council as currently constructed, there is little evidence of the council's purpose or authority in 1986, when the Petitioner received her identity card. The record does not demonstrate what professional qualifications, if any, the council considered for issuance of the document to the Petitioner. As the Federal Nursing Council issued this identity card to a fourteen-year-old with no degree in nursing, we cannot conclude that it evidences membership in a professional association.[5] Accordingly, we conclude the Petitioner has not established she satisfies this criterion.

Summary of Exceptional Ability Determination

We need not analyze the Petitioner's eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(F), relating to "evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." Even if the evidence established the Petitioner satisfies this criterion, this would only establish that she meets two of the regulatory criteria. If a petitioner satisfies less than three of the criteria, then a final merits determination is not required.

The record does not support a finding that the Petitioner satisfies at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we do not analyze the Petitioner's eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(F) or provide a final merits analysis.[6] Accordingly, the Petitioner has not established her eligibility as an individual of exceptional ability under section 203(b)(2)(A) of the Act.

III. NATIONAL INTEREST WAIVER

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. Dhanasar, 26 I&N Dec. at 889. In Dhanasar, we noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." Id.

[5] A "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 U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. 8 C.F.R. § 204.5(k)(3). Section 101(a)(32) of the Act states that a profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.

[6] Nevertheless, we conclude the record does not establish the Petitioner's experience is beyond that which is ordinarily encountered in the profession.

The Director determined the record did not establish the broader impact of the Petitioner's proposed endeavor to work as a nurse. In addition, the Director stated she had not established her "work has implications beyond her current employer (or any prospective employers), their business partners, alliances, clients, patients, or her workplace at a level sufficient to demonstrate the national importance of her endeavor." On appeal, the Petitioner states the Director ignored her evidence and the implications her proposed endeavor has in the healthcare and education fields. While we do not discuss each piece of evidence individually, we have reviewed and considered each one.

In support of the national importance of her endeavor, the Petitioner emphasized the importance of the nursing field and the overall impact of nurses. In particular, the Petitioner emphasized the national shortage of nurses, as well as the increased demand for them due to the aging "baby boomer" generation and the COVID-19 pandemic.[7] She provided numerous articles and statistics about the industry to support her assertions. However, in determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on "the specific endeavor that the foreign national proposes to undertake." Dhanasar, 26 I&N Dec. at 889. While we acknowledge the factors the Petitioner highlighted and agree the nursing field is important, this is not necessarily sufficient to establish that the Petitioner's specific proposed endeavor is nationally important. The Petitioner improperly relies upon the collective impact of all nurses as sufficient to establish the impact of her proposed endeavor. However, in Dhanasar, we determined 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, we conclude that the Petitioner's proposed endeavor activities of patient care and training other healthcare professionals do not rise to the level of national importance because she has not established how these activities would impact the field of nursing more broadly.

On appeal, the Petitioner argues a single nurse can potentially impact millions in need of care and that "it would be unfair to state that the Petitioner's endeavor does not have national implications within the healthcare field based on the mere fact that she is just one healthcare professional." In support, she cites an article stating that 59.4% of nurse practitioners see three or more patients per hour. While we acknowledge the Petitioner's assertions, she has not offered sufficient evidence to establish that her proposed endeavor would place her among the 59.4% of nurses that serve three or more patients per hour. As such, it is not apparent how this statistic applies to her proposed endeavor.[8]

[7] The Petitioner should be aware that the Department of Labor (DOL) has already determined the United States lacks sufficient nurses and that employment of noncitizens in "Schedule A" positions will not harm the wages or working conditions of U.S. workers in similar positions. 20 C.F.R. § 656.5. This means that an employer who wishes to hire a person for a Schedule A occupation is not required to conduct a test of the labor market and apply for a permanent labor certification with DOL. Rather, such employer may apply for Schedule A designation by submitting an application for permanent labor certification to USCIS in conjunction with the petition. See generally, 6 USCIS Policy Manual E.7.C, https://www.uscis.gov/policymanual. Accordingly, while we acknowledge the national shortage of nurses in the United States is of such concern that DOL designated nursing as a Schedule A occupation, this does not necessarily support a finding that the Petitioner's specific proposed endeavor to work as a nurse has national importance in the context of a national interest waiver.

[8] While a more proper consideration under prong two of the Dhanasar analysis, we nevertheless conclude that the Petitioner has not offered sufficient evidence to establish she qualifies as a nurse practitioner.

Also on appeal, the Petitioner notes that she has healthcare "methods and strategies" and a "unique approach." However, the Petitioner has not explained what her methods, strategies, or approaches are. We cannot determine whether such practices are already known and used in the United States or how they might impact the field of nursing in the United States, if at all. Similarly, the Petitioner asserts she has an emergency and critical care specialization in nursing, which is "rare" because most nurses are generalists and "must be prepared to provide patient care for almost any situation they encounter." Here, the Petitioner has not offered a comparison of her training in emergency and critical care to that of other nurses in the United States. It is insufficient to claim her experience is rare without providing evidence that others do not generally have similar experience and abilities.

The Petitioner states the Director did not sufficiently consider the advisory opinion letter from [redacted] of the [redacted] Institute. [redacted] provided a summary of the Petitioner's proposed endeavor and then, without explaining how she will meaningfully address the national nursing shortage, declared that she will fill the gap of qualified nurses. He provided Brazilian and U.S. healthcare industry statistics and growth projections, as well as an explanation of the importance of nurses, but he did not sufficiently analyze the impact of the Petitioner's specific proposed endeavor such that his opinion supports a finding that the endeavor has national importance. As a matter of discretion, we may use opinion statements submitted by a petitioner as advisory. Matter of Caron *Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we will reject an opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. Id. Here, [redacted] primarily provides statistics on the healthcare industry but does not sufficiently analyze the impact of the Petitioner's specific proposed endeavor. Therefore, his advisory opinion is not probative in this matter.

IV. CONCLUSION

The Petitioner has not demonstrated that she qualifies as a member of the professions holding an advanced degree or as an individual of exceptional ability under section 203(b)(2)(A) of the Act. Furthermore, the record does not establish the national importance of the proposed endeavor as required by the first prong of the Dhanasar precedent decision.[9] Further analysis of eligibility under the second and third prongs outlined in Dhanasar would serve no meaningful purpose. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Otiende, 26 I&N Dec. 127, 128 (BIA 2013). The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.

[9] Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the Dhanasar 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 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).