U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27465600

Date: JUL. 13, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a human resources specialist, 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 that the record did not establish that the Petitioner is eligible for the EB-2 classification as an individual of exceptional ability. In addition, she concluded that the Petitioner was not eligible for, and did not merit as a matter of discretion, a national interest waiver. 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 at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] If a petitioner does so, 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.

If a petitioner demonstrates eligibility for the underlying EB-2 classification, 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

The Petitioner initially claimed eligibility for the EB-2 classification as a member of the professions holding an advanced degree, but in responding to the Director's request for evidence (RFE) added her claim to qualify as an individual of exceptional ability. In her decision, the Director considered only the latter claim, concluding that the Petitioner did not meet the requisite three evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). On appeal, the Petitioner does not challenge the Director's decision regarding her qualification as an individual of exceptional ability, but asserts instead that she qualifies as a member of the professions holding an advanced degree.

The record shows that the Petitioner earned a *titulo de bacharel*, or title of bachelor, degree in psychology from [redacted] University in Brazil in October 2011. An educational evaluation submitted by the Petitioner concludes that this degree is the equivalent of three and one half years of study towards a bachelor's degree at an accredited institution of higher learning in the United States, and does not conclude that it is a foreign degree equivalent to a United States bachelor's degree as required under the regulation. While the evaluation ultimately concludes that she holds the foreign equivalent of a U.S. bachelor's degree in psychology and human resource management, this is based upon the Petitioner's receipt of a postgraduate *lato sensu* certificate in human resources management, issued by [redacted] University in September 2020.[4]

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[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).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 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] We note that the transcript for the Petitioner's *lato sensu* certificate indicate that she completed her coursework in April 2015, and lists a "date of defense" of her thesis as November 10, 2015. Neither the Petitioner not the evaluator explain the nearly five-year gap between this date and the date her certificate was issued.

The Petitioner asserts on appeal that she has the requisite five years of progressive, post-baccalaureate experience in the human resources field. However, the evaluation concludes that she attained the foreign equivalent of a U.S. bachelor's degree in 2020, and it is therefore not possible for her to have completed five years of post-baccalaureate work experience prior to the filing of her petition in August 2021.

In addition, we note that the letters from her former employers do not document at least five years of work experience in the specialty of human resources. A letter from a partner of the [redacted] verifies that the Petitioner was employed in progressively responsible human resources positions by that company from October 2, 2013 to March 6, 2018, a period of four years and five months. However, another letter from was submitted not from the Petitioner's former employer, as required by the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B), but from a former co-worker at [redacted] A third letter was submitted by one of the Petitioner's former professors, who indicates that she "invited [the Petitioner] to conduct a project at my company." This letter does not indicate when the Petitioner conducted this project or if it was on a full-time basis.

The Petitioner also submits new evidence on appeal pertaining to her work experience. Additional pages of what she describes as her "work identity card" list start dates and dates of pay increases with two companies, one of which appears to be the legal name of the [redacted] However, where, as here, a Petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The Petitioner was notified in the Director's RFE that the evidence was insufficient to show her eligibility as a member of the professions holding an advanced degree, and was provided with examples of evidence which could cure these deficiencies. We also note that even if we were to accept this evidence, it does not change the date on which she earned the foreign equivalent of a baccalaureate degree issued by an accredited college or university in the United States.

For the reasons discussed above, we conclude that the Petitioner has not established her eligibility for the EB-2 classification.

III. NATIONAL INTEREST WAIVER

As the Petitioner has not established her eligibility for the underlying EB-2 classification, she is not eligible for a national interest waiver. We will nevertheless briefly address her proposed endeavor.

The Petitioner proposes to work as a human resources manager for a company in the United States. She initially provided a letter from a company proposing to hire her in a human resources position, but in response to the Director's RFE submitted a new letter which confirmed her employment with a different company in a banking customer service position.[5] In addition, she submitted a personal statement describing her proposed endeavor and her qualifications to advance that endeavor.

[5] Although a job offer is not required of a petitioner seeking a national interest waiver, we may look to evidence regarding their current and proposed employment in determining their eligibility under the *Dhanasar* analytical framework.

On appeal, the Petitioner submits new evidence along with her brief, including a business plan for a human resource consulting firm which the Petitioner intends to start and serve as its chief executive officer (CEO). As with the evidence relating to her work experience which was discussed above, the Petitioner was put on notice of the deficiency in the evidence relating to her proposed endeavor and was given an opportunity to respond to that deficiency. We will therefore not accept this evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

In addition, the Petitioner's initial description of her proposed endeavor did not include plans to form a consulting company and serve as its CEO. 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). Here, the Petitioner has made significant changes to her initial proposed endeavor of working as a human resources manager for an employer. As the *Dhanasar* framework requires an analysis of the substantial merit and national importance of the specific endeavor proposed by an individual, such a change is material to their eligibility for a national interest waiver. Also, a petitioner must meet eligibility requirements for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). The Petitioner's new plans, submitted for the first time on appeal, to establish and direct a new company cannot retroactively establish eligibility. We will therefore not consider this new evidence in our analysis under the *Dhanasar* framework.

A. Substantial Merit and National Importance

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.

As stated above, the Petitioner intends to work as a human resources manager for a company in the United States. In her decision, the Director concluded that the Petitioner failed to provide sufficient detail regarding her proposed endeavor to show that it was of substantial merit. We agree that the Petitioner's statement includes generic descriptions of a human resources manager's duties, but does not shed light on her specific proposed endeavor. Per our decision in *Dhanasar*, it is the substantial merit of the specific endeavor that must be established, not the merits of an entire field or industry. *Id.* On appeal, the Petitioner does not challenge the Director's conclusions, but instead focuses on the merits of her newly submitted business plan which was never before the Director. She has thus not shown that her original proposed endeavor is of substantial merit in the area of business.

Similarly, the Petitioner does not address the Director's conclusion that her proposed endeavor would not have broader implications for the field of human resources management, or have significant potential to employ U.S. workers or have other substantial positive economic effects. We note that in her statement submitted in response to the Director's RFE, she provided links to articles regarding the happiness of employees and the mental health effects of the COVID-19 pandemic. However, this evidence concerns the overall impact of the human resources and psychology fields in general, and does not show that the Petitioner's work for a single company in the United States would have broader implications for those fields or would otherwise be of national importance.

On appeal, the Petitioner states that her proposed business will create jobs and benefit the wider U.S. economy. Even if we were to consider this new evidence and proposed endeavor, it is insufficient to show that the potential prospective impact of this endeavor would have the sort of potential to employ U.S. workers or other positive economic effects that would rise to the level of national importance.

As the Petitioner does not challenge the Director's reasons for concluding that her proposed endeavor is not of substantial merit or national importance, the Petitioner has not established that she meets the first prong of the *Dhanasar* analytical framework.

A petitioner must meet all three prongs of the *Dhanasar* analytical framework to establish eligibility for a national interest waiver. Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the *Dhanasar*'s second and third prongs. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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 Petitioner has not met her burden of proof to establish her eligibility for the EB-2 classification, either as a member of the professions holding an advanced degree or an individual of exceptional ability. She also has not shown that she merits, and merits as a matter of discretion, a waiver of the classification's job offer requirement.

ORDER: The appeal is dismissed.