U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30231855

Date: APR. 11, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a food industry management consultant, 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).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that she was eligible for the requested classification or that a waiver of the classification's job offer requirement, 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 because the Petitioner did not establish that she is eligible for the requested EB-2 classification. Because this identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding her eligibility for a national interest waiver of the classification's job offer requirement, and thus of the labor certification. 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).

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. 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.

Once eligibility for the EB-2 visa classification is established, a petitioner 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 (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. EXCEPTIONAL ABILITY

The first issue to be addressed is whether the Petitioner established her eligibility for EB-2 classification. The Petitioner claims eligibility as an individual of exceptional ability.[4]

The Petitioner is a chef and food industry manager "with innovative methodologies and deep expertise creating food products and executing a high level of service." The Petitioner asserts that she satisfies at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Specifically, the Petitioner asserts that she has at least ten years of full-time experience in the industry (B), a license to practice the profession or certification for her occupation (C), commanded a salary or other remuneration for services that demonstrates exceptional ability (D), and membership in professional associations (E). The Petitioner further asserts that the record includes comparable evidence to establish her eligibility pursuant to 8 C.F.R. § 204.5(k)(3)(iii).

The Director issued a request for evidence (RFE) informing the Petitioner that the record did not establish her eligibility for EB-2 classification as an individual of exceptional ability under any of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii). The Director noted that recommendation letters in the record attesting to the Petitioner's experience and salary did not include certified English translations.[5] The

[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 Flores v. Garland, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[4] The Petitioner does not assert, and the record does not include evidence to establish, that she is a member of the professions holding an advanced degree.

[5] Any document containing foreign language submitted to USCIS shall be accompanied by a full English language

Director also noted that the record did not include evidence to demonstrate the Petitioner's license to practice the profession or certification for her occupation or her membership in professional associations. Regarding comparable evidence, the Director noted that the Petitioner did not submit evidence to establish that the six criteria do not apply to her field of endeavor, or explain the reasons required evidence is not available.

The Petitioner did not submit a response to the RFE. The Director reviewed and analyzed the evidence submitted with the initial filing and denied the petition. The Director determined that the record did not establish that the Petitioner met any of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) to demonstrate that she is an individual of exceptional ability and that she was, therefore, not eligible for the requested EB-2 classification.

On appeal, the Petitioner states that she has experienced repeated difficulties in receiving correspondence from USCIS and did not receive the RFE before its deadline.[6] She submits evidence of her inquiries to USCIS requesting a duplicate copy of the RFE, as well as the RFE response she was unable to submit timely. With her appeal, the Petitioner provides certified English language translations of letters attesting to her experience and salary as a chef and event promoter.

> 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)

This criterion focuses on evidence of experience in the occupation which a petitioner intends to pursue in the United States. The Petitioner submits letters from several individuals stating that she provided chef services from 2005 to 2021.[7]

A letter from [redacted] of the [redacted] states that the Petitioner was a kitchen chef from August 20, 2005 to January 19, 2021. However, the letter does not document whether the experience was full- or part-time. Further, this information is inconsistent with the Petitioner's resume and business plan in the record, which states that she was a chef with the [redacted] from 2005 to 2018, and from 2021 to 2022.[8] The

translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3).

[6] USCIS records reflect that the RFE was sent to the Petitioner on February 13, 2023 at the address listed on the petition but it was returned as undeliverable. A duplicate copy was sent to her on July 10, 2023.

[7] As the Director noted, with the initial filing the Petitioner submitted letters attesting to her experience as a chef but did not include certified English translations of those letters. While not the basis of our decision, we note that none of these letters states the dates of the Petitioner's experience. Additionally, one letter, from [redacted] attests to the experience of another individual in mechanical engineering, without any mention of the Petitioner.

[8] We also note that the information is inconsistent with a 2018 nonimmigrant visa application the Petitioner submitted to the U.S. Department of State. In that application, the Petitioner stated that, since March 2002 she was a sales representative for [redacted] in Brazil, a glass and crystal business. As the Petitioner was not previously informed of this information it does not form the basis of our decision. However, in any further filings, the Petitioner must resolve this inconsistency. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

Petitioner must resolve any material inconsistencies in the record by competent, objective evidence. Matter of Ho, at 591-92.

A second letter from [redacted] identifies her as partner and president of [redacted] In this letter, [redacted] states that the Petitioner provided services to the company as a chef and promoter of events from December 2005 to January 2021. However, the dates of this experience overlap with the Petitioner's claimed experience with the [redacted] and the letter does not document whether the Petitioner's experience was full- or part-time.

A letter from [redacted] of [redacted] states that the Petitioner "provided us with services in the gastronomic area from 2005 to 2021, meeting the needs in all commemorative events of the company, meetings, dinners, birthdays, get-togethers." However, the dates of this experience overlap with the Petitioner's claimed experience with the [redacted] and others, and the letter does not document whether the Petitioner's experience was full- or part-time.

A letter from [redacted] of the [redacted] states that the Petitioner "provided services to the [redacted] initially as a cook, later as a chef and event promoter" from August 20, 2005 to January 15, 2021. However, as noted above, this information is inconsistent with other evidence and does not document whether the experience was full- or part-time.

A letter from [redacted] of the [redacted] states that the Petitioner provided "services in the gastronomic area in an administrative and operational way ... from December 2015 to December 2020." However, the dates of this experience overlap with the Petitioner's claimed experience with the [redacted] and others, and the letter does not document whether the Petitioner's experience was full- or part-time.

The Petitioner states she was a business owner and not an employee, "therefore, to meet this criterion letters from former or current employer are not applicable." While we acknowledge that the Petitioner may submit letters from her former clients to support her experience as a chef, the record does not establish that she was self-employed. The letters do not indicate that the Petitioner's services were contracted through her own business. Nor does the record include objective, documentary evidence that the Petitioner provided chef services through her own business on a full-time basis for at least ten years.

Because the record lacks evidence that the Petitioner has at least ten years of full-time employment in the occupation in which she seeks to provide her services in the United States, she has not satisfied 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 Petitioner indicated in her initial filing that she provided "the License Card issued by the Ministry of Labor of Brazil" to demonstrate that she meets this criterion. The Director stated in the RFE that no evidence was submitted to meet this criterion. On appeal, the Petitioner states that she provided

her "employment identity card issued by the Ministry of Labor of Brazil" with the original submission but does not submit a copy of this document.

Upon review of the record, we conclude that the Petitioner did not provide evidence that she has a license to practice or certification for her profession. Therefore, the Petitioner has not established that she meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

> Evidence that the individual has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D)

With respect to this criterion, the Petitioner states in her initial filing, and again on appeal, that the letters documenting her experience as a chef also document her salary that demonstrates exceptional ability. The letters in the record state that the Petitioner earned R$7,500 to R$10,000 per event for her services as a chef.

The Director noted in the RFE that the record does not include documentary evidence to demonstrate how the Petitioner's services led to salary based on her exceptional ability, tax documents to support the Petitioner's claimed salary, or other relevant evidence. The Petitioner does not submit any other evidence to support her eligibility for this claimed criterion on appeal.

With the initial filing the Petitioner submitted a salary survey from Salario BR showing salary data for the position of "Administrative Consultant" in 2022. However, as the salary data is for a different occupation than the occupation for which the Petitioner was compensated, we are precluded from conducting an analysis of the Petitioner's earnings per event based on this data. Therefore, the Petitioner has not established that she meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D).

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

On appeal, the Petitioner states, "No evidence was submitted to meet this criterion." Accordingly, we deem this ground 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)).

> 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)(F)

For the first time on appeal, the Petitioner asserts that she meets this criterion. She references the letters documenting her experience and salary as a chef. While the letters commend the Petitioner's services, the personal recognitions described and documented in the letters do not demonstrate that she has been recognized for "achievements and significant contributions" to the broader culinary field. Accordingly, the Petitioner has not demonstrated that she satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

The Petitioner has not submitted the required initial evidence demonstrating that she meets at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), and we therefore 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 field. 8 C.F.R. § 204.5(k)(2).

III. NATIONAL INTEREST WAIVER

The Petitioner asserts that she meets all three prongs of the analytical framework set forth in Matter of Dhanasar, 26 I&N Dec. 884. She states that her proposed endeavor is to continue using her expertise and knowledge to work as a "food industry management consultant."

In the RFE the Director addressed the evidence submitted with the initial filing and allowed the Petitioner an opportunity to submit additional evidence in attempt to establish her eligibility for the national interest waiver. As noted above, the Petitioner did not submit a response to the RFE.

The Director determined that the Petitioner submitted sufficient evidence to demonstrate that her proposed endeavor has substantial merit. However, she concluded that the Petitioner had not demonstrated that her proposed endeavor had national importance, that she was well-positioned to advance her proposed endeavor, or that, on balance, waiving the job offer requirement would benefit the United States. On appeal, the Petitioner submits a business plan.

The Petitioner has not established her qualification for the EB-2 classification and is therefore ineligible to be granted a national interest waiver as a matter of discretion. Although the Petitioner asserts on appeal that she meets all three of the prongs under the Dhanasar analytical framework and that the Director erred in concluding otherwise, as noted above, we will reserve these issues.[9] See INS v. Bagamasbad, 429 U.S. at 25.

III. CONCLUSION

The Petitioner has not established that she is eligible for classification as an individual of exceptional ability or that she is otherwise eligible for EB-2 classification. Accordingly, the petition will remain denied and the appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.

[9] Even if we had addressed the remaining issues, we still would have dismissed this appeal. As noted above, the Director concluded that, although the proposed endeavor has substantial merit, the Petitioner did not establish its national importance, that she was well-positioned to advance the proposed endeavor, or 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. On appeal, the Petitioner submits a business plan which projects that within five years the business will hire a total of 27 employees and have a net profit of $184,481. The evidence does not demonstrate that the use of the Petitioner's experience will have substantial positive economic effects that will reach beyond benefitting her own company and clients or have broader implications within the field of restaurant management. Additionally, the Petitioner did not demonstrate national interest factors such as the impracticality of a labor certification, the benefit of her prospective contributions to the United States, an urgent national interest in her contributions, the potential creation of jobs, or that her self-employment does not adversely affect U.S. workers. The Petitioner's assertions on appeal do not establish that she meets all of the three Dhanasar prongs.