U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31842373

Date: JUL. 9, 2024

Appeal of Texas Service Center Decision

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

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. 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 the Petitioner had not established eligibility for the underlying immigrant classification and for a waiver of the required job offer, and thus of the labor certification, would be in the national interest. 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.

As it relates to the underlying immigrant classification, the Director determined the Petitioner did not demonstrate her receipt of an associate's degree qualified her as a member of the professions holding an advanced degree.[1] Moreover, the Director concluded that USCIS did not previously find the Petitioner qualified as an individual of exceptional ability, as asserted by the Petitioner, and the record did not reflect the Petitioner's eligibility claim as an individual of exceptional ability.[2] On appeal, the Petitioner asserts that "in light of the evidence in the record, we believe it is clear the many years of work experience can show that [the Petitioner] is an individual of exceptional ability."

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[1] In order to show an individual holds an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

[2] The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

We adopt and affirm the Director's decision relating to the Petitioner's eligibility for the underlying immigrant classification. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted this issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight U.S. Court of Appeals in holding the appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case). The Director thoroughly reviewed, discussed, and analyzed the Petitioner's underlying immigrant classification claims and correctly determined the Petitioner did not qualify for the benefit sought.

The Petitioner does not contest the Director's finding that the Petitioner does not meet the eligibility requirements as a member of the professions holding an advanced degree. 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)). Instead, as indicated above, the Petitioner asserts that her "many years of work experience" qualifies her as an individual of exceptional ability and individuals have "been granted the requested classification by having less than a United States baccalaureate degree or a foreign equivalent degree if they classified themselves and met the requirements as an [sic] individuals of exceptional ability." In addition, the Petitioner identifies five regulatory criteria and claims the record contains evidence showing her eligibility for each one. However, the record does not reflect the Petitioner claimed eligibility as an individual of exceptional ability prior to the filing of this appeal.

The Petitioner's initial cover letter claimed that she "is eligible for EB-2 classification as a member of the professions holding an advanced degree . . . because she holds an Associate's degree in Human Resources Management and Technical Course in Logistics in addition to various courses in the area plus more than 10 years of work experience in the field." The Petitioner made no indication of her eligibility as an individual of exceptional ability. In response to the Director's request for evidence (RFE), the Petitioner further maintained her qualification as a member of the professions holding an advanced degree. In addition, the Petitioner claimed that "[a]s the RFE did not mention anything on the regulatory criteria, we understand that the USCIS recognizes that the Petitioner satisfied at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification." The record does not support the Petitioner's assertion.

Nonetheless, the Director addressed this issue in the denial. Specifically, the Director stated that since the Petitioner did not initially claim eligibility as an individual of exceptional ability, the RFE did not mention documentation relating to the exceptional ability classification. Moreover, the Director indicated that the Petitioner's updated personal statement "made no reference in qualifying for the requested classification as an individual of exceptional ability." Furthermore, the Director found that none of the "exceptional ability criteria[] were discussed or claimed." We agree, and the record supports the Director's conclusions.

On appeal, the Petitioner claims she meets the criteria relating to 8 C.F.R. § 204.5(k)(3)(ii)(A)-(D) and (F) and points to evidence in the record for each one. Because the Petitioner makes such eligibility claims for the first time on appeal and not previously before the Director, we will not consider them. Appellate bodies will not consider claims raised for the first time in an appeal. *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842, 2024 WL 2751216, at *10 n.5 (U.S. May 30, 2024). Moreover, the Petitioner

does not argue how the evidence establishes her degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.[3] Here, the Petitioner has not shown that the Director erred in concluding that she did not satisfy the requirements for second preference immigrant classification.

Because the documentation in the record does not establish her eligibility for the underlying immigrant classification, we need not determine whether the Petitioner has demonstrated her qualification for a national interest waiver.[4] 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] Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). 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* F.5(B)(2), https://www.uscis.gov/policymanual. 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.*

[4] *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 alternate issues on appeal where applicants do not otherwise meet their burden of proof).