U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34867479

Date: NOV. 05, 2024

Appeal of Texas Service Center Decision

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

The Petitioner 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 record did not establish that the Petitioner qualifies for EB-2 classification as an alien of exceptional ability or that the Petitioner was eligible for the requested national interest waiver. 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 qualify for the underlying EB-2 visa classification, a petitioner must establish they are an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act.

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 at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] 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 the requisite degree of expertise and will

[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).

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

substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate 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,[3] 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.

Id.

II. ANALYSIS

The Petitioner has not claimed she is a member of the professions holding an advanced degree, nor does the record contain evidence that the Petitioner previously earned a U.S. baccalaureate degree or its foreign equivalent. Therefore, to qualify for EB-2 immigrant classification, the Petitioner must establish she is an individual with exceptional ability in the sciences, arts, or business.

A. Individual of Exceptional Ability

The Director concluded that the Petitioner is not an individual of exceptional ability because she only satisfied two of the six regulatory criteria, 8 C.F.R. §§ 204.5(k)(3)(ii)(A) and (B), relating to attainment of a degree, diploma, certificate, or similar award and ten years of full-time experience in the occupation. On appeal, the Petitioner contends that, in addition to these two criteria, she meets the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D) and (F), relating to commanding a salary or remuneration demonstrating exceptional ability and recognition of achievements and significant contributions to her industry. The Petitioner does not assert error in the Director's conclusions regarding the remaining criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(C) and (E), nor does she claim to meet these criteria on appeal; therefore, we consider the issue of eligibility under these criteria to be waived. *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).

Upon de novo review of the record, we agree with the Director's determination that the Petitioner has not established she is an individual of exceptional ability as she has not met at least three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii).

[3] *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).

Evidence that the Petitioner has commanded a salary, or other remuneration for services, which demonstrate exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D)

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*.[4]

On appeal, the Petitioner asserts the Director did not provide an explanation as to why the submitted evidence was insufficient to meet this criterion and contends that, "contrary to [the Director's conclusion]," the record did establish that the Petitioner's salary was due to her exceptional ability. However, while we acknowledge the brevity in which the Director discussed this criterion, the Director's decision does address the Petitioner's salary evidence in the record as well as her employment letters, and explains that the evidence did not establish that she commanded a salary which demonstrated exceptional ability. Moreover, for the reasons discussed herein, we agree with the Director's conclusion that the record does not establish the Petitioner's satisfies this criterion. And therefore, any alleged error is, at most, harmless. *See generally Matter of O-R-E-*, 28 I&N Dec. at, 350 n.5 (citing *Japarkulova v. Holder*, 615 F.3d 696, 701 (6th Cir. 2010) (stating that error is harmless where there is no "reason to believe that . . . remand might lead to a different result" (citation omitted))).

To support this criterion the Petitioner highlights the letter provided by S-B- in which they commend the Petitioner for her successful execution of multiple projects surrounding the centralization of data centers, asserting that the Petitioner is among the "highest top data center and [c]yber [s]ecurity specialists in the industry." However, while this letter is complimentary to the Petitioner's expertise and her execution of the data center centralization projects, the letter does not discuss the Petitioner's remuneration, or otherwise establish that the Petitioner commanded a salary or remuneration that is demonstrative of her claimed exceptional ability.

We are also not persuaded by the pay records and salary data submitted in the record. The Petitioner provided evidence of her salary earnings and bonuses received in the years between 2019 to 2022, with her highest earnings occurring in 2019 with a cumulative remuneration of 233,796 Brazilian real (BRL) inclusive of a base salary of BRL 198,032.28 and bonuses totaling BRL 35,763.96. The record also contains a letter from her employer between 2018 to 2020, stating that she held the position of delivery lead and noted that her earnings were the result of "her significant contribution to [redacted] as well as her achievements compared to her peers," and that the Petitioner was a recipient of a top percentage bonus reserved for "the most valued and high-performing individuals in the company." Notably, while her employer compared her achievements to other employees within their company, the letter does not establish that her salary relevant to others working within her field demonstrated exceptional ability.

And the salary reports from payscale.com and salary explorer also do not establish the Petitioner's salary is demonstrative of exceptional ability. First, the Petitioner asserted that the printout from payscale.com showed that the average salary for an information technology project manager is $89,000. However, the printout from payscale.com indicates that the information provided is for

[4] See 6 USCIS Policy Manual, supra, at F.5(B)(2).

"support analyst, information technology" salaries, and was calculated based on 11 salaries provided, without identify the area of employment of these individuals. And the printout from payscale.com states that support analysts, information technology generally are responsible for day-to-day technical support of technological systems, whereas the letter from [redacted] confirming the Petitioner's salary indicates that in her role of delivery lead she was responsible for managing projects and operational teams. Accordingly, the Petitioner has not shown that the payscale.com report provides a comparison to others working in her position within the field. Likewise, the additional salary information from salary explorer provides "information technology average salaries in Brazil," and indicates that a person working in the information technology field typically earns BRL 8,820 per month (BRL 105,840 annually) with the highest average salary reaching BRL 14,000 per month (BRL 168,000 annually). Here again, while the Petitioner asserts in the record that this salary report establishes the average salary for information technology project managers, the report itself only refers to individuals "working in [i]nformation [t]echnology," without identifying both the source of the salaries or the positions covered. Moreover, these reports do not indicate whether they are for a specific area in Brazil or the country as a whole, and therefore do not constitute a basis for comparison of the Petitioner's earnings to other working in her field in the same location and time period.

Without more, we agree with the Director that the Petitioner does not satisfy this criterion.

> *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 plain language of this criterion requires the Petitioner to establish that she has received recognition for "achievements *and* significant contributions to the industry or field." The Director acknowledged the evidence in the record, including multiple recommendation letters attesting to the Petitioner's competency and success in her prior positions, but concluded that the record did not demonstrate the Petitioner had made significant contributions to her field.

On appeal, the Petitioner generally disagrees with the Director's conclusions, asserting that the letters contained in the record do establish the Petitioner's "recognition of achievements and significant contributions to IT." And the Petitioner claims that even though she was working in the capacity of an employee, this does not limit "her significant achievements in the field," asserting that the evidence in the record shows that that her work led to broader contributions because she was providing "critical services for IT infrastructure that [benefited] people in entire regions." Additionally, she asserts that her work led to the creation of jobs ultimately benefiting her employer's customers and employee.

Upon de novo review, we agree with the Director that, while the record contains numerous letters from the Petitioner's former employers, colleagues, and peers praising her skills and abilities, along with evidence of various awards and recognition she received from her prior employers, she has not shown significant contributions to her field. While we agree that a person's designation as an employee does not diminish their ability to significantly contribute to their field, the Petitioner has not shown that her contributions benefiting her employers and their customers resulted in *significant* contributions to her field. The letters also do not substantiate the Petitioner's assertions of the greater benefit derived from her work, as they focus specifically on the benefits to their respective company's operations and

customer base. A petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

On appeal, the Petitioner points again to the letter form S-B- detailing the Petitioner's success in executing two critical data center centralization projects, which resulted in reduced costs for the company and the centralization of data center employment resulting in an increase of employees in the centers located in the United States and Brazil. But, while we acknowledge the writer's assertions commending the Petitioner's successful execution of this complex project, the letter does not explain how her work contributed to the field more broadly, beyond impact the company's operations and its employees.

The letter from M-L- who worked with the Petitioner on a project to update the business service management tool (BSM) for [redacted] group commended the Petitioner's expertise and execution of their assigned projects. In particular, M-L- states that due in part to the Petitioner's work on the BSM project, the company was able to substantially reduce its monthly maintenance costs and reduce lost revenue. And M-L- also confirms that the project team was able to drastically reduce downtime in the [redacted] environment and improve the experience for its end users. While this letter details the contributions the Petitioner helped make for her employers and customers, the letters do not explain how this resulted in significant contributions to her field. Similarly, the expert opinion letter provided in the record also concludes that the Petitioner's contributions outlined in her letters of recommendation indicate that the benefits were limited to her employers, as the expert confirms that these letters "describe not only her role and responsibilities but *also her professional accomplishments and, thus, how she has benefited the company.*"

We have also reviewed the evidence of awards the Petitioner received during her employment, including multiple awards received from her employers and colleagues recognizing her contribution to the success of their company, and conclude that these do not indicate significant contributions to the field more widely, as they appear to be limited to her employer. For the reasons discussed, we agree that the Petitioner did not meet this criterion.

While we acknowledge the Petitioner has had a successful career, the record does not establish that she meets at least three of the evidentiary criteria at 8 C.F.R. §§ 204.5(k)(3)(ii). Because the Petitioner did not satisfy the initial evidence requirements, we need not conduct a final merits analysis to determine whether the evidence in its totality shows that she is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability.

B. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. Here, the Petitioner has not established eligibility for the underlying EB-2 immigrant classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding the Petitioner's eligibility for a national interest waiver under the *Dhanasar* analytical framework.

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).

III. CONCLUSION

As the Petitioner has not established that she qualifies for EB-2 classification, the appeal will be dismissed.

ORDER: The appeal is dismissed.