U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30632802

Date: APR. 29, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur and a fiscal analyst, seeks second preference immigrant classification (EB-2) as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant 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 had not established eligibility for the underlying EB-2 classification as an individual of exceptional ability.[1] In addition, the Director concluded that the Petitioner did not establish eligibility for a national interest waiver. The matter is now before us on appeal pursuant to 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.

Only those who demonstrate "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as individuals of exceptional ability. 8 C.F.R. § 204.5(k)(2).

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F) sets forth the following six criteria, at least three of which a petitioner must initially submit in order to qualify as an individual of exceptional ability in the sciences, the arts, or business:

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[1] The Director also concluded that the Petitioner does not qualify as an advanced degree professional. On appeal, the Petitioner does not contest this finding, and thereby abandons this issue. 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)).

(A) 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;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the [individual] has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(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.

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. If a petitioner satisfies these initial requirements, 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. *See Kazarian* v. *USCIS,* 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); *See* 6 *USCIS Policy Manual* F.2, https://www.uscis.gov/policymanual.

II. ANALYSIS

The Petitioner's proposed endeavor is working "as an international tax consultant for American companies" by establishing and operating her company, [redacted] in the state of Florida. The Petitioner explained that this company will provide "a wide range of financial advice and planning, including tax management, financial research, financial planning, sales projections and contingency plans services for companies" through "a team of qualified professionals consisting of American citizens and permanent residents."

A. Exceptional Ability

We will first address the threshold requirement that the Petitioner must qualify for the underlying EB-2 classification under Section 203(b)(2)(B)(i) of the Act, as an individual of exceptional ability.

The Director determined that the Petitioner fulfilled only two criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) (having an official academic record) and 8 C.F.R. § 204.5(k)(3)(ii)(B) (having at least ten years of full-time experience in the occupation). On appeal, the Petitioner claims that she meets additional two criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D) and (E). However, upon de novo review, we agree with the

Director that the Petitioner has not met three of the six criteria to qualify as an individual of exceptional ability, as discussed below.

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires "[e]vidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability." To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of their claimed exceptional ability relative to others working in the field. *See* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2).

The Petitioner claimed that she has received "an average salary of R$3,240.00 per month as a Senior Fiscal Analyst over the course of her career" and submitted a letter from her accountant stating this salary is "significantly above average in comparison to other professionals in her field." The Petitioner asserts on appeal that "the statement issued by her accountant should be considered a reliable documentary foundation to substantiate that the petitioner indeed earned an above-average salary." However, the Petitioner does not provide other supporting documentation to establish how her compensation compares to other professionals working as fiscal analysts in the same geographical area. Further, the record does not show that the Petitioner's income is a direct result of her exceptional ability. Therefore, the Petitioner has not met this criterion.

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations." On appeal, the Petitioner asserts her membership with the "Commercial Association of [redacted] satisfies this criterion and that [redacted] is a professional association. However, 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 the minimum requirement for entry into the occupation." As the Petitioner has not demonstrated that her occupation requires a U.S. bachelor's degree or foreign equivalent, this association is not "professional" within the meaning of the regulation, as noted by the Director in her decision. Furthermore, the association's bylaws submitted on appeal do not show that the membership requires a foreign equivalent of a U.S. bachelor's degree.[2] Therefore, we conclude that the Petitioner's [redacted] membership does not satisfy this criterion.

The Petitioner also submits on appeal a registration card issued by the Brazilian Federal Council of Administration (CFA) for this criterion. However, the Petitioner did not provide any independent and objective evidence to establish the relevance and significance of the registration document. Moreover, the registration date on the card is shown as October 24, 2023, postdating the filing of this instant petition. The Petitioner must establish eligibility at the time of filing for the requested benefit. 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) (stating that 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). Therefore, we conclude that the Petitioner's CFA registration card does not satisfy this criterion.

For the reasons set forth above, the Petitioner has not met additional two criteria as claimed on appeal and did not satisfy at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we need

[2] The association's bylaws state that the association is "a nonprofit civil association" and that its "membership is made up of individuals and legal entities that are legally qualified, carry out business activities and are linked to economic life, provided that they undertake to follow these Bylaws."

not conduct a final merits determination. Nevertheless, we have reviewed the record in the aggregate and examined "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. While we note that the Petitioner has steadily progressed in the field, starting as a sales assistant to working as a tax analyst, she has not demonstrated exceptional ability beyond that which is ordinarily encountered in the occupation.

B. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. As previously outlined, the Petitioner has not established eligibility for the underlying EB-2 immigrant classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding her eligibility for a national interest waiver under the *Dhanasar* analytical framework.[3] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (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. 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 at least three of the six regulatory criteria required to qualify as an individual of exceptional ability pursuant to 8 C.F.R. § 204.5(k)(3)(ii). The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[3] We nevertheless agree with the Director's analysis of her eligibility under the *Dhanasar* framework. On appeal, the Petitioner reiterates the same eligibility claims that she had previously submitted to the Director without meaningfully addressing the evidentiary deficiencies the Director identified. Additionally, the Petitioner offers no new evidence on appeal to support her claims of eligibility or to overcome the reasons for the Director's denial.