U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31306001

Date: AUG. 1, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur and swim instructor, 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 qualifies for the EB-2 classification or for a national interest waiver as a matter of discretion. 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 qualify for a national interest waiver, a petitioner must first show eligibility 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 and will substantially

[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.

benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

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.

Id.

II. ANALYSIS

The Petitioner originally filed the petition as a member of the professions holding an advanced degree. The Director concluded that the Petitioner did not qualify as a member of the professions holding an advanced degree as her advanced degree, which was determined to be the U.S. equivalent of a master of science in surveying engineering technology, was not related to the field of the proposed endeavor. On appeal, the Petitioner does not address the matter. 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)). Therefore, we will not address the Petitioner's eligibility for the EB-2 Classification as a member of the professions holding an advanced degree.

In analyzing the Petitioner's eligibility as an individual of exceptional ability, the Director determined that the Petitioner only met one required criterion, and since at least three of the six criteria are required, she was not eligible for EB-2 classification. On appeal, the Petitioner contends that the Director erred in finding she does not qualify as an individual of exceptional ability. After de novo review of the evidence, we agree that the Petitioner does not meet at least three of the six required criteria, nor has she shown that she possesses a degree of expertise significantly above that ordinarily encountered in her field.

[3] *See 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 is discretionary in nature).

An official academic record showing that the individual has a degree, diploma, certificate, or other 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)

The Petitioner submitted evidence that she completed a certificate program in physical education and sports from [redacted] in 2016. This is related to the area of exceptional ability, which is swimming and swim instruction. The Director determined that this criterion had been met and we agree.

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 8 C.F.R. § 204.5(k)(3)(ii)(B)

The Director concluded that the record shows the Petitioner has seven years of experience, at the time of filing, in the field of the proposed endeavor. Therefore, as the record does not show at least ten years of full-time experience, she does not meet this criterion. On appeal, the Petitioner does not address this issue and therefore, as discussed above, the issue is waived.

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 Director stated that the Petitioner did not provide any evidence of a license or certification to practice the profession or claim to meet this criterion and that, "there is no evidence the area of claimed exceptional ability requires a license to practice the profession or occupation." On appeal, the Petitioner does not address this issue and therefore, as discussed above, the issue is waived.

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)

Similarly, the Director stated that the Petitioner also did not provide any evidence or claim that she has commanded a salary or other remuneration for services which demonstrates exceptional ability. On appeal, the Petitioner does not address this issue and therefore, as discussed above, the issue is waived.

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

The record shows the Petitioner is a member of the International Association for Support and Development of Infant and Baby Swimming. The Director determined that this criterion had not been met because, "the evidence does not show that the associations in which the petitioner has membership with are professional." On appeal, the Petitioner contends that the association is, "a corporate non-profit organization. . . based on voluntary membership and created to represent and protect common, including professional interests. . . [T]he fact that the Association is open to non-professional members who share common interest does not invalidate its status as a professional association."

We note that the term "profession" is defined at 8 C.F.R. § 204.5(k)(2) as "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." Along with her membership card, the Petitioner submitted the association's governing statute; however, the record does not establish the occupation, or the membership in an association for that occupation, requires a U.S. bachelor's degree or foreign equivalent. Therefore, we conclude that she has not established that International Support and Development of Baby and Infant Swimming qualifies as a professional association and that she meets 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 contends the Director erred in concluding the recommendation letters in the record, "do not mention specific achievements and significant contributions to the industry or field made by the Petitioner." On appeal, the Petitioner highlights one recommendation letter in particular that states her work for the fitness center helped the swimming department achieve 120% of the financial plan. In addition, the record contains other recommendation letters in support of the Petitioner highlighting her experience; one stating that she "took the initiative and independently developed special programs and activities for children with special needs in our swimming pool." These letters show her experience in the field and the impact she had on these specific employers; however, they do not show significant contributions made to the industry. The Petitioner also submitted a letter of gratitude from the [redacted] Swimming Federation for implementing the [redacted] methodology. However, it is unclear how this methodology has had a significant contribution on the industry. Although the Petitioner is shown gratitude for implementing the methodology, neither the certificate, nor the record shows the significance of this contribution to the industry. The record also contains other recommendation letters along with many certificates for swimming competitions the Petitioner took part in. While these evidence the Petitioner's personal achievements, such as her placing in a competition or the impact she has had on specific employers and clients, they do not demonstrate that these personal achievements constitute significant contributions to the sport of swimming or the industry of swim instruction, as a whole.

The Petitioner also submitted evidence of a "Certificate for Master of Sports in Swimming" and on appeal states that obtaining this status is more complex than simply completing a course, as the Director stated in her decision. The appeal states this title is awarded for, "achieving the standard in sports competitions not below the status of official sports competitions. . . ." However, we agree with the Director, that it remains unclear how this title demonstrates the Petitioner has been recognized for achievements and significant contributions to the industry.

> *If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility* 8 C.F.R. § 204.5(k)(3)(iii).

Finally, the Petitioner submitted two instructional manuals she wrote entitled, [redacted] and, [redacted] However, if a petitioner wishes to submit comparable evidence, they must first establish that the other standards for establishing exceptional ability do not apply to their occupation. The Petitioner has not

asserted that the other criteria do not readily apply to her occupation, in fact, she argues that she has met the other criteria, therefore we will not consider the submitted comparable evidence.

For the reasons given above, the evidence does not establish that the Petitioner meets the eligibility requirements as an individual of exceptional ability and therefore does not meet the requirements for EB-2 classification. Because the Petitioner has not established that she meets the minimum required criteria under 8 C.F.R. § 204.5(k)(3)(ii), we need not conduct a final merits determination. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established that she possesses a degree of expertise significantly above that ordinarily encountered in her field.

While we do not discuss each piece of evidence individually, we have reviewed and considered the record in its entirety. The Petitioner has not established her qualification for the EB-2 classification as an individual of exceptional ability in the sciences, arts, or business, and is therefore 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. 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 the applicant did not otherwise meet their burden of proof).

III. CONCLUSION

We conclude by a preponderance of the evidence that 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 and therefore is not eligible for a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.