U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30217246

Date: MAR. 21, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a speech language pathologist, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, 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 for 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

To establish eligibility for a national interest waiver, a petitioner must first demonstrate 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. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

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).

If 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. 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,[1] 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

A. EB-2 Classification

The Petitioner asserts that she qualifies for the EB-2 classification as an advanced degree professional. The Director concluded that the record established the Petitioner earned the foreign equivalent of a U.S. bachelor's degree; however, she had not provided adequate evidence to establish she had five years of progressive experience. On appeal, the Petitioner states the Director "wrongfully stated" that [she] does not qualify as an advanced degree professional, but does not identify where the Director has erred. Instead, the Petitioner states that the Petitioner has over 15 years of experience and to "refer to the record."

Upon review of the record, we conclude that the Petitioner has not established that she qualifies as an advanced degree professional under section 203(b)(2)(B)(i) of the Act, 8 C.F.R. § 204.5(k)(1). The record contains evidence that the Petitioner obtained "*Bacharel em Fonoaudiologia*" in 2008 from [redacted] in Brazil. The record includes a diploma, educational transcripts showing four years of education, along with an academic evaluation which states that she obtained the equivalent of a U.S. bachelor's degree in phonoaudiology. The evidence establishes that the Petitioner has the foreign equivalent of a U.S. bachelor's degree.

In support of her five years of progressive experience, the Petitioner submitted her resume, letters of employment, and recommendation letters. However, the letters do not meet the requirements under 8 C.F.R. § 204.5(g)(1) and do not establish qualifying experience.[2] For example, the Petitioner submitted a letter from her accountant listing her employment history, but this letter is not from a current or former employer. In another instance, the Petitioner submitted a letter from [redacted] which states that they were partners. However, [redacted] also states, "[t]here are cases where we worked together but this rarely occurred." It is not clear that [redacted] had firsthand knowledge of her duties since he stated that they rarely worked on cases together. Therefore, this letter also does not meet the requirements of 8 C.F.R. § 204.5(g)(1).

[1] *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).

[2] 8 C.F.R. § 204.5(g)(1) states, in part, "[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 the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered."

The next letter was submitted in 2023 in response to the request for evidence (RFE) and comes from [redacted] This letter states that the Petitioner worked for [redacted] part-time from July 2008 to November 2013. However, this contradicts a letter submitted in 2019 by the same individual, which states that she worked with the Petitioner for the same time period at [redacted] The 2023 letter states that she referred patients to the Petitioner and the Petitioner in turn, referred patients to her; however, it does not say that they worked directly together or that she was her employer working for [redacted] as the employment verification letter states.

The next employment letter submitted in 2023 in response to the RFE, comes from the clinical director of [redacted] stating that the Petitioner worked as a full-time speech therapist from June 2008 to November 2013. However, this contradicts a 2019 letter in which the same individual states, "[h]er role was as a service provider (i.e. no employment relationship with the clinic)." In addition, the Petitioner's resume lists that this was part-time employment and not full-time as the employment letter claims.

Lastly, the Petitioner submitted a letter from [redacted] where she asserts that she worked from March 2011 to November 2013. This letter is written by the owner and coordinator of [redacted] This letter appears to meet the requirements under 8 C.F.R. § 204.5(g)(1); however, it only covers approximately two years and eight months, and not five years as required under 8 C.F.R. § 204.5(k)(2).

The Director addressed the above contradictions in her RFE and in the decision. Neither the RFE response nor the appeal address these contradictions or present clarifying evidence. The Director also determined that the Petitioner did not qualify for exceptional ability. The Petitioner does not argue exceptional ability on appeal and an issue not raised on appeal is waived. *See, e.g., Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). Because the Petitioner has not submitted evidence that she holds an advanced degree or foreign equivalent degree, or a bachelor's degree followed by five years of progressive post-baccalaureate experience, she has not established her eligibility for classification as a member of the professions possessing an advanced degree under section 203(b)(2) of the Act.

B. National Interest Waiver

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education.

However, the record contains conflicting information regarding the Petitioner's proposed endeavor. The Petitioner's proposed endeavor as presented in her professional plan dated July 2019, and initially submitted with her petition, states that her proposed endeavor is, "to work with a health care facility or school to provide expert advice and treatment to patients in the area of speech language pathology and treatment." Therefore, her proposed endeavor at the time of filing was to work as a speech language pathologist.

However, the record reflects that a business plan was submitted in response to the RFE which states that the Petitioner's proposed endeavor was to direct operation of an interdisciplinary therapy business. She will also serve as a speech language pathologist; however, the business plan emphasizes the operation of the business. The personal plan originally submitted does mention that she often works with interdisciplinary teams, but it makes no mention of operating a business; only working as a speech language pathologist.

In addition, no documents submitted with the initial petition: the petition itself, the personal statement, the expert opinion letter, or any of the supporting letters, mention a business as part of her proposed endeavor; the initial filing only mentions her endeavor of being a speech therapist. All documents that include information on the proposed business are dated after the RFE. A petitioner may not make material changes to a petition that has already been filed in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). Therefore, we will be evaluating the national importance of her proposed endeavor as it was initially submitted.

The record includes information on the industry of speech therapy; how speech therapists evaluate, diagnose, and treat various issues; how crucial treatment is, especially in children, and how there is a growing shortage and demand in the industry. We conclude that the proposed endeavor has substantial merit.

In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar* 26 I&N Dec. at 889. On appeal, the Petitioner asserts that she will be creating jobs with her proposed endeavor. As we are basing our analysis on the original proposed endeavor in the record, there is no evidence that jobs will be created as she will be serving as a speech pathology therapist in health care facilities or in schools. The Petitioner then states that based on her experience and business achievements she will successfully manage her business. Again, based on her originally proposed endeavor, there is no evidence of a business to manage. In addition, evidence of her past experience does not further a claim of national importance. This is more appropriate for a prong two argument where we analyze if the Petitioner is well-positioned to advance the endeavor.

The Petitioner points to the industry reports and articles that were submitted. These pieces of evidence provide background information on what speech therapy is and the substantial merit of speech therapy, however they do not prove the national importance of the Petitioner's specific proposed endeavor. They do not show how her proposed endeavor may have "national or even global implications within a particular field." *Dhanasar* at 889. The record also does not show how her proposed endeavor would impact more than her direct clients. Similarly, in *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893.

The expert opinion letter in the record also emphasizes the field of speech language pathology, the Petitioner's experience, and that her proposed endeavor of working as a speech language therapist is of national importance because it is filling a shortage of healthcare workers in the United States and meeting the demand for these types of services. There is no indication that her proposed endeavor stands to impact or significantly reduce the claimed national shortage. Further, shortages of qualified workers are directly addressed by the U.S. Department of Labor through the labor certification process.

While we do not discuss each piece of evidence individually, we have reviewed and considered the record in its entirety. As the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework, the Petitioner has not demonstrated eligibility for a national interest waiver. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the *Dhanasar* framework *See INS v. Bagamasbad,* 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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).

III. CONCLUSION

The Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework. We therefore conclude by a preponderance of the evidence that the Petitioner has not established that she is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.