U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31522413

Date: JUL. 23, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a business consultant, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business, 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 Nebraska Service Center denied the petition, concluding that the Petitioner did not meet the criteria for the EB-2 immigrant classification as an individual holding an advanced degree or as an individual of exceptional ability. She also indicated the Petitioner had not shown 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.

To establish eligibility for a national interest waiver, a petitioner must first demonstrate their 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. Here, the Petitioner claims to be an individual of exceptional ability.

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). The analysis for this classification is a two-part analysis. 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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. If a petitioner does so, 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.

The Director found the Petitioner met three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). Specifically, the Director indicated the Petitioner satisfied the following criteria: an

official academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A), a salary commensurate with exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(D), and membership in a professional association at 8 C.F.R. § 204.5(k)(3)(ii)(E).

A. Salary Commensurate with Exceptional Ability

Unlike the other two criteria above, the Director's decision lists the evidence submitted in support of the category related to salary, 8 C.F.R. § 204.5(k)(3)(ii)(D), but does not provide an analysis of how she made the determination that the Petitioner commanded a salary commensurate with exceptional ability. To satisfy this criterion, the evidence must show that an individual has commanded a salary or remuneration for services that is indicative of their claimed exceptional ability relative to others working in the field. *Id.* Although the Petitioner appears to have been paid more than the average junior administrative analyst in 2016, this alone does not necessarily indicate she received a salary commensurate with her claimed exceptional ability. For instance, the Petitioner is claiming to have exceptional ability in the field of business consulting as a Chief Executive Officer (CEO) for a business consulting company but does not provide documentation showing she commanded a salary above others working in this field as a CEO or in another higher-level position. However, as we are affirming the Director's final merits determination, we need not reach a decision on whether she in fact does have a salary commensurate with exceptional ability. Accordingly, we reserve this issue.[1]

B. Final Merits Determination

Because the Director found the Petitioner fulfilled at least three criteria, she then conducted a final merits determination, concluding the Petitioner did not possess a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. The Director explained that the evidence presented in relation to the Petitioner's academic record, salary, and membership in a professional association did not show she possessed a degree of expertise significantly above that ordinarily encountered in her field of business consulting. More specifically, the Director described how 78% of CEOs, the position the Petitioner will hold, had a bachelor's degree or more, but the Petitioner has only the equivalent of 3 years of university study in the United States. Similarly, pay stubs from 2016 show that in Brazil the Petitioner was receiving a salary higher than the average junior administrative analyst, the position she held at the time, but not a salary significantly above that which a business consultant (her area of exceptional ability) would receive. Finally, the Director acknowledged the Petitioner's membership in a professional association but indicated that this membership was not significantly above what would normally be encountered in a career as a business consultant.

On appeal, the Petitioner does not contest the finding that she does not hold an advanced degree. She contends that the Director made a biased decision and applied evidentiary requirements beyond the scope allowed by law when she found the evidence submitted insufficient on exceptional ability. The Petitioner states further that the Director's request for evidence did not indicate there was an evidentiary deficiency in the final merits determination of an individual of exceptional ability, thus

[1] *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).

taking away her ability to address the deficiency and violating her right to due process. Moreover, the Petitioner asserts that she should have been judged by the advancement of her career in Brazil and how that compares to other Brazilians, noting that she is a woman CEO when 90% of CEOs in Brazil are male. She also asserts how despite her lack of academic credentials she was able to succeed in her career, indicating that her knowledge is thus above what would ordinarily be encountered. Finally, the Petitioner contends that the Director, in analyzing the three criteria mentioned individually, did not consider her expertise in its totality. In support of her appeal, she submits a news article on CEOs in Brazil, a report on a national initiative to support small businesses, and her business plan.

As an initial matter, although the Director appears to have omitted in his request for evidence, specifically, the issue of a potential deficiency in a final merits determination, 8 C.F.R. § 103.2(b)(8)(iii) gives USCIS the discretion to issue a request for evidence on any given issue, but neither the Act nor the regulations compels us to do so. Moreover, the final merits determination, a totality of the circumstances analysis, is such that the request for evidence issued, provided adequate notice regarding deficiencies in the petition without needing to specifically articulate the potential for an insufficiency in the final merits determination. In addition, the Director's final decision provided adequate notice regarding deficiencies in the petition and yet, as we will discuss more below, the Petitioner has not submitted sufficient documentation to establish eligibility on appeal.

Overall and considering the factors as they are presented by the Petitioner, we will affirm the Director's decision that the Petitioner has not demonstrated a degree of expertise significantly above that ordinarily encountered in her field of business consulting. Here, the Petitioner provided evidence showing she completed the equivalent of three years of university study in the United States; served as a financial assistant for approximately five years; served as a junior administrative analyst in her field for approximately 3 years; and trained as a financial analyst in 2020 for an unknown period. Her reference letters also indicate she was well regarded as an exemplary employee. However, the Petitioner has not shown how her expertise through her education, job experience, and/or professional accomplishments significantly differentiates her from what is ordinarily encountered in the field of business. We acknowledge that the Petitioner appears to have developed a career in business in Brazil despite her lack of education and the lack of gender diversity amongst CEOs, however, these factors are not the standard by which she is being evaluated as a claimed individual with exceptional ability. She must demonstrate, by a preponderance of the evidence, that she possesses a degree of expertise in the field of business significantly above what is normally encountered. The current record does not provide the detail and specifics necessary to show how her accomplishments, knowledge, and ability to consult in the field of business, would be significantly above what is normally encountered in the careers of other CEO business consultants.

The record, in its totality, does not establish the Petitioner's eligibility as an individual of exceptional ability. Although the Director determined that the Petitioner satisfied three of the initial categories of evidence, the record does not demonstrate that the Petitioner has obtained a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).[2] As such, we need not reach a decision on whether, as a matter of discretion, she is eligible for or otherwise merits a national interest waiver. Accordingly, we reserve this issue.[3] The

[2] *See also* 6 *USCIS Policy Manual*, *supra*, F.5(B)(2).
[3] *See INS v. Bagamasbad*, *supra*; *see also Matter of L-A-C-*, *supra*.

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.