U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28540490

Date: APR. 15, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a software engineer, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, or, in the alternative, as an individual of exceptional ability in the sciences, arts or business. See Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. See section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). 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 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.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree.[1] 8 C.F.R. § 204.5(k)(2). A U.S. bachelor's degree or a foreign equivalent

[1] Profession shall include, but not be limited to, architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) of the Act.

degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. Id.

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:

> (A) 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;
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> (B) 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;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;
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> (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).[2]

Where a petitioner meets these initial evidence requirements, 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); see also Visinscaia v. Beers, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); Rijal v. USCIS, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). 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.

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

[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 F.5(B)(2), https: //www.uscis.gov/policy-manual.

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 eligibility for 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 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.

Id. at 889.

II. ANALYSIS

The Petitioner proposes to work as a software developer for her new public emergency response mobile platform business. The Director found that the Petitioner did not establish eligibility for the underlying EB-2 immigrant classification either as an advanced degree professional or 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." Upon de novo review, the Petitioner has not established eligibility for the underlying EB-2 classification and therefore is not eligible for the discretionary waiver of the job offer requirement in the national interest.

A. Member of Professions Holding an Advanced Degree

The record includes a diploma indicating the Petitioner was granted a bachelor of information technology from [redacted] in June 2000. An advanced degree is a U.S. degree or a foreign equivalent degree above that of a bachelor's degree. 8 C.F.R. § 204.5(k)(2). In addition, a petitioner who holds a U.S. bachelor's degree or a foreign equivalent degree followed by five years of progressive experience in the specialty has the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2). In this case, the Petitioner has not submitted evidence establishing that her bachelor of information technology is the foreign equivalent of a U.S. bachelor's degree or above that of a U.S. bachelor's degree. The Petitioner did not submit an official academic record or an evaluation of her foreign educational credentials. She has not established that her foreign diploma for a bachelor of information technology is the equivalent of an academic or professional degree of or above a U.S. bachelor's degree. See 8 C.F.R. § 204.5(k)(2).

Also, the record does not adequately document that she has five years of progressive post-baccalaureate experience in the specialty. Evidence relating to qualifying experience should be in the form of letters from current or former employers and shall include the name, address and title of the writer, and a specific description of the duties performed by the individual. See 8 C.F.R. § 204.5(g)(l). The Petitioner submitted a letter from her former employer indicating she worked as a software

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

engineer from September 15, 2010, to December 20, 2014. While the letter indicates her job title as a software engineer, the letter does not detail whether her job duty experience was in her specialty. Additional letters relate to the Petitioner's job offers, project assignments, and her completion of job probationary periods. However, the letters do not show her dates of employment or that her job duties were in her specialty.

The Petitioner has not established that she has a U.S. degree or a foreign equivalent degree above that of a bachelor's degree, or a U.S. bachelor's degree or a foreign equivalent degree followed by five years of post-baccalaureate experience in her specialty. Therefore, she does not meet eligibility for the underlying EB-2 classification as a member of the professions possessing an advanced degree.

B. Individual of Exceptional Ability

The Petitioner submitted evidence to meet all six criteria of evidence for exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii). The Director concluded that the Petitioner met one criterion, academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A). However, as discussed below, we withdraw that determination, because the Petitioner has not established that she meets this criterion.

On appeal, the Petitioner reasserts being an individual of exceptional ability. After reviewing the evidence in the record, the Petitioner has not demonstrated satisfying at least three of the six initial evidentiary criteria for classification as an individual of exceptional ability and is not otherwise eligible for the requested benefit.[5]

> An official academic record showing that the individual 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).

As discussed above, the Petitioner submitted a copy of her diploma from [redacted] granting her degree of bachelor of information technology. However, the record does not include an official academic record from the university, as required under the criterion. Therefore, the Petitioner does not meet eligibility under the 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).

To meet this criterion, the Petitioner maintains she worked for eight employers having obtained more than ten years of experience in her occupation. However, the documents submitted do not meet the plain language of the criterion.

As mentioned above, a letter from her former employer confirms the Petitioner's employment as a software engineer from September 15, 2010, to December 20, 2014. While the letter indicates her job title as a software engineer, the letter does not sufficiently detail whether her job duty experience was in her occupation, or her work was full-time. The other letters relate to the Petitioner's job offers,

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

project assignments, and her completion of job probationary periods. However, the letters from the former employers do not show her dates of employment, whether her work was full-time, or that her job duties were in her occupation. For instance, the record includes parts of letters offering her positions, including a letter from [redacted] offering her a research engineer position, a letter from [redacted] offering her a research engineer position, and a letter from [redacted] offering her a student researcher position. Other letters from [redacted] and [redacted] indicate the Petitioner completed her probationary period and confirm her job position. However, the letters lack sufficient details of her dates of employment, her job duties, and whether her positions were full-time, as required by the criterion. Therefore, the Petitioner has not demonstrated she has at least ten years of full-time experience in the relevant occupation.

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

To meet this criterion, the Petitioner submitted a certificate stating she completed test requirements and is recognized as a Cisco certified network associate. She claims that being a Cisco certified network associate is "one of the most recognizable certifications in the [information technology] industry." She also submitted two certificates of achievement indicating she completed Microsoft approved courses for MS WIN 2000 network and operating system essentials and for supporting MS WIN 2000 professional and server. She claims these Microsoft course completions validate "the skills needed to run a highly efficient and modern data center, identity management, system management, virtualization, storage and networking." However, the record does not show that her certification as a Cisco certified network association, or her Microsoft course completions are required for entry into the Petitioner's occupation or is specifically tailored for that occupation. The Petitioner indicates in her statement that the trainings are recognized in her industry and aid her in carrying out her job duties, but she does not suggest that any of them are required for her occupation.

The Petitioner also submitted certificates to show she completed training courses relating to her work. Although most of the certificates show the Petitioner completed coursework related to her work with information technology, they do not show that the Petitioner has a license to practice her profession or that she received certification for her occupation as software engineer.

Because the Petitioner has not demonstrated that she has a license to practice the profession or certification for her occupation, she has not established that she meets this criterion.

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

To meet this criterion, the Petitioner states that the average monthly salary for a software engineer in Malaysia "ranges from RM3800 to RM5500" based on a website, "Jobstreet Malaysia" and that she earned RM5500 in salary and RM859 in management incentives while working with [redacted]. The record includes a payroll receipt from June 2006 reflecting her claimed pay with [redacted] as well as two letters from [redacted] indicating her assignment as a project manager and as a project leader for specified projects. However, the record does not include evidence showing her pay was for services related to her occupation as a software engineer. Also, the record does not include the claimed average

salary range indicated on "Jobstreet Malaysia" or other evidence as comparison to show her salary in 2006 demonstrates her exceptional ability in her occupation.

The Petitioner also claims that while working at [redacted] "her annual base salary was RM61200" and provided a pay receipt dated April 2005 indicating earnings of RM5250. We first note that the record does not include evidence showing her pay relates work as a software engineer. Also, as mentioned above, the record does not include the claimed average salary range indicated on "Jobstreet Malaysia" or other evidence as comparison to show her salary in 2005 demonstrates her exceptional ability in her occupation.

For these reasons, the Petitioner has not shown that she meets this criterion.

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

The Petitioner submitted a certificate from The Institute of Electrical and Electronics Engineers (IEEE) dated 2023 indicating she is a member in good standing through December 2023. The Director's decision did not mention this certificate of membership. On appeal, the Petitioner argues, "IEEE is the world's largest technical professional organization dedicated to the advancing technology, engineering, computer science and other related disciplines."

First, this petition was filed in 2022, and the certificate from IEEE is dated in 2023, after the filing date. The record does not show that the Petitioner was a member of IEEE at the time she filed the petition, and a petitioner must establish eligibility for the benefit being sought at the time the petition is filed. See 8 C.F.R. § 103.2(b)(l). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Additionally, the record does not include documentary evidence of this organization's membership requirements or of IEEE being a professional association under this criterion. The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as "any occupation for which a United States baccalaureate degree or its foreign equivalent is minimum requirement for entry into the occupation." Accordingly, a professional association is one which requires its members to be members of a profession as defined in the regulation. The record does not show that IEEE requires that its membership body be comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association.

The Petitioner also states that she is a member of Professional Association of Diving Instructors (PADI). Although she submitted certificates from PADI indicating she was awarded the ratings of specialty instructor, open water scuba instructor, and divemaster, the record does not include evidence of her membership in PADI or that PADI is a professional association.

For the reasons explained above, the Petitioner does not meet this criterion.

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).

The Petitioner claims she meets this criterion based on her work with [redacted] as a software engineer and her work with [redacted] on specific projects. To support her claims, she submitted a letter from [redacted] indicating she "passed her probationary period" and that she "exhibited diligent performance" for her work with specified projects. She also provided letters from [redacted] indicating she completed her probationary period, her assignment as a senior engineer, and her assignment to two specified projects. In addition, she included an information document related to [redacted] integrated platform, the subject of the Petitioner's projects.

The Petitioner indicates she has been successful at her software work with [redacted] and [redacted] and provides documents that she worked with the businesses. However, the record does not demonstrate that the Petitioner has been recognized for achievements and significant contributions to her industry or field, as required under the criterion. Therefore, the Petitioner has not demonstrated she meets this criterion.

Because the Petitioner has not established that she meets at least three of the initial 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.

III. CONCLUSION

The Petitioner has not established her qualification for the underlying EB-2 classification either as an advanced degree professional or as an individual of exceptional ability in the sciences, arts, or business. Therefore, she is 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, we reserve our opinion regarding these issues. See INS v. Bagamasbad, 429 U.S. at 25 (noting that "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. at 526 n.7 (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.