U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27447324

Date: JUL. 17, 2023

Appeal of Texas Service Center Decision

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

The Petitioner 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. 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 professional holding an advanced degree or an individual of exceptional ability, and did not establish that a waiver of the required job offer, and thus of the labor certification, would be 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. Section 203(b)(2)(B)(i) of the Act. Next, a petitioner must then demonstrate they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver if the petitioner shows:

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

[1] *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).

II. ANALYSIS

As a preliminary matter, the Petitioner asserts through counsel on appeal that in denying the petition, the Director "imposed novel substantive and evidentiary requirements beyond those set forth in the regulations." However, counsel does not point to specific examples of this within the Director's request for evidence (RFE) and denial. Importantly, counsel also does not offer detailed analysis explaining the particular ways in which the Director "imposed novel substantive and evidentiary requirements" in denying the petition, supported by pertinent law or regulation.

The Petitioner further alleges through counsel that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, 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. *See Matter of Chawathe, 25 I&N Dec. at 375; 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).* Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions. *See 1 USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-manual. While counsel asserts on appeal that the Petitioner has provided evidence sufficient to demonstrate her eligibility for the EB-2 classification and a national interest waiver, counsel 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.

The Petitioner's counsel also mistakenly and repeatedly references the Petitioner in the masculine pronoun case in her appeal brief and letter submitted in response to the Director's request for evidence (RFE). The record lacks an explanation for this inconsistency as the Petitioner references herself in the feminine pronoun case. Thus, we must also question the accuracy of counsel's assertions on appeal and whether the information provided is correctly attributed to this particular petitioner.

A. EB-2 Classification

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability. On appeal, the Petitioner does not assert nor does the record establish that she is eligible for the EB-2 classification as a member of the professions holding an advanced degree. Therefore, she must establish that she qualifies as an individual of exceptional ability.

The Petitioner indicates her intention to be employed as a dentist should this petition be approved. A petitioner must provide documentation that satisfies at least three of six regulatory criteria to meet the initial evidence requirements for this classification. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). In denying the petition, the Director determined that the Petitioner fulfilled only the academic record criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A), which the record supports.

In the appeal brief, the Petitioner generally asserts that she meets at least three of the regulatory criteria for classification as an individual of exceptional ability, but she does not sufficiently identify the specific criteria that she believes she qualifies for, nor does she explain how the Director erred in concluding that she only met the academic record criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the [individual] 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 petition was filed in October 2020; the Petitioner indicated in her Application for Alien Employment Certification, Form ETA-750 Part B, and in part 6 of the petition that she will be employed as a dentist, quoting her prospective job duties verbatim from DOL's Occupational Information Network (O*NET) summary report for "Dentists, General." The O*NET Summary Report for "Dentists, General," may be viewed at https://www.onetonline.org /link/summary/29-1021. Thus, the record must establish that she had at least ten years of full-time experience as a dentist as of October 2020, the time of filing the petition. 8 C.F.R. § 103.2(b)(1).

The Director concluded that the Petitioner did not meet this criterion, indicating that while letters had been submitted from the Petitioner's current and former employers, the letters did not establish the requisite years of employment in the dentist occupation. Specifically, the Director discussed the letters and concluded that her collective work history in the field of dentistry at the time of filing the petition comprised six months of work as a general dentist, thirteen months of work as a dental assistant, and four months of part-time work as a dental hygienist.

On appeal, the Petitioner asserts that she has "19 years of experience, based on her solid academic and professional background." She also references her employment in the United States as a dentist in the United States in the years since her petition was filed. However, the record does not establish that she was employment in the "Dentist, General" occupation for a period of time covering at least ten years prior to the date of filing of this petition. 8 C.F.R. § 103.2(b)(1). For this reason, the criterion has not been met.

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

On appeal, the Petitioner acknowledges that the Director determined that she did not meet this criterion, but she does not identify or discuss the specific evidence, if any, in the record that should be considered as part of this determination. When dismissing an appeal, we generally do not address issues that were not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be "waived."[2] Since the Petitioner did not address this issue with specificity on appeal, we deem the issue waived and conclude the Petitioner has not met 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).

On appeal, the Petitioner notes the Director's conclusion that she did not meet this criterion, but she does not identify or discuss the specific evidence, if any, in the record that should be considered as part

[2] *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).

of this determination. Therefore, we deem the issue waived and conclude the Petitioner has not met this criterion.

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

On appeal, the Petitioner notes the Director's conclusion that she did not meet this criterion, but she does not identify or discuss the specific evidence, if any, in the record that should be considered as part of this determination. Therefore, we deem the issue waived and conclude the Petitioner has not met this criterion.

Although the Petitioner asserts her eligibility for another criterion on appeal, the record does not currently establish that she has fulfilled the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). As she is ineligible for the EB-2 classification, we will not address the additional criterion.

In summary, the record supports the Director's finding that the Petitioner did not meet at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we need not provide a final merits determination to evaluate whether the Petitioner has achieved the level of expertise required for the exceptional ability aspect of the EB-2 classification.

B. National Interest Waiver

The Petitioner has not established that she is eligible for the EB-2 classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding the remaining issues, including whether she is eligible for a national interest waiver as a matter of discretion. *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 M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not demonstrated that she qualifies for the EB-2 classification under section 203(b)(2)(A) of the Act. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.