U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31381470

Date: JUN. 28, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a nurse technician, aesthetic specialist, and wellness spa entrepreneur, 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 evidence did not establish the Petitioner's eligibility for the EB-2 classification as an advanced degree professional or an individual of exceptional ability and that a waiver of the required job offer, and therefore of the labor certification, would be in the national interest because she did not meet all three requisite prongs as set forth in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). This matter is now before us on appeal, which we review 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 be eligible for a national interest waiver, a petitioner must first establish eligibility for the underlying EB-2 visa classification, as an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A), (B) of the Act; 8 C.F.R. § 204.5(k)(1).[1]

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).[2] Meeting at least three criteria, however, does not by itself establish eligibility for this classification. If a

[1] The Petitioner sought classification below only as an individual of exceptional ability. She does not assert on appeal, and the record does not show, she is a member of the professions holding an advanced degree. This issue therefore is not before us. *See Matter of Garcia*, 28 I&N Dec. 693 n.1 (BIA 2023) (holding that issues not raised on appeal are waived); *Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) (noting that matters not raised previously are waived on appeal); *see also United States v. Campbell*, 26 F.4th 860, 875, 887-88 (11th Cir. 2022) (holding that while the circuit court may in extraordinary circumstances consider arguments not raised on appeal, "[i]n most cases, an issue abandoned on appeal should still be dismissed without reaching the merits.").

[2] 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).

petitioner does so, we then conduct a final merits determination to decide whether the evidence in its totality demonstrates that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[3]

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate that they warrant 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,[4] grant a national interest waiver if the petitioner establishes that: (1) the proposed endeavor has both substantial merit and national importance; (2) they are well-positioned to advance their proposed endeavor; and (3) on balance, waiving the job offer and thus labor certification requirements would benefit the United States. *Id.* The Petitioner bears the burden of establishing her eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

II. EB-2 CLASSIFICATION

The Director determined that the Petitioner did not establish that she qualifies for underlying EB-2 classification as an individual of exceptional ability as she did not satisfy at least half of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii), which requires her to meet at least three of the following evidentiary criteria: "(A) An official academic record showing that the [she] 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; (B) Evidence in the form of letter(s) from current or former employer(s) showing that [she] has at least ten years of full-time experience in the occupation for which [she] is being sought; (C) A license to practice the profession or certification for a particular profession or occupation; (D) Evidence that [she] has commanded a salary, or other renumeration for services, which demonstrates exceptional ability; (E) Evidence of membership in professional associations; or (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." *Id.* The Director determined that the Petitioner's documentation only satisfied the licensure criteria and did not meet the remaining five of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (D), (E), (F).

Upon de novo review, and at the outset, we disagree with the Director's finding that the Petitioner did not provide an academic record relating to the area of her exceptional ability. The plain language of the regulations requires an official academic record showing she 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). Here, the record includes a high school course diploma in nursing technician and the underlying program transcript reflecting that course of study, one of her claimed areas of exceptional ability, which meets the plain meaning of this regulatory requirement. We thus withdraw the Director's finding to the contrary. Nevertheless, for the following

[3] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the exceptional ability context. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

[4] *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 holding that USCIS' decision on a national interest waiver is discretionary in nature).

reasons, the record does not establish that the Petitioner is eligible for the EB-2 classification as she still has not met at least three of the six regulatory criteria.

Although the record includes many reference letters from the Petitioner's former employers for the next criteria, they do not show that she has at least ten years of full-time experience in the occupation for which she is being sought. 8 C.F.R. § 204.5(k)(3)(ii)(B). None of the letters she submitted indicate she previously worked or currently works full-time. Additionally, only one letter from [redacted] human resources manager lists specific dates of employment only covering several months in 2010 during which the letter writer states that the Petitioner worked as a nursing technician but provides no description of the work experience. The remaining employer letters lack specific dates of the claimed employment and only partially list months and years of her prior work experience. The letters also do not satisfy the requirements of 8 C.F.R. § 204.5(g)(1) for employer letters submitted as evidence of qualifying work experience. For instance, the letters provide either no description or only general descriptions of the Petitioner's duties and the various job titles/roles she held—including owner or CEO of a health spa, beautician, cosmetologist, independent nursing technician, stylist, and aesthetician. *Id.* (requiring that employer letters provide specific description of duties performed). The Petitioner also submitted a self-employment letter indicating that she "worked as an independent (Home Care) Nursing Technician/Aesthetics" from August 2010 to December 2014. This letter also does not indicate she worked full-time during this period and only lists general descriptions of her multiple job duties, comprising "facial treatment and skin cleaning," "body massage," "lymphatic drainage," "hair removal in general," "waxing in general," "eyebrow designer," and "performing bioimpedance test." Further, although one letter states that the Petitioner is an owner of a health spa in [redacted] Florida, it is from her business partner who is not her employer. Similarly, another letter stating that she is the "OWNER and CEO" of a clinic in Brazil is from a human resources employee. Consequently, even when considered collectively, the employer letters, including the self-employment letter, do not show the requisite ten years of full-time experience. While we acknowledge her appeal assertions reiterating the contents of the same letters and her qualifications in part based on her experience as a self-employed individual, she has not submitted "letters from current or former employer(s)" establishing that she has at least ten years of full-time experience in the occupation for which she is being sought, as required. 8 C.F.R. § 204.5(k)(3)(ii)(B).[5]

As evidence of membership in professional associations, 8 C.F.R. § 204.5(k)(3)(ii)(E), the Petitioner submitted membership certificates for "Union of Integrative and Complementary Therapy Therapists of Parana" and "National Council of the Beauty Professionals and the Union of Integrative and Complementary Therapists of Parana."[6] To meet the plain language requirements of professional membership, the Petitioner must show actual membership at or before the filing of the petition and that the association is professional in nature. The relevant regulations further defines *profession* as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into

[5] We also note that the Petitioner's claim on her Form ETA-750B that she worked 20 hours a week as a nursing technician at a hospital for 10 years from 2010 to 2020 is uncorroborated and inconsistent with her own resume and the employer letters she submitted, which do not reflect the claimed work experience as nursing technician during the referenced period. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that where there are inconsistencies, petitioners must resolve the discrepancies with independent, objective evidence pointing to where the truth lies).

[6] She also submitted membership documents for a nursing council in Brazil, but does not assert this membership constitutes membership in a professional association on appeal. We thus deem any potential claim related to this group waived for purposes of this appeal. *Matter of Garcia*, 28 I&N Dec. at 693 n.1 (holding that issues not raised on appeal are waived).

the occupation." 8 C.F.R. § 204.5(k)(2). Here, the evidence does not show that the Beauty Council and the Union are professional in nature. The Petitioner does not claim, and the record does not show, that her membership in these associations required her to hold a U.S. or foreign equivalent baccalaureate degree. Although she submitted below general one-page informational statement for each association describing their origins, values, roles, and benefits of being a member, these documents do not mention any membership requirements or criteria that would permit inquiry into the claimed professional nature of these groups. The Petitioner thus has not met this requirement.

As evidence of professional recognition for achievements and significant contributions to the industry, as required under 8 C.F.R. § 204.5(k)(3)(ii)(F), the Petitioner submitted many recommendation letters which she asserts is sufficient to satisfy this criterion. The support letters from colleagues generally state that she is a highly qualified, excellent esthetician who has a genuine passion for and vast knowledge of the profession, generating high admiration from other colleagues and business owners; and the letters from her former clients generally praise her exceptional professionalism, care, and competence. She also submitted copies of photographs indicating she was interviewed by various individuals and short articles recognizing her clinic work as a successful wellness specialist focusing on weight loss. However, while we acknowledge her claim that she received some media recognition, the interview photographs themselves do not indicate the reasons for the interviews or their content. Further, although the news articles recognize some of her past achievements in utilizing unique weight loss methods and her business expansion, these reports do not discuss whether or how she made "significant contributions to the industry or field." 8 C.F.R. § 204.5(k)(3)(ii)(F). There is also no indication that the interviews and news stories were in fact done by "peers, governmental entities, or professional or business organizations." *Id.* Further, the letters from colleagues and former customers generally praising the Petitioner's professional skills, knowledge, and background as well as her past successes in performing her jobs do not evidence that she has received "recognition for achievements" and made "significant contributions to the industry or field." *Id.* Although the Petitioner also highlights her training certificates, these documents do not otherwise satisfy this requirement, and she has not submitted any other relevant evidence to meet it.

As for the last remaining dispositive criterion, she does not dispute or address the Director's conclusion that the Petitioner did not submit any evidence of ever having commanded a salary, or other remuneration for services, which may be indicative of exceptional ability, and she thus has not met this requirement. 8 C.F.R. § 204.5(k)(3)(ii)(D). Consequently, considering the foregoing, the Petitioner has not established her eligibility for the EB-2 classification as a person of exceptional ability as she has not satisfied at least three of the six evidentiary criteria for establishing exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we are not required to reach a final merits determination.

Without first establishing her eligibility for EB-2 classification, the Petitioner cannot qualify for a national interest waiver. We thus decline to reach her eligibility for a discretionary national interest waiver under the *Dhanasar* framework and hereby reserve her arguments on whether she meets all three requisite prongs as set forth in *Dhanasar*. *See, e.g.*, *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (holding that agencies are not required to reach issues that are unnecessary to the ultimate decision).

ORDER: The appeal is dismissed.