U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29846722

Date: FEB. 27, 2024

Appeal of Texas Service Center Decision

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

The Petitioner is a substance abuse rehabilitation coach who seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver (NIW) 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 Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition) on two bases. First, they concluded the record did not establish that the Petitioner qualifies for the underlying visa classification as a member of the professions holding an advanced degree. The Director also decided the Petitioner did not merit a discretionary waiver of the job offer requirement in the national interest. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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 an NIW, 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. An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. Profession is defined as the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. 8 C.F.R. § 204.5(k)(3).

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 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 NIW petitions. *Dhanasar* states that USCIS may, as matter of discretion, grant an NIW 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.

The purely discretionary determination of whether to grant or deny an NIW rests solely with USCIS. *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (citations omitted).

II. ANALYSIS

Within the initial filing, the Petitioner did not clearly indicate the basis under which she was applying. The Petitioner did not plainly identify whether she was applying as a member of the professions holding an advanced degree, or alternatively as an individual of exceptional ability. Based on the initial filing documents, the Director issued a request for evidence seeking materials to support the claim that she was a member of the professions holding an advanced degree. The Petitioner responded to the request with no indication that she qualified as an individual of exceptional ability, and as a result, the Director issued their decision evaluating her claims as a professional holding an advanced degree.

A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998). Part of that burden is for a petitioner to clearly argue in favor of the appropriate classification rather than to rely on the Director to infer or second-guess the intended classification. In view of the Petitioner's burden, she only made arguments relating to an advanced degree professional before the Director.

Turning to the appeal brief, the Petitioner clearly asserts claims under both EB-2 bases; as a professional holding an advanced degree, and as an individual of exceptional ability. This amounts to the Petitioner making claims on appeal that were not argued before the Director. New assertions advanced for the first time to an administrative appellate body are not properly before it. *Matter of M-F-O-*, 28 I&N Dec. 408, 410 n.4 (BIA 2021) (refusing to consider an appellant's claims that were presented for the first time on appeal); *see also Slack Techs., LLC v. Pirani*, 598 U.S. 759, 765 n.1 (2023) (finding where an issue is argued for the first time on appeal, it is not properly before the appellate body). We will not entertain a request for an alteration of the requested visa classification post-adjudication as it constitutes a material change. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998) (declining to allow a petitioner to make material changes to a petition in an effort to make it conform to USCIS requirements). Consequently, we will consider the Petitioner's appellate claims as a member of the professions holding an advanced degree.

A. Member of the Professions Holding an Advanced Degree

The Petitioner intends to provide services relating to substance abuse rehabilitation. The Petitioner filed the petition in October of 2022. The Petitioner does not claim to possess a U.S. academic or professional degree (or a foreign equivalent degree) above that of a bachelor's degree. The Petitioner provided evidence she earned a foreign bachelor's degree in Pentecostal ministerial theology in 2018 and a separate foreign bachelor's degree in psychology in 2022.[1] The Petitioner claimed work experience during various periods between 2013 and 2019.

For foreign nationals who have not attained a U.S. advanced degree (or a foreign equivalent degree), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires them to possess a U.S. bachelor's degree (or a foreign equivalent degree) and at least five years of progressive post-baccalaureate experience in the specialty. The Director partly denied the petition because the Petitioner had not met these requirements on the date she filed the petition in October of 2022.

Within the appeal, the Petitioner claims she is a professional in ministerial theology and psychology and she possesses in excess of five years of experience as of the date of the appeal brief.[2] The Petitioner further equates her bachelor's degree relating to theology to a U.S. bachelor's degree and compares her ministerial ordination to a professional license to practice.

Within the appeal brief the Petitioner acknowledges she did not have five years of experience in the specialty after she earned a bachelor's degree. She then posits that her case warrants an exception to the regulatory requirements to alleviate immigration processing because she has satisfied the post-baccalaureate experience as of the date she filed the appeal.

The Petitioner refers to section 204(a)(1)(F) of the Act claiming it offers the flexibility to consider exceptional circumstances in evaluating visa petitions and in doing so, she requests we apply this statutory provision too broadly. We cannot. Section 204(a)(1)(F) refers back to the precise statute under which the Petitioner is already being considered and we are not persuaded by this circular argument. Additionally, no such exception to alleviate immigration processing exists within the regulation for the requirement that the five years of post-bachelor's experience be completed at the time of filing for an advanced degree professional. In fact, the regulation at 8 C.F.R. § 204.5(k)(3)(i) mandates that as part of the required initial evidence a petitioner must file with the petition, they must provide an official academic record showing they possess the required degree or the foreign equivalent, and if applicable, specific proof they have earned at least five years of progressive post-baccalaureate experience in the specialty. Because this is initial evidence, there is no exception to the rule that the Petitioner mentions in her appeal brief.

Ultimately in this particular scenario, the Petitioner must have completed all substantive requirements of the degree or its equivalent, and already earned the mandatory experience on the date she filed the NIW petition to establish eligibility. *See Matter of O-A-, Inc.*, Adopted Decision 2017-03, at 3–4 (AAO Apr. 17, 2017); *see also* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l

[1] The Director noted the Petitioner did not comply with their request that she provide an advisory education evaluation in support of her claim that she possesses an equivalent to a U.S. bachelor's degree.

[2] Although the appeal brief is dated August 8, 2022, this appears to be a typographical error in the year, and it should read August 8, 2023, as the appeal was filed with USCIS on August 10, 2023.

Comm'r 1971) (a visa petition may not be approved based on speculation of future eligibility or after an individual becomes eligible under a new set of facts).

Because the regulatory requirement relating to five years of progressive post-baccalaureate experience at 8 C.F.R. § 204.5(k)(3)(i)(B) mandates foreign nationals already possess the required experience in the specialty, and because the Petitioner attained her foreign bachelor's degree in Pentecostal ministerial theology in 2018, the earliest she could have properly filed this petition while relying on five years of post-bachelor's experience in the specialty would have been October 2023. As a result, she did not possess the requisite experience, and she did not qualify as a member of the professions holding an advanced degree when she filed the petition.

We ultimately agree with the Director's adverse determination on this issue.

The Petitioner has not provided sufficient evidence to meet the regulatory requirements at 8 C.F.R. § 204.5(k)(3)(i)(A)–(B). As the Petitioner has not established she is qualified for the EB-2 classification as a member of the professions holding an advanced degree, she has failed to satisfy the antecedent requirement for consideration of an NIW. Although the Petitioner asserts on appeal that she meets additional NIW eligibility requirements under the *Dhanasar* analytical framework, we reserve our opinion regarding these issues. Where a case warrants a denial regardless of other eligibility considerations, it is unnecessary that we address those other considerations. *Patel v. Garland*, 596 U.S. 328, 332 (2022) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25–26 (1976) (finding agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision)); *see also Matter of Chen*, 28 I&N Dec. 676, 677 n.1, 678 (BIA 2023) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as a member of the professions holding an advanced degree and we will dismiss their appeal.

ORDER: The appeal is dismissed.