U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28962778

Date: DEC. 20, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, a nurse technician, seeks employment-based second preference (EB-2) immigrant classification as 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). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for the underlying visa classification or merits a discretionary waiver of the job offer requirement in the national interest. 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. 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.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability:

(A) An official academic record showing that the [noncitizen] 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;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the [noncitizen] has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the [noncitizen] has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) 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).[1]

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides, "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] We then consider the totality of the material provided in a final merits determination and assess whether the record shows that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[3] See Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." Matter of Chawathe, 25 I&N Dec. at 376.

Once a petitioner demonstrates eligibility for the underlying classification, the petitioner must then establish eligibility for a discretionary waiver of the job offer requirement "in the national interest."

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[1] The regulations provide that if any of the criteria do not readily apply to a beneficiary's occupation, comparable evidence may be submitted to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii)

[2] See generally 6 USCIS Policy Manual F.5(B)(2), https: //www.uscis.gov/policy-manual.

[3] 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, supra, at F.5(B)(2).

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 USCIS may, as matter of discretion[4], 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. ANALYSIS

The Petitioner proposes to establish a home healthcare business for which she would be its chief executive officer and a nurse specialist. The Director found that the Petitioner did not establish eligibility for the underlying EB-2 classification as an individual of exceptional ability. The Director further found that the Petitioner did not merit a discretionary waiver of the job offer requirement in the national interest.

With respect to the underlying EB-2 classification, the Petitioner submitted evidence to meet all six criteria for exceptional ability. The Director concluded that the Petitioner only met two of the regulatory criteria, ten years of full-time experience in her proposed occupation at 8 C.F.R. § 204.5(k)(3)(ii)(B) and license or certification of the profession or occupation at 8 C.F.R. § 204.5(k)(3)(ii)(C).

On appeal, the Petitioner reasserts being an individual of exceptional ability by satisfying two criteria, 8 C.F.R. § 204.5(k)(3)(ii)(A) and (E), and that she provided sufficient evidence for the national interest waiver. The Petitioner does not address or contest on appeal the Director's finding that she does not meet the criteria that she has commanded a salary, or other renumeration for services demonstrating her exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(D), and that she has been recognized for achievements and significant contributions to her field under 8 C.F.R. § 204.5(k)(3)(ii)(F). Accordingly, we deem these grounds to be waived. An issue not raised on appeal is waived. See, e.g., Matter of O-R-E-, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing Matter of R-A-M-, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). After reviewing the evidence in the record, we find that the Petitioner has not demonstrated satisfying at least three of the six initial evidentiary criteria and is not otherwise eligible for the requested benefit.[5]

> An official academic record showing that the [noncitizen] 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 found that the record does not show that the Petitioner's "certificates were received from accredited institutions of learning," and therefore the evidence does not meet the criterion.

[4] 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).

[5] While we do not discuss each piece of evidence in the record individually, we have reviewed and considered each one.

The Petitioner argues on appeal that her diploma and academic transcripts from the [redacted] in Brazil satisfies this criterion. The diploma indicates the Petitioner completed the qualification course, "Technical Nursing Professional - Professional Health Area, being able to perform the function of Technician of Nursing" in 2006. The academic transcripts indicate the Petitioner completed 1730 class hours in coursework related to her proposed occupation as a nursing technician. Based on the diploma and academic transcripts, we find the Petitioner has met this criterion. Therefore, we withdraw the Director's findings on this criterion.

> Evidence in the form of letter(s) from current or former employer(s) showing that the [noncitizen] 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 Director found that the Petitioner met this criterion. The record contains employment letters, contracts to hire the Petitioner, and the Petitioner's social benefit documents. However, the documents do not indicate that the Petitioner's work was full-time. For instance, a letter from [redacted] indicates the Petitioner worked as a first responder from September 1, 2014, to October 1, 2019, and another letter from Municipal Health Department in [redacted] indicates the Petitioner worked as a nurse technician from May 2, 2012, to April 1, 2017. The letters do not indicate whether the Petitioner worked in a full-time capacity as required by the plain language of the criterion. Also, the letters state that the Petitioner worked for both employers at the same time during 2014 to 2017, thereby indicating that the Petitioner's work may not have been full-time for each employer.

The Petitioner also provided employment contracts indicating she was contracted to work temporarily as a nursing technician, as well as her social security documents showing that she worked as a nurse technician during various time periods. However, the documents are not from the Petitioner's current or former employers and do not indicate the Petitioner's work was in a full-time capacity, as required under the plain language of the regulations. Also, while the employment contracts state she was contracted to work as a nurse technician, they do not show that the Petitioner performed the work.

Since the evidence provided does not demonstrate that the Petitioner has at least ten years of full-time experience in her occupation, the Petitioner has not established that she meets the plain language of the criterion. Therefore, we withdraw the Director's finding regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

> 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 found that the Petitioner met this criterion based on a license issued by the Ministry of Labor of Brazil and an identity card and an enrollment document which were both issued by the Regional Council of Nursing of the Federal District of Brazil. However, we disagree with the Director's assessment of the documentation. Contrary to the Director's decision, the record does not include a license issued by the Ministry of Labor. The identity card and the enrollment document issued by the Regional Council of Nursing of the Federal District of Brazil indicate that the Petitioner is enrolled with the council for the occupation of nursing technician. The record does not include

evidence explaining the significance of either document, nor does it indicate that either serves as a license or certification for the profession.

The Petitioner also submitted her previously discussed diploma from the [redacted] indicating she completed the qualification course, "Technical Nursing Professional-Professional Health Area, being able to perform the function of Technician of Nursing". Although the diploma shows the Petitioner completed her nursing technician coursework, it does not show that the Petitioner has a license or certification as a nursing technician.

The Petitioner also submitted her Brazil employment and social security record book to meet this criterion. The record book provides her personal information and her employment history; however, it does not show she has a license or certification as a nurse technician.

Since the record does not demonstrate that the Petitioner has a license or certification for her occupation, she has not established that she meets the plain language of the criterion. Therefore, we withdraw the Director's finding regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

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

To meet the criterion, the Petitioner relies on her previously discussed enrollment document and identity card, both issued by Regional Council of Nursing of the Federal District of Brazil. As stated above, the enrollment document and identity card indicate she is enrolled as a nursing technician.

The Director found that the Petitioner did not submit evidence showing that she has "membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields." While we disagree with the Director that the evidence of membership under this criterion requires "outstanding achievements of their members, as judged by recognized national or international experts," we agree that the Petitioner has not met this criterion.

This criterion requires evidence of membership in a professional association. The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation having a minimum requirement of a U.S. bachelor's degree or foreign equivalent for entry into the occupation. The record does not show that the Regional Council of Nursing for the Federal District of Brazil is comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that it otherwise constitutes a professional association. Therefore, the Petitioner has not demonstrated her membership in a professional association under this criterion.

Since the Petitioner has not established that she meets at least three of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F), we need not conduct a final merits analysis to determine whether the evidence in its totality shows that she is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). Nevertheless, we advise that we have reviewed the record in the aggregate and conclude that it does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability.

The Petitioner has not established her qualification for the EB-2 classification as an individual of exceptional ability in the sciences, arts, or business, and is therefore ineligible for a national interest waiver. While the Petitioner asserts on appeal that she meets all three of the prongs under the Dhanasar analytical framework and is otherwise eligible for the national interest waiver, we reserve our opinion regarding these issues. 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).

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference employment visa as an individual of exceptional ability. Therefore, we conclude that the Petitioner has not established eligibility for the immigration benefit sought.

The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.