U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30968670

Date: JULY 11, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner is a bakery and pastry chef who seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, 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 Nebraska Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition) and dismissed three subsequent motions, concluding that the record did not establish that the Petitioner qualified for the underlying visa classification, nor did she merit a discretionary waiver of the job offer requirement in the national interest. 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 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). 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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. 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. USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

Once a petitioner demonstrates eligibility for the 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 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) (joining four U.S. Circuit Courts of Appeals in concluding that USCIS' decision to grant or deny an NIW to be discretionary in nature).

II. ANALYSIS

Qualifying for a national interest waiver requires a petitioner to first establish eligibility for the underlying EB-2 immigrant classification. Meeting the exceptional ability standards requires the foreign national to submit documentation that satisfies at least three of the six categories of the following types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

(A) An academic degree relating to the area of claimed exceptional ability;
(B) Ten years of full-time experience in the occupation;
(C) A license or certification for the profession or occupation;
(D) A salary or other remuneration that demonstrates exceptional ability;
(E) Membership in professional associations; and
(F) Recognition for achievements and significant contributions to the industry or field.

Before the Director, the Petitioner claimed she met all six of the criteria listed above, but the Director did not agree and only granted paragraphs (A) and (B). In doing so, the Director determined the Petitioner was not eligible for the EB-2 classification as an individual of exceptional ability. The Petitioner claims the remaining four criteria on appeal.

A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(ii)(C).

In the initial filing before the Director, the Petitioner offered various copies of certificates in a foreign language and an accompanying translation, which showed that she had completed various short-term training courses. She indicated the certificates allow her to work in her occupation. The Director determined the certificates did not establish that her profession or occupation requires such certificates. In her motion before the Director, the Petitioner offered the same attenuated eligibility arguments and the same evidence that she previously offered. On appeal, the Petitioner does not offer any analysis to contest the Director's reasoning for not granting this criterion. Instead, she refers to the same

evidence that appear to be certificates of instructional courses such as taking "part in the Wedding Cakes and Fine Chocolates Course."

The certificates the Petitioner offers showing she has completed short-term training courses do not establish she holds a "certification for a particular profession or occupation," as the regulation requires. Even though the Association of Cake Designers and Sugar Artists identifies the Petitioner as a member, she did not submit analysis or evidence to establish that this document is a license to practice the profession or certification for a particular profession or occupation. Consequently, she has not persuaded us that the Director was incorrect to decide against her under this criterion.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D).

Because exceptional ability is defined as a degree of expertise *significantly* above that ordinarily encountered in one's area of claimed exceptional ability (8 C.F.R. § 204.5(k)(2)), a petitioner should submit evidence demonstrating they have commanded a salary or other remuneration commensurate with that standard.

The Director's original decision on the petition acknowledged the evidence the Petitioner presented, but determined that articles on the topic of salaries was not sufficient to demonstrate she met this criterion's requirements. In the motion, the Petitioner offered evidence from a salary website, but this still did not carry the Petitioner's burden.

The Director acknowledged the Petitioner's statements and evidence offered and noted that the average monthly salary for a professional in her area was R$1,900 (Brazilian Reals) and that she asserted her earnings were above that amount. But because the Petitioner failed to offer any evidence in support of her assertions, the Director did not offer any further analysis relating to those claims and they made an adverse determination under this criterion.

On appeal, the Petitioner not only offers the evidence she submitted before the Director, but she also provides new evidence she did not previously claim under this criterion in the form of a letter attesting to her earnings. This letter is in a foreign language and its translation into English is not accompanied by a translator's certification as the regulation requires. Any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. § 103.2(b)(3). The translator must certify that the English language translation is complete and accurate, and that the translator is competent to translate from the foreign language into English. *Id.* Because the Petitioner did not submit this document's properly certified English language translation, we cannot meaningfully determine whether the translated material is accurate and thus supports her claims.

Despite those shortcomings, the letter reflects the Petitioner worked for a company as an administrator with no indication that she performed duties as a bakery and pastry chef, which is her claimed area of exceptional ability. And even if none of those deficiencies were present, we still would not consider the letter in these proceedings because both the regulation and the Director's request for evidence put the Petitioner on notice and gave her a reasonable opportunity to provide this evidence. Consequently, we will not consider it for the first time on appeal. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Furtado*, 28 I&N Dec. 794, 801–02 (BIA 2024)

(declining to consider new evidence on appeal when the filing party was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial); *see also Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

As is apparent from the above analysis, the Petitioner has not met this criterion's requirements.

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

To satisfy the requirements here, a petitioner must show membership in a "professional association." 8 C.F.R. § 204.5(k)(3)(ii)(E). The regulations define "profession" to include "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries" or "as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. § 204.5(k)(2) (incorporating by reference Section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32)).

The Director discussed the certificates the Petitioner offered and briefly explained why the evidence fell short of satisfying this criterion's requirements. The appeal brief does not contest the Director's findings, but instead identifies a single piece of evidence and claims it "certifies me to work in my field and also regulates my profession." The identified evidence is her registration in the Association of Cake Designers and Sugar Artists. But the Petitioner does not explain, nor does she offer evidence to demonstrate, that this association is a professional association.

As the Petitioner presents essentially the same argument on appeal that it offered before the Director without identifying an error, we conclude that she has abandoned or waived this issue. *Matter of Garcia*, 28 I&N Dec. 693, 693 (BIA 2023) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) and finding issues that are not meaningfully challenged in the appeal are waived). As such, she has not submitted evidence to satisfy this criterion's requirements.

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 regulation here requires more than a simple showing of achievements as it mandates achievements *and* significant contributions that extend their reach to the industry or field as a whole, rather than simply to a project, an organization, or anything lesser than the industry or field. Further, the Petitioner's achievements and significant contributions must have already been realized rather than being potential, future improvements. And finally, the regulation requires evidence under this criterion to have originated from the Petitioner's peers, government entities, or professional or business organizations. The Petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The Director listed several recommendation letters the Petitioner offered and found they were not accompanied by documentation to establish the author's credentials relating to whether each letter was from her peers, governmental entities, or professional or business organizations, as the regulation requires. On appeal, the Petitioner makes no effort to refute the Director's findings, nor does she

explain how the Director might have erred. Instead, she identifies the support letters that the Director considered and found inadequate.

The first letter was from a peer—a pastry chef—who infused her narrative with flavors of camaraderie and professional indebtedness. But nothing in her letter addressed the Petitioner's achievements and significant contributions to the industry or field. The remaining letters also share this same fault in that they do not speak to this criterion's requirements.[1] In the appeal brief, the Petitioner highlights that she impacted the authors' professional lives, but the record lacks evidence to illustrate that her impact in these careers has somehow resulted in achievements and significant contributions to the industry or field.

The Petitioner has not submitted arguments or evidence sufficient to satisfy this criterion's requirements.

> *Comparable evidence based on the claim that the standards at 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F) do not readily apply to the Petitioner's occupation.* 8 C.F.R. § 204.5(k)(3)(iii).

Within the appeal, the Petitioner claims that "awards, workshops, magazine articles, etc." meet this comparable evidence criterion. But she asserts this claim on appeal without explaining how any of the six standard criteria do not readily apply to her occupation as a baker and pastry chef. And it appears the Petitioner now claims eligibility for comparable evidence on appeal after the Director evaluated this evidence under the standard criteria listed above, but found it wanting.

Similar to the new evidence prohibition noted above, the Petitioner may not simply shift her claims on appeal to qualify under a different standard that she did not assert in the most recent adverse decision. New assertions advanced for the first time to an administrative appellate body are not properly before us. *Matter of M-F-O-*, 28 I&N Dec. 408, 410 n.4 (BIA 2021) (refusing to consider an appellant's humanitarian claims that were presented for the first time on appeal). Because the Petitioner did not raise her comparable evidence claims in the decision just below, naturally the Director did not address them in the motion dismissal, and we generally are not the proper authority to now decide that issue. *Harrow v. Dep't of Def.*, No. 23-21, 2024 WL 2193874, at *6 (U.S. May 16, 2024).

But still, we will briefly address this issue to offer the Petitioner a better understanding of how a comparable evidence claim normally should occur. Generally, foreign nationals seeking to rely on comparable evidence must explain why an individual regulatory criterion does not apply to their occupation. Then, they should explain how the evidence in the record is comparable to that specific criterion. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2). General assertions that any of the six objective criteria do not readily apply to a foreign national's occupation are not sufficient. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2). Where an individual is simply unable to meet or submit sufficient documentary evidence of at least three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(iii) does not allow for the submission of comparable evidence.

[1] We note one letter was from a journalist and the Petitioner has not established how a journalist is one of the acceptable sources to recognize her for her achievements and significant contributions to the field or the industry.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.