U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31474341

Date: JUL. 19, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a preschool and drama teacher, 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 is eligible as an individual of exceptional ability or that she merits 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

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A U.S. baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

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

[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.

in its totality shows that they are recognized as having the requisite degree of expertise and will substantially 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 establishes eligibility for the underlying EB-2 classification, they must then demonstrate 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 issues before us are whether the Petitioner is a member of the professions holding an advanced degree or an individual of exceptional ability, and if so, whether she is eligible for a national interest waiver. The Petitioner filed her Form I-140 petition in August 2023, and she proposed employment as a preschool and drama teacher with her current employer, [redacted] a daycare center in [redacted], NJ. She submitted identification documents, newspaper articles about her, reference letters, supporting documents related to her projects and the teaching field, a bachelor's degree certificate from Portugal for a theater and education program, a credentials evaluation finding it to be the equivalent of a U.S. bachelor's degree, three employer letters claiming a total of three years and six months of employment, a child development associate (CDA) credential, a pedagogical skills certificate, a teaching skills certificate, and online training certificates. The Petitioner claimed to be a member of the professions holding an advanced degree and an individual of exceptional ability. She also claimed eligibility for a national interest waiver.

However, in regard to being a member of the professions holding an advanced degree, which permits a U.S. baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty to be the equivalent of a master's degree, the Petitioner only claimed to have four years of employment experience as a teacher and stated, "I didn't complete the 5 years required yet." The Petitioner also referenced evidence in asserting that she met five of the six criteria to establish she is an individual of exceptional ability. The Director issued a request for evidence (RFE) as the initial evidence was insufficient to establish eligibility for the benefit sought. In the RFE, the Director discussed the evidence submitted with the Form I-140, and listed the type of

[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).

evidence needed to establish the Petitioner is a member of the professions holding an advanced degree, an individual of exceptional ability, and eligible for a national interest waiver.

The Petitioner did not submit any evidence in response to the RFE showing she has at least five years of progressive post-baccalaureate experience in the specialty. Rather, the Petitioner responded with evidence related to four of the six exceptional ability criteria and the three national interest criteria in *Dhanasar*. The Director determined that the Petitioner met the requisite three exceptional ability criteria in 8 C.F.R. § 204.5(k)(3)(ii) through evidence of her "equivalent to a U.S. bachelor's degree," CDA credential, and memberships in the National Association for the Education of Young Children and the National Head Start Association. The Director conducted a final merits determination and found that while the evidence demonstrates the Petitioner is a competent and qualified teacher, it did not establish she has a degree of expertise significantly above that ordinarily encountered by teachers. The Director stated that since the record did not establish the Petitioner is an individual of exceptional ability, no meaningful purpose would be served by addressing her national interest waiver. Nonetheless, the Director found that the record did not establish the proposed endeavor has national importance and that she did not merit a national interest waiver as a matter of discretion.

On appeal, the Petitioner claims eligibility both as a member of the professions holding an advanced degree and an individual of exceptional ability, and she then asserts eligibility for a national interest waiver. The Petitioner submits documentation related to her national interest waiver, new recommendation letters, and previously submitted evidence. We will first address her claim that she is an advanced degree professional. The Director issued an RFE as the initial evidence was insufficient to establish the Petitioner is a member of the professions holding an advanced degree. The Petitioner did not submit any of the requested evidence in response to the RFE related to this issue. Although the Director did not address this issue in the denial, for the reasons discussed below, we determine upon de novo review that she is not a member of the professions holding an advanced degree. The Petitioner claims that she has a foreign equivalent degree to a U.S. baccalaureate followed by at least five years of progressive experience in the specialty. The Petitioner previously submitted three employer letters claiming a total of three years and six months of employment. On appeal, the Petitioner submits an additional employer letter covering employment from January 2020 until July 2021 as a tutor. Because the Petitioner was put on notice through the RFE and given a reasonable opportunity to provide this evidence previously, 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 Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial"). Additionally, we note that her claim on appeal that she has five years of progressive work experience is inconsistent with her initial claim that she had only four years of employment experience. Finally, the credential evaluation provides that the Petitioner's completion of her three-year licentiate program in Portugal resulted in the equivalent of a U.S. bachelor's degree in drama and education. As a matter of discretion, we may use credential evaluations as advisory testimony. However, we are responsible for making the final determination regarding eligibility for the benefit sought. According to the Electronic Database for Global Education (EDGE),[4] an online resource regarding foreign educational equivalencies, a Portuguese licentiate (i)

[4] EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).

is awarded after completion of three years of post-secondary study. A three-year degree is only equivalent to three years of university study in the United States. As the Petitioner has not established that she has a foreign equivalent degree to a U.S. baccalaureate followed by at least five years of progressive experience in the specialty, she is not eligible as a member of the professions holding an advanced degree.

Next, we will address the Petitioner's claim that she is an individual of exceptional ability. To meet the initial evidence requirements for this classification, a petitioner must show that they meet at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). The Director determined that the Petitioner met the requisite three criteria through evidence of her Portuguese licentiate, CDA credential, and memberships in the National Association for the Education of Young Children and the National Head Start Association. On appeal, the Petitioner asserts that she also meets the fourth and fifth criterion, at 8 C.F.R. § 204.5(k)(3)(ii)(F), through evidence of her salary and reference letters. However, as we agree that she meets the initial evidentiary requirement, we need not consider whether she also meets additional criteria. Rather, we will consider this evidence together with the balance of the record to determine whether the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field and is therefore eligible for the requested classification.

In reviewing the totality of the evidence in a final merits determination, we consider the quality of the evidence.[5] The Petitioner claims that her academic background, CDA credential, and trainer certificate, along with speaking four languages (English, Portuguese, Spanish, and French), is more than an ordinary teacher possesses. However, the Petitioner is required to establish that her degree of expertise is significantly above that ordinarily encountered in the field. The Petitioner has not submitted sufficient documentation to establish that her academic background, CDA credential, teaching skills certificate, trainer certifications, and pedagogical skills certificate are qualifications significantly above that ordinarily encountered with a preschool and drama teacher. The Petitioner also has not established how her fluency in different languages relates to her work in a way that results in a degree of expertise significantly above that ordinarily encountered in the field.

Additionally, the evidence regarding her professional memberships in the National Association for the Education of Young Children and the National Head Start Association does not demonstrate that the organizations have any membership requirements above those commonly found in teachers actively working in the field. Accordingly, none of this evidence shows that the Petitioner has exceptional ability in preschool and drama teaching.

The record also includes evidence that the Petitioner won modeling awards in Portugal, acted in theater shows in Portugal, and gave an interview to her city's newspaper about her life journey. The Petitioner has not established how her prior work as a model and theater actress would result in her having exceptional ability in preschool and drama teaching. The record includes employer letters which state that the Petitioner has worked as a preschool and drama teacher, and as a sociocultural moderator. Additionally, the record includes letters from former teachers of the Petitioner which provide that she

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AACRAO is a non-profit, voluntary association of more than 11,000 professionals in more than 40 countries. *See* AACRAO, *Who We Are*, https://www.aacrao.org/who-we-are; *see also Viraj, LLC*, v. *U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (describing EDGE as "a respected source of information").

[5] 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

was a great and committed student, and letters from parents of her current preschool students describing her as a good teacher with good character. The letters do not specify which skill sets possessed by the Petitioner place her above other teachers or include details of her work reflecting that she has a degree of expertise significantly above that ordinarily encountered in the teaching field. Rather, the letters reflect that the Petitioner is a competent and qualified teacher. Finally, the Petitioner points to her salary being more than the ordinary teacher. The Petitioner's current employer states that her salary is $1,900 every two weeks. The Petitioner has not shown that her salary is significantly above other preschool teachers in the geographic location she is working in.

After review of the totality of the record, we agree with the Director's conclusion that the Petitioner has not established that she possesses a degree of expertise significantly above that ordinarily encountered in the field of teaching. She has therefore not shown that she is an individual of exceptional ability.

The Petitioner has not established that she is a member of the professions holding an advanced degree or an individual of exceptional ability. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding her eligibility for a national interest waiver. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *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 an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.