U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29830588

Date: APR. 22, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a physical therapist and aesthetician, 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 record did not establish that the Petitioner is eligible as an individual of exceptional ability. In addition, the Director found that although the Petitioner is well positioned to advance the proposed endeavor, the endeavor was not of substantial merit, was not of national importance, and the Petitioner had not established that it would be beneficial to the United States national interest to waive the requirement of a job offer, and thus of labor certification. On appeal, the Petitioner contends that the Director applied novel evidentiary requirements and an impermissibly strict standard of proof. The Petitioner further asserts that she meets the standards for a noncitizen of exceptional ability and qualifies for a national interest waiver as a matter of discretion. 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

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

[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, supra,* at F.5(B)(2).

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. ANALYSIS

A. Individual of Exceptional Ability[4]

The term 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). When assessing exceptional ability, USCIS uses a two-step analysis. *See generally 6 USCIS Policy Manual* F.(5)(B)(2), https://www.uscis.gov/policy-manual. First, a petitioner must submit at least three of the following types of evidence:

- An official academic record showing the noncitizen's possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- Letters from current or former employers showing that the noncitizen has at least 10 years of full-time experience in the proposed occupation;
- A license to practice the profession or certification for the profession or occupation;
- Evidence of the noncitizen's receipt of a salary or other remuneration demonstrating exceptional ability;
- Proof of membership in professional associations; or
- 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). If these types of evidence do not "readily apply" to a beneficiary's occupation, a petitioner may establish eligibility by submitting "comparable evidence." 8 C.F.R. § 204.5(k)(3)(iii).

[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] The Petitioner has not asserted that she is an advanced degree professional.

In the analysis's second part, the final merits determination, USCIS evaluates all evidence, considering the petition in its entirety. *See generally 6 USCIS Policy Manual, supra,* at F.(5)(B)(2). The Agency must determine whether a petitioner, by a preponderance of evidence, has demonstrated a beneficiary's possession of a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

The Director determined that the Petitioner met the following four of the six categories of evidence required to demonstrate exceptional ability: an official academic record showing the Petitioner has a degree, ten years of experience, a license, and membership in a professional association. 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B), (C), and (E). The Director concluded, however, that the Petitioner had not demonstrated that she has a degree of expertise significantly above that ordinarily encountered in the field, and, as such, the Petitioner had not established that she is an individual of exceptional ability and, thus does not qualify for the EB-2 classification.

On appeal, the Petitioner avers that the Director "imposed novel substantive and evidentiary requirements beyond those set forth in the regulations" and applied a stricter standard of proof to the petition than the required preponderance standard. 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). Counsel argues that the Director did not give due regard to several pieces of evidence. However, counsel does not explain or identify any specific instance in which the Director engaged in this impermissible weighing of the evidence.

In regards to the categories of evidence, we agree with the Director that the Petitioner did not establish evidence of a salary or other remuneration demonstrating exceptional ability or that she received recognition for achievements and significant contributions to the industry or field. 8 C.F.R. §§ 204.5(k)(3)(ii)(D) and (F). Nevertheless, contrary to the Director's decision, we disagree that the Petitioner met two of the other four categories of evidence. While we agree that the Petitioner established that she received a degree and possesses a license to practice her profession, we find the record does not establish that she had 10 years of experience and possessed membership in a professional association at the time of the petition's filing. 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (C), (B), and (E). Therefore, the Petitioner can only satisfy two of the six categories of evidence, short of the required three.

The Petitioner did not submit evidence or argue that she has commanded a salary or other remuneration demonstrating exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(D). As such, we will not address the issue further as it is not in contention. We will address the remaining criteria in contention under 8 C.F.R. § 204.5(k)(3)(ii)(B), (E), and (F) below.

1. Letters from current or former employers showing that the noncitizen has at least 10 years of full-time experience in the proposed occupation. 8 C.F.R. § 204.5(k)(3)(ii)(B).

To satisfy this criterion, the evidence must show "in the form of letter(s) from current or former employer(s)…that the alien has at least ten years of full-time experience" in the proposed occupation. 8 C.F.R. § 204.5(k)(3)(ii)(B).

At the outset we note that the brief accompanying her application states that her proposed endeavor is to work as a "Physical Therapist and Aesthetician." To satisfy the criterion, a petitioner must establish at least 10 years of full-time experience in the proposed occupation. Moreover, a petitioner must meet all the eligibility requirements of the petition at the time of filing. 8 C.F.R. § 103.2(b)(l), (12). Here, the record does not demonstrate the Petitioner had any experience in the occupation of a physical therapist prior to the filing of the petition. Furthermore, for the reasons below, we find the record does not demonstrate the Petitioner's work as an aesthetician satisfies the criterion.

The Petitioner submitted the current petition on September 3, 2020, and has asserted in her resume that she began working as an aesthetician in May 2009. Her resume lists no employment prior to this time. Her I-140 statement and counsel's brief, submitted with the petition, also both declare that the Petitioner has an approximately 11-year work history. As such, to comply with the criteria, the Petitioner must establish that she held full-time employment as an aesthetician for at least 10 years of her roughly 11-year work history. The evidence in the record does not demonstrate the Petitioner's 10 years of full-time employment in the proposed occupation.

The regulations plainly state that the evidence for this criterion must come in the form of letter(s) from current or former employer(s). 8 C.F.R. § 204.5(k)(3)(ii)(B). The Petitioner has not complied with that requirement as none of the evidence submitted to establish this criterion are letters from former employers. A petitioner is also entitled under 8 C.F.R § 204.5(k)(3)(iii) to submit comparable evidence if the standards do not readily apply to their occupation. Here, the Petitioner has not claimed to have submitted comparable evidence, nor has she demonstrated that the criterion does not readily apply to their occupation and why the evidence submitted is comparable. 8 C.F.R. §§ 103.2(b)(2)(i), 204.5(k)(3)(ii); *see generally 6 USCIS Policy Manual, supra*, at F.5(B)(2). In this case, the Petitioner has not established eligibility under this criterion as she has not complied with the plain language of the regulation. Even if the Petitioner had complied with this requirement, the documents submitted do not establish that the Petitioner has at least 10 years of full-time employment.

The Petitioner's resume lists that she was employed at [redacted] as a beautician and makeup artist from May 2009 to April 2013. The resume further asserts that she was the owner, as well as a beautician and cosmetologist, of [redacted] from May 2013 to August 2017. Finally, it states that she worked as a beautician and cosmetologist at the [redacted] from September 2017 onward. The Petitioner was admitted to the United States on August 24, 2019.

The evidence presented fails to confirm the Petitioner held any employment from May 2009 to February 2012. She provided two undated letters regarding this period from [redacted] and [redacted] Ms. [redacted] wrote that the Petitioner has worked as a self-employed aesthetician since May 2009. The letter does not mention how Ms. [redacted] knows this information, nor does it mention if the Petitioner's employment was full-time. Ms. [redacted] wrote that she has worked with the Petitioner since February 2012 at the [redacted] and [redacted] The letter also mentions that the Petitioner has been a self-employed aesthetician since May 2009. However, the letter does not indicate that the Petitioner was employed full-time or express how she knows the Petitioner worked as an aesthetician before their professional relationship began in 2012. As these letters do not specify any basis for their knowledge and do not state if the Petitioner's employment was full-time, the

Petitioner has not established by a preponderance of the evidence that she was employed full-time from May 2009 to February 2012.

Moreover, both letters contradict the Petitioner's resume, which mentions no self-employment in this period. It states that she was an employee of [redacted] from May 2009 to April 2013. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). We also note that none of the evidence in the record states if any of the Petitioner's work was full-time, as required. The remaining evidence in the record concerns the Petitioner's employment from April 2013 onward.[5]

As she has not established her employment from May 2009 to February 2012 of this 11-year period, she has not shown 10 years of experience. Moreover, she has not provided any evidence that she worked as a physical therapist. Therefore, the Petitioner has not established that she meets the requirements of this criterion to show at least 10 years of full-time employment in the offered occupation.[6]

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

To meet the requirements of this criteria, a petitioner must show membership in a "professional association." 8 C.F.R. § 204.5(k)(3)(ii)(E). The regulations define "profession" to include "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries" or "as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. § 204.5(k)(2) (incorporating by reference Section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32)).

The Petitioner submitted a copy of her membership card for the Aesthetic Professionals Association of Paraná and a letter from the group's president declaring that the Petitioner is in good standing. The Petitioner provided no further information on this association. As such, there is nothing in the record to establish that the Aesthetic Professionals Association of Paraná is an association of professionals as defined in the regulations as one of the occupations listed above or as an occupation requiring a U.S. baccalaureate degree or its foreign equivalent. 8 C.F.R. § 204.5(k)(2). Therefore, the Petitioner has not demonstrated that her membership in this group satisfies the regulatory requirement.

3. 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).

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[5] We note that the record includes other evidence of the Petitioner's employment history, including letters of recommendation from clients and colleagues. However, this evidence also does not establish the Petitioner's 10 years of full-time experience in the proposed occupation.

[6] We observe that there are further deficiencies with the Petitioner's evidence. The record presented does not demonstrate the Petitioner's employment [redacted] from September 2017 until her arrival in the United States in 2019 as claimed on her resume. While she has presented letters of recommendation from colleagues and clients that address her work in this period, nothing establishes her employment by this clinic. The Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

The Petitioner's initial evidence for this criterion consisted of letters of recommendation from co-workers and clients and a special tribute from the city of [redacted] The Director found this evidence insufficient to meet the criterion. Following the Director's Request for Evidence, the Petitioner submitted two letters, one undated and one from 2022, from [redacted] expressing her interest in hiring the Petitioner. She also submitted three letters from different clients, all written in 2022.

On appeal, the Petitioner contends that the letters and special tribute are "substantial evidence of her extensive experience and expertise in her field" and demonstrate her significant contributions to the industry. The Petitioner further generally argues that she was deprived of due process and fair treatment by the Director but does not point to any specific violations.

Upon de novo review, we agree with the Director and find the record does not establish eligibility for this criterion." As the Director observed, the special tribute the Petitioner received was limited to the local community and the record lacks any information as to the requirements associated with this tribute. Likewise, the letters of recommendation only discuss the Petitioner's success with a small number of individual clients. Moreover, the letters received in response to the Request for Evidence do not establish that the Petitioner was eligible at the time of filing as required under 8 C.F.R. § 103.2(b). Each of the letters either fail to state when the events occurred or note events that happened after the time of filing. Thus, they do not establish the Petitioner's eligibility at the time of filing. We agree with the Director that nothing presented points to the Petitioner's recognition for achievements or significant contributions to her industry as a whole.

Based on the above, the Petitioner has only established two of the six criteria. As the Petitioner has not established that she possesses at least three of the six criteria, she cannot establish that she is an individual of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii).

B. Final Merits Determination

Because of our decision that the Petitioner does not meet the minimum three required criterion, we need not provide the type of final merits determination referenced in *Kazarian v. USCIS,* 596 F.3d 1115, 1119-20 (9th Cir. 2010). Nevertheless, we have reviewed the entire record and conclude that it does not establish that the Petitioner has met the standard.

Meeting the minimum requirements by providing at least three types of initial evidence does not, in itself, establish that the individual in fact meets the requirements for exceptional ability. *See* 6 *USCIS Policy Manual, supra,* at F.5(B)(2). In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. *Id.* The officer must determine whether or not the petitioner, by a preponderance of the evidence, has demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.* For the reasons discussed below, we conclude that the Petitioner does not qualify as an individual of exceptional ability.[7]

[7] While we may not discuss every document submitted, we have reviewed and considered each one.

On appeal, the Petitioner argues that as she met three of the six criteria, she established that she is an individual of exceptional ability. The Petitioner did not provide further argument on how she qualifies as an individual of exceptional ability or address how or if the Director erred in their final merits determination. As outlined above, more is required to establish a degree of expertise significantly above that ordinarily encountered in the profession. Meeting the criteria requirement merely advances a petitioner along to a final merits determination.

Upon de novo review of the record, we agree with the Director that considering all the evidence, the Petitioner has not established by a preponderance of the evidence that she is an individual of exceptional ability. In discussing the final merits of the Petitioner's claim of exceptional ability in the totality of the evidence, the Director provided a full discussion and analysis of the evidence in the record. The Director observed that the evidence presented did not render the Petitioner an individual of exceptional ability because the evidence was part of the normal course of employment and professional development in her field. On appeal, the Petitioner has not addressed the Director's concerns or provided new evidence that sufficiently explains the nature of her contributions to the field that set her apart from others in this vocation.

The Petitioner has not shown that she is as an individual of exceptional ability, and she has not asserted that she is an advanced degree professional. Therefore, the documentation in the record does not establish eligibility for the underlying EB-2 classification.

C. National Interest Waiver

As the Petitioner has not established eligibility for the EB-2, she is ineligible for a national interest waiver. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the *Dhanasar* framework. *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 established that she qualifies as an individual of exceptional ability, or that she is otherwise eligible for the underlying EB-2 immigrant visa classification. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.