U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31384880

Date: JUNE 17, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a physiotherapist, seeks employment-based second preference (EB-2) immigrant classification, 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 Petitioner did not qualify for the requested EB-2 visa classification and she also did not establish eligibility for a national interest waiver under the analytical framework set forth in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). The matter is now before us on appeal.

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

To qualify for a national interest waiver, a petitioner must first show eligibility 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.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is 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

[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).

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.

Once a petitioner demonstrates eligibility for the underlying 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.at 889, provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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.

II. ANALYSIS

The issues on appeal are (1) whether the Petitioner has demonstrated eligibility for EB-2 visa classification and, if so, (2) whether she merits a discretionary waiver of the job offer requirement "in the national interest." Upon review, we conclude that the Petitioner has not met her burden of proof to establish that she is eligible for the underlying EB-2 visa classification. Because the Petitioner's ineligibility for the EB-2 classification is dispositive of her appeal, we need not address at this time whether she meets the national interest waiver criteria and reserve our opinion on that issue.

The record reflects that the Petitioner, a native of Brazil, was awarded a title of physiotherapist by the School of Sciences of the [redacted][2] "in view of the completion of the Physiotherapy Course on December 20, 2006." In November 2022, she filed the instant petition, representing that she had a bachelor's degree in physiotherapy, and intended to work in the United States as a Pilates instructor and aesthetic masseuse. In support, the Petitioner provided a copy of the above referenced "title of physiotherapist" award document with a 2004 course syllabus, certificates of participation in or completion of several training sessions between 2006 and 2022, two employment verification letters, and evidence that she became a member of the American Management Association shortly before filing the instant petition.

In response to the Director's subsequent request for evidence (RFE), the Petitioner submitted additional documents, including recommendation letters, beauty training certificates, a statement regarding past self-employment as physiotherapist and Pilates instructor, evidence of her 2021-2022 business income and payment of taxes in Brazil, general information about minimum wages in Brazil during 1994-2023 period, and a business plan clarifying that she intended to "establish and direct the operations of her business, "P- E-[3] [redacted] in the United States, "to provide a unique

[2] [redacted]

[3] We use initials where possible for privacy.

approach to clients' well-being by combining proven physiotherapy techniques with Pilates method exercises as well as by providing aesthetic services."

The Director determined that the Petitioner was ineligible for EB-2 visa classification as a member of the professions holding an advanced degree or as an individual of exceptional ability in the sciences, arts, or business. The Petitioner has not overcome this determination on appeal.

A. Member of the Professions Holding an Advanced Degree

To establish eligibility for the EB-2 classification as an advanced degree professional, a petitioner must demonstrate, in part, that they hold a qualifying advanced degree through submission of an official academic record showing that they have a United States advanced degree or a foreign equivalent degree. 8 C.F.R. § 204.5(k)(3)(i)(A). In the alternative, a petitioner may provide an official academic record showing that they have 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 they have at least five years of progressive post-baccalaureate experience in the specialty. 8 C.F.R. § 204.5(k)(3)(i)(B).

The Director concluded that the Petitioner did not show she met either requirement because her RFE response did not include an educational evaluation to establish that the "title of physiotherapist" conferred upon her by [redacted] was an advanced degree or its foreign U.S. equivalent.

The Petitioner does not challenge the Director's determination that she is ineligible for the EB-2 classification as a member of professions holding an advanced degree, and we consider this issue waived on appeal. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived).

B. Individual of Exceptional Ability

To establish eligibility for EB-2 visa classification 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), summarized below:

(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.

If an individual meets at least three of these regulatory criteria, we then consider the totality of the material provided in a final merits determination and assess whether the record shows a degree of expertise significantly above that ordinarily encountered in the individual's field. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if sufficient to satisfy the required number of criteria, considered in the context of a final merits determination). *See also generally* 6 *USCIS Policy Manual* F.5(B)(2),

https://www.uscis.gov/policy-manual (providing guidance on conducting the final merits determination).

The Director concluded that the Petitioner did not qualify for EB-2 visa classification as an individual of exceptional ability because she did not meet at least three of the above criteria. On appeal, the Petitioner indicates that the evidence she previously submitted is sufficient to establish that she satisfies all six, or at least three of the criteria and the Director's adverse decision was therefore in error.

We have reviewed the entire record of proceedings, and for the reasons explained below conclude that the Petitioner has not shown she meets the required number of criteria.

> *An official academic record showing that the [noncitizen] has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A).

The Director determined that the Petitioner did not meet this criterion because the beauty training certificates she provided did not appear to have been issued by a college, university, school, or other institution of learning. The Director further found that the Petitioner did not establish that this documentation constituted an official academic record, and no educational evaluation was submitted to show that she had an advanced degree or a foreign U.S. equivalent.

The Petitioner does not contest that the beauty training certificates do not qualify as "academic records." She points out, however, that the previously provided evidence demonstrates she was awarded a title of physiotherapist by [redacted] a medical school in Brazil, which offers healthcare related courses including nursing, physiotherapy, and social work.

Upon review, we conclude that the "title of physiotherapist" award document from [redacted] is sufficient to show that the Petitioner meets the first criterion and withdraw the Director's determination to the contrary.

In the context of EB-2 exceptional ability petitions, an "'official academic record' is not limited to a formal diploma." *Matter of O-A-, Inc.*, Adopted Decision 2017-03 at 3 (AAO Apr. 17, 2017). Rather, for a noncitizen of exceptional ability, USCIS may more broadly accept "a degree, diploma, certificate, or similar award." *Id.* Furthermore, a noncitizen need not have "an advanced degree or a U.S. foreign equivalent" to meet the first criterion. Rather, under the plain language of the regulation "a degree, diploma, certificate, *or similar award* from a college, university, school, or other institution of learning relating to the area of exceptional ability" will suffice. 8 C.F.R. § 204.5(k)(3)(ii)(A) (emphasis added).

Here, the "title of physiotherapist" awarded to the Petitioner by [redacted] constitutes an "award" from "an institution of learning." In addition, this award relates to the Petitioner's claimed area of exceptional ability – physiotherapy. The "title of physiotherapist" award document is also an "official academic record" because it reflects that [redacted] conferred this title upon the Petitioner "in view of the completion of the Physiotherapy Course on December 20, 2006."

Accordingly, the Petitioner's "title of physiotherapist" award document satisfies the evidentiary standard set forth in 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner therefore has met her burden of proof to show that she meets this criterion.

Nevertheless, the preponderance of the evidence in the record is not sufficient to establish that she satisfies at least two more of the remaining regulatory criteria.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the [noncitizen] has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

Although the Director determined that the Petitioner established eligibility under this criterion, we withdraw that determination as the evidence is not adequate to show that the Petitioner has at least ten years of full-time experience in the occupation in which she intends to work in the United States.

As an initial matter, the Petitioner provided inconsistent statements about her prior employment and work experience. In a November 2022 declaration initially submitted with the petition, she claimed:

- Employment at [redacted] from October 2008 to August 2009;
- Self-employment as a physiotherapist from January 2010 to January 2013;
- Work as a Pilates instructor at [redacted] from February 2013 to December 2014;
- Performance of services "aimed at weight loss, rejuvenation, and Pilates" at [redacted] from July 2015 to December 2015;
- Work as a physiotherapist and CEO at her own business from March 2021, until April 2022.[4]

In support, the Petitioner provided a letter confirming that she was employed at [redacted] as a "physiotherapist" for five months, from July through December 2015, and a letter from the [redacted] owner stating that she worked "for this physical rehabilitation clinic . . . as a Pilates instructor and aesthetic masseuse from February 2013 to December 2014." We note, however, that the letter from [redacted] confirming the Petitioner's employment as a "physiotherapist" is not consistent with the Petitioner's own description of her work during this period as services "aimed at weight loss, rejuvenation, and Pilates."

In her response to the RFE the Petitioner submitted a statement indicating that she was additionally self-employed as a physiotherapist in Brazil from January 2007 through September 2008; from September 2009 through January 2013; and from January 2015 through June 2015. She did not explain why she did not initially include this information in the original declaration concerning her work experience, and she did not submit corroborating evidence of the claimed self-employment periods since January 2007 aside from a March 2022 Simplified Taxation System Statement (Extrato do Simples Nacional).

The Petitioner must resolve the inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA

[4] We note that the Petitioner's originally claimed periods of work experience as a physiotherapist, Pilates instructor, masseuse, and CEO amount to approximately seven years in the aggregate.

1988). Because the Petitioner has neither addressed the discrepancies nor provided additional documentation to reconcile the inconsistent information about her employment history, we cannot give her largely unsupported statements concerning work experience significant probative weight.

Furthermore, the employment confirmation letters the Petitioner submitted do not specify start and end dates of her employment, and they do not indicate whether she worked full-time or part-time. The letters also do not include sufficient details about the Petitioner's duties, any job-related training she may have received, or the experience she gained in the course of her employment. As such, they do not meet the plain language of the regulation at 8 C.F.R. § 204.5(g)(1)[5] and have minimal evidentiary value. Absent other evidence of the Petitioner's requisite ten years of full-time experience in the occupation for which she is being sought, we cannot conclude that she meets the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

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

The Director determined that the Petitioner did not show she satisfied this criterion, and we agree.

On appeal, the Petitioner asserts that the Director's determination was in error because she previously submitted a copy of her license issued by the Regional Council of Physiotherapy – CREFITO 15, which she claims confirms she is licensed to perform her professional activities as a physiotherapist.

We note, however, that the certification was issued in May 2023, approximately six months after the petition's November 2022 filing date. *See* 8 C.F.R. § 103.2(b)(1) (providing in pertinent part that a petitioner must establish eligibility for the requested benefit at the time of filing).

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

Again, the Director found the evidence insufficient to demonstrate the Petitioner's eligibility under this criterion.

On appeal, the Petitioner asserts that because "her tax statement from Simples Nacional shows that her "gross income in February 2022 was R$ 9,444 . . . . [i]t can be assumed that [her] annual earning[s] would equate to around R$ 113,328" and that she has therefore met this criterion.

We acknowledge this assertion, as well as tax evidence indicating that the Petitioner's "total gross revenue" in February 2022 was significantly above the Brazil's minimum monthly wage for the same year. However, the general information about minimum wages in Brazil does not provide an adequate basis for determining how the Petitioner's salary compares to the salaries of other physiotherapists, Pilates instructors, or aesthetic masseuses. As the Petitioner does not offer any other evidence to show how her earnings point to her exceptional ability relative to others working in the field, we agree with the Director that she has not established she meets this criterion.

[5] This regulation provides in relevant part that "[e]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include . . . a specific description of the duties performed by the [noncitizen] or of the training received."

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 Director acknowledged the submission of letters from friends and colleagues complimenting the Petitioner's work and abilities as a physiotherapist, Pilates instructor, aesthetic masseuse, and entrepreneur, but determined that they were insufficient to establish her eligibility under this criterion because they did not address how the Petitioner's work alone constituted the requisite achievements or significant contributions to the field. The Director explained that absent documentation showing that the Petitioner has been recognized by peers, government entities, or professional or business organizations for achievements and significant contributions to the industry or field, USCIS was unable to find that she satisfied the evidentiary standard under 8 C.F.R. § 204.5(k)(3)(ii)(F).

On appeal, the Petitioner does not offer any additional documentation and does not address the deficiencies identified by the Director. Instead, she references three of the previously provided letters and asserts generally that "the letters of support should have been found to be recognition by her peers for her achievements and contributions to the industry." The Petitioner adds that her "impeccable skills are a common denominator among all the support letters received," and the evidence therefore shows that she meets this criterion.

The letters describe the Petitioner's personal achievements, professional skills, and the quality of the services she provided to her employers, clients, or patients. For example, the Petitioner's former employer writes that "[t]hrough her method in . . . Pilates classes and massages [the Petitioner] evidenced a rehabilitation process in shorter time, qualifying patients for an above-average evolution, raising the clinic's services, and efficiently promoting the restoration of physical health of athletes and elderly patients of this clinic." Another employer states that while the Petitioner worked at her clinic, she "noticed a significant improvement in the evolution and discharge of elderly patients with pain complaints." Yet another former employer opines that "[a] professional like [the Petitioner] elevates the profession, leading patients to a quick rehabilitation and providing health and well-being." Although these statements indicate that the Petitioner is a skilled physiotherapist, Pilates instructor, and masseuse, the Petitioner has not explained how her past successful work performance in those positions establishes that she has been recognized for achievements and significant contributions to the industry or field of her proposed endeavor.

For these reasons, we conclude that the Petitioner has not shown she meets this regulatory criterion.

In sum, the Petitioner has not met her burden of proof to establish that she satisfies at least three of the six regulatory criteria described at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). She therefore does not meet the threshold requirement to qualify as an individual of exceptional ability under section 203(b)(2)(A) of the Act, and we will not conduct a final merits analysis to determine whether the evidence in its totality is sufficient to show that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Consequently, as the Petitioner has not demonstrated eligibility for the underlying EB-2 visa classification, we need not address at this time whether she merits a discretionary waiver of the job

offer requirement "in the national interest" and reserve the issue. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that "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 has not otherwise met their burden of proof).

III. CONCLUSION

The Petitioner has not demonstrated that she qualifies for the requested EB-2 visa classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. As such, she is ineligible for the immigration benefit sought, and her petition will remain denied.

ORDER: The appeal is dismissed.