U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30338728

Date: MAR. 21, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, seeks classification as an advanced degree professional. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish either the Petitioner's qualification as an advanced degree professional or that a waiver of the job offer requirement is in the national interest. 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 immigrant classification, as either a member of the professions holding an advanced degree 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 United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by at least 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. *Id.*

Once a petitioner demonstrates eligibility as either an advanced degree professional or an individual of exceptional ability, the petitioner must then establish eligibility for a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither 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 USCIS may, as a 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

The Director concluded that the record does not demonstrate that the Petitioner qualifies for the EB-2 classification. The Director also concluded that the record does not demonstrate the national importance of the proposed endeavor, that the Petitioner is well-positioned to advance it, or that, on balance, waiving the job offer requirement would benefit the United States. The Petitioner proposes to work as an entrepreneur, developing and selling an ice cream product that she describes as "a guilt-free dessert option" that is high in protein and low in sugar.

A. The Petitioner's Qualification for the EB-2 Classification

The Petitioner claims to qualify for the EB-2 classification as an advanced degree professional, based upon obtaining a bachelor's degree followed by at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2). The Director concluded that although the Petitioner obtained a bachelor's degree,[2] she did not demonstrate five years of post-baccalaureate experience in the specialty.

To document her work history, the Petitioner submitted letters from four prior employers. The letters reflect that the Petitioner was employed as follows:

- As a pastry chef from January 19, 2017 to February 28, 2018 (approximately 13 months)
- As a hostess and then senior hostess at a restaurant from March 24, 2018 to January 28, 2019 (approximately 10 months)
- As a restaurant operations manager from March 20, 2020 to February 28, 2021 (approximately 11 months)
- As a chief of operations for a bakery shop from March 1, 2021 to February 28, 2022 (approximately 1 year)

[1] *See also Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and the Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver is discretionary in nature).

[2] The record shows that the Petitioner obtained a bachelor's degree from the [redacted] in hotel and restaurant management in 2016.

Additionally, the Petitioner claims that she operated a business making and selling ice cream from September 2018 to March 2020. In a statement, the Petitioner states that she tested and developed a low-sugar, high-protein ice cream recipe and obtained lab testing to confirm the nutritional content and safety of the product. The Petitioner states that she established relationships with several restaurants, cafes, and other retail points in [redacted] Peru to sell her ice cream.

The Director concluded that, although the letters indicate that the Petitioner "was employed from January 2017 to present in various positions," the evidence did not demonstrate that the Petitioner obtained five years of "progressive" experience in the specialty as "demonstrated by advancing levels of responsibility and knowledge." The Director specifically cited to the Petitioner's employment as a restaurant hostess as not being progressive in nature. The Director also noted that the Petitioner's endeavor is to be an entrepreneur operating an ice cream business, but that the letters did not demonstrate the Petitioner has experience in entrepreneurialism.

On appeal, the Petitioner asserts that the Director did not carefully review the evidence in the record. The Petitioner contends that she does have entrepreneurial experience, based upon operating her business in Peru. Additionally, the Petitioner notes that the Director, when listing in the decision the employment letters summitted, did not include one of the employment letters in this list. The Petitioner also notes a typographical error in the decision's list of employment letters, specifically that the decision provides the translator's name in place of the letter writer's name in two instances.

Despite the typographical error and the omission of one of the letters from the list in the decision, we conclude that the Petitioner has not established sufficient legal or factual error in the Director's decision. Although the decision omits one of the employment letters initially submitted, the decision does list another letter from the same employer, representing the same period of employment, that was submitted in response to the request for evidence (RFE). Therefore, the Director presumably did consider this period of employment in their decision. Additionally, the use of the translator's name appears to be a typographical error that is, at most, harmless. *See generally Matter of O-R-E-*, 28 I&N Dec. 330, 350 n.5 (BIA 2021) (citing cases regarding harmless or scrivener's errors). The Petitioner has not established that this typographical error resulted in the Director not considering the substance of the evidence.

Moreover, we agree with the Director that the Petitioner has not established that she possesses five years of progressive experience in the specialty. Although working as a restaurant hostess relates to the food service industry generally, the record does not establish how experience as a hostess represents additional progressive experience related to the specialty of manufacturing and selling ice cream. We further note that the employment letters, taken together, establish less than four years of experience. Although the Petitioner claims that she has additional experience operating a business, upon de novo review, we conclude that the Petitioner did not submit sufficient evidence to establish this claim. The Petitioner submitted only her own statement, affidavit, and a copy of her resume to demonstrate this period of self-employment. The Petitioner did not submit independent, documentary evidence to support her claims about operating this business, such as business registration documentation, evidence of sales, invoices, tax returns, or letters from employees or business partners regarding her job duties that would support her statements about operating a business. Additionally, the employment dates on the Petitioner's resume overlap with other employment, creating a lack of clarity as to when the Petitioner began operating the business. Finally, the Petitioner's statement and

affidavit lack sufficient details regarding the Petitioner's business operations and the specific duties that the Petitioner performed. We conclude that, without additional relevant, probative, and credible evidence, the Petitioner has not met her burden of proof to demonstrate her qualifying progressive experience in the specialty. *See Matter of Chawathe*, 25 I&N Dec. at 376.

Because the Petitioner has not demonstrated that she possesses at least five years of post-baccalaureate progressive experience, the Petitioner does not qualify as an advanced degree professional. Having determined that the Petitioner does not qualify as an advanced degree professional, we conclude that the Petitioner has not demonstrated eligibility for the underlying EB-2 classification.

B. The Petitioner's Eligibility for a National Interest Waiver

The next issue is whether the Petitioner has established that a waiver of the classification's job offer requirement is in the national interest. Because the Petitioner has not established that she meets the threshold requirement of eligibility for the underlying EB-2 classification, we need not address whether she is eligible for, and merits as a matter of discretion, a waiver of that classification's job offer requirement. *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 the applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not established that she satisfies the regulatory requirements for classification as a member of the professions holding an advanced degree. 8 C.F.R. §§ 204.5(g)(1), (k)(2). Because the Petitioner has not demonstrated eligibility for the underlying EB-2 immigrant classification, we conclude that the Petitioner is not eligible for a national interest waiver. We reserve our opinion regarding whether the Petitioner has satisfied any of the three prongs of the *Dhanasar* analytical framework.

ORDER: The appeal is dismissed.