U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 35054249

Date: JAN. 6, 2025

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a university, seeks to permanently employ the Beneficiary as an assistant professor of gender and sexuality studies. The school requests her classification under the employment-based, second-preference (EB-2) immigrant visa category as a member of the professions holding an "advanced degree." *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). In lieu of an accompanying certification from the U.S. Department of Labor (DOL), the school also requests her designation under Schedule A as a noncitizen of "exceptional ability." *See* 20 C.F.R. §§ 656.5, 656.15.

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the Beneficiary's eligibility for Schedule A designation. On appeal, the school notes that the Director mistakenly considered the Beneficiary's EB-2 eligibility as a noncitizen of "exceptional ability" rather than as an advanced degree professional.[1]

The Petitioner bears the burden of demonstrating eligibility for the requested benefits by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, because the school did not demonstrate the Beneficiary's eligibility for Schedule A designation, the Director's EB-2 classification error was harmless. We will therefore dismiss the appeal.

I. LAW

Organizations may sponsor noncitizens for U.S. permanent residence as advanced degree professionals to work in jobs requiring at least bachelor's degrees followed by five years of progressive experience in their specialties. 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree"). Immigration in this category typically follows a three-step process. First, to permanently fill a U.S.

[1] Both DOL and U.S. Citizenship and Immigration Services (USCIS) benefits in this matter require showings of "exceptional ability." But the agencies define the term differently and have different evidentiary standards. *Compare* 20 C.F.R. §§ 656.5(b)(1), 656.15(d) (defining the term "exceptional ability" and listing evidentiary requirements for Schedule A designation) *with* 8 C.F.R. § 204.5(k)(2), (3)(ii) (defining the same term and listing evidentiary requirements for EB-2 purposes).

job with a foreign worker, a prospective employer must seek DOL certification. *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D). Second, if DOL certifies a job, an employer next submits the labor certification with an immigrant visa petition to USCIS. *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Finally, if USCIS grants a petition, a noncitizen beneficiary may apply abroad for an immigrant visa or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

DOL, however, has already determined that the United States lacks sufficient workers for certain occupations, as well as other jobs requiring exceptional ability. 20 C.F.R. § 656.5. DOL has pre-determined that the employment of foreign workers in these Schedule A jobs would not harm the wages or working conditions of U.S. employees in similar positions. *Id.* As prospective employers of Schedule A workers need not advertise their offered jobs to U.S. workers, DOL authorizes USCIS to adjudicate Schedule A applications in petition proceedings. 20 C.F.R. § 656.15(a). Thus, here, USCIS rules not only on the petition but also on its accompanying Schedule A application. *See* 20 C.F.R. § 656.15(e) (describing USCIS Schedule A determinations as "conclusive and final").

II. ANALYSIS

A. The Beneficiary Does Not Warrant Schedule A Designation as a Noncitizen of Exceptional Ability

Unless accompanied by an individual labor certification from DOL, a petition for an advanced degree professional must generally include an application for Schedule A designation. 8 C.F.R. § 204.5(k)(4)(i).[2] The Petitioner requested the Beneficiary's designation under Schedule A Group II as a noncitizen of exceptional ability in the sciences or arts. *See* 20 C.F.R. § 656.5(b)(1).

To obtain Schedule A designation for a noncitizen of exceptional ability, a petitioner must submit documentary evidence:

- Meeting at least two of seven listed requirements;
- Showing that a beneficiary has received "widespread acclaim and international recognition . . . by recognized experts" in their field; and
- Demonstrating that their work in the field during the past year and their intended U.S. work require exceptional ability.

20 C.F.R. § 656.15(d)(1).

1. The Evidentiary Criteria

The record supports the Director's finding that the Petitioner met two of the seven criteria by submitting evidence of the Beneficiary's participation as a judge of others' work in her field and her authorship of scholarly articles in the field in international journals. *See* 20 C.F.R. § 656.15(d)(1)(iv), (vi). On appeal, the school claims that it satisfied an additional two evidentiary requirements by

[2] USCIS also has discretion to excuse job-offer and labor certification requirements if an EB-2 petitioner demonstrates that waiver of these U.S.-worker protections would be "in the national interest." Section 203(b)(2)(B)(i) of the Act. This petition, however, does not request a national interest waiver.

documenting her receipt of internationally recognized awards for excellence in her field and her original scholarly research contributions of major significance in the field. *See* 20 C.F.R. § 656.15(d)(1)(i), (v).

Because the Petitioner met the minimum amount of evidentiary criteria, however, we need not determine whether it satisfied others. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (per curiam) (holding that agencies need not make "purely advisory findings" on issues unnecessary to their ultimate decisions). We therefore decline to address the additional evidentiary criteria that the school claims to have satisfied.

2. Widespread Acclaim and International Recognition by Recognized Experts

The Director found insufficient evidence of the Beneficiary's purported widespread acclaim and international recognition. On appeal, the school argues that the Director erred by making "a final merits determination" on this requirement.

As the Petitioner contends, the Director's decision describes her conclusion regarding evidence of the Beneficiary's purported acclaim and international recognition as a "final merits determination." USCIS makes final merits determinations when considering a noncitizen's eligibility as a noncitizen of exceptional ability for EB-2 classification purposes. *See* 6 *USCIS Policy Manual* F.5(b)(2), www.uscis.gov/policy-manual; *see also Kazarian v. USCIS*, 596 F.3d 1115, 1119-20 (9th Cir. 2010) (similarly requiring a final merits determination as the last part in a two-step analysis of "extraordinary ability" under section 203(b)(1)(A) of the Act).

The decision's inclusion of a final merits determination suggests that the Director confused the exceptional ability standards for Schedule A and EB-2 classification purposes. The decision quotes USCIS' definition of "exceptional ability" for EB-2 purposes.[3]

A close review of the decision, however, shows that the Director did not consider the Beneficiary's exceptional ability under the EB-2 standard. Rather, the Director focused on the proper factors for exceptional ability under Schedule A: widespread acclaim; and international recognition. The decision states that "[t]he record contains little evidence that the beneficiary has achieved widespread recognition internationally." The Director also found that "publications are not as reliable a gauge in determining a beneficiary's international recognition and widespread acclaim as the number of citations those publications have garnered." Further, the decision concludes: "The record fails to show that the beneficiary's authored works have received widespread acclaim and international recognition. Therefore, the evidence submitted does not establish that the beneficiary is a person of exceptional ability for the purpose of Group II certification." Thus, although confusingly describing its conclusion as a final merits determination, the decision properly focuses on and discusses the Schedule A factors of widespread acclaim and international recognition.

[3] The decision states its consideration, in part, of whether the Beneficiary has "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." *See* 8 C.F.R. § 204.5(k)(2) (defining the term "exceptional ability" for EB-2 classification purposes).

The record supports the Director's finding of insufficient evidence of the Beneficiary's claimed widespread acclaim and international recognition. As previously indicated, the Petitioner demonstrated the Beneficiary's authorship of scholarly articles in her field. But, as the Director found, the Petitioner has not provided evidence of these articles' effects on the Beneficiary's field, such as the number of citations to her work and whether she has more citations than others in her field, factors that may indicate widespread acclaim or international recognition. Without such evidence, the record does not establish her acclaim as widespread or show her international recognition.

As evidence of the Beneficiary's purported acclaim and recognition, the Petitioner primarily relies on five letters from other U.S. professors in her field or related areas. The letters describe her as "a crucial asset in the national and international humanities research community," "a remarkable asset to the academic community and to the nation as whole," "a scholar of international repute," and "an internationally recognized expert in gender and sexuality studies."

But the record lacks sufficient evidence to support these accolades. For example, the letters state that two prestigious universities in England invited the Beneficiary to lecture. But the record lacks objective documentary evidence of the purported lecture invitations and the reactions of experts in the field to the Beneficiary's presentations. Statements made by experts "should be corroborated by documentary evidence in the record." *See* 6 *USCIS Policy Manual* F.2(B)(3) (discussing support letters in the context of petitions for noncitizens with extraordinary ability under section 203(b)(1)(A) of the Act).

Also, some of the letters indicate the Beneficiary's potential to garner widespread acclaim and international recognition rather than her realization of these achievements. A letter from a U.S. professor of Africana studies states that the Beneficiary's exploration of economic and social conditions leading people to engage in sex work "has the *potential* to guide the development of interventions aimed at addressing the root causes of sex work, thereby contributing to efforts to prevent individuals from entering this profession." (emphasis added). Similarly, a letter from an associate professor of English/women's gender and sexuality studies states that the Beneficiary's ongoing research on race, gender, and "post-coloniality" "has the *potential* to shape national and international discussions on decolonization and nation-building."

The record identifies the Beneficiary as a talented young professor and researcher in the gender and sexuality field. But the evidence does not demonstrate widespread acclaim and international recognition sufficient to establish her as a noncitizen of exceptional ability for Schedule A designation purposes. We will therefore affirm the Director's denial of the Petitioner's Schedule A application.

As the Petitioner has not demonstrated her receipt of sufficiently widespread acclaim and international recognition, we need not reach and hereby reserve consideration of whether her past and future work in the field requires exceptional ability. *See Bagamasbad*, 429 U.S. at 25.

B. The Director's EB-2 Misclassification Was Harmless

As previously indicated, the Director erred by considering the Beneficiary's EB-2 eligibility as a noncitizen of exceptional ability. Both advanced degree professionals and noncitizens of exceptional ability can qualify for the EB-2 category. Section 203(b)(2)(A) of the Act. But the Petitioner

specifically requested the Beneficiary's EB-2 classification as an advanced degree professional. The initial filing included a letter from the school's vice provost of academic personnel asserting that "[the Beneficiary] qualifies as a professional with an advanced degree."

Nevertheless, the Director's error was immaterial. Even if the Beneficiary qualifies for EB-2 classification as an advanced degree professional, the Director properly denied the accompanying Schedule A application. Thus, lacking a labor certification or an approvable Schedule A application, the petition required denial. *See* 8 C.F.R. § 204.5(k)(4)(i) (requiring an advanced degree petition to include a labor certification or an approvable Schedule A application). The Director's EB-2 classification error was therefore harmless. *See Zamorano v. Garland*, 2 F.4th 1213, 1228 (9th Cir. 2021) (applying "traditional administrative law principles," including the harmless error rule, when reviewing an agency's decision).

III. CONCLUSION

The Director misanalysed the Beneficiary's EB-2 eligibility. But the Director correctly denied the petition's accompanying application for Schedule A designation. We will therefore affirm the filing's denial.

ORDER: The appeal is dismissed.