U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33966106

Date: NOV. 18, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in the restaurant industry, 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 the record did not establish that the Petitioner was an individual of exceptional ability and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The matter is now before us on appeal. 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

[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] U.S. Citizenship and Immigration Services (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.

in its totality shows that they are recognized as having the requisite degree of expertise and will 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

A. Exceptional Ability

The Director concluded the Petitioner met four of the six evidentiary criteria, official academic records, more than ten years of full-time experience, license to practice the profession, and recognition for achievements and significant contributions to the industry, at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (C), and (F), but that, upon review of the evidence its totality, had not established she is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. While we agree with the Director's ultimate conclusion, for the reasons discussed below, we disagree the Petitioner meets the license to practice the profession and recognition for achievements and significant contributions to the industry at 8 C.F.R. § 204.5(k)(3)(ii)(C) and (F).

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

Upon review, we disagree with the Director's conclusion that the Petitioner met this criterion, and hereby withdraw it. Notably, the Petitioner did not claim to have met this criterion, and the Director did not provide any explanation for their conclusion. The record includes copies of her business licenses which only establish that her businesses are allowed to operate at specific addresses in China. The Petitioner has not, however, demonstrated that she holds a license to practice the profession[4] or a certification for a particular profession or occupation as required by the plain language of the regulation. Therefore, the Petitioner has not established eligibility for this criterion.

[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).

[4] The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation having a minimum requirement of a U.S. bachelor's degree or foreign equivalent degree for entry into the occupation.

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).

We also disagree with the Director's determination that the Petitioner met this criterion, and hereby withdraw it. The Petitioner's evidence consisted of letters of recommendations from associates, awards, certificates, and media articles for her restaurants. While the letters of recommendation commend the Petitioner's services, the personal recognitions described and documented in the letters do not demonstrate that she has been recognized for "achievements and significant contributions" to the broader restaurant or entrepreneurial industry. Similarly, although the awards, certificates, and media articles show the Petitioner's success with her ventures, they also do not establish the Petitioner's recognition for significant contributions to the industry.[5]

The plain language of the regulation calls for "evidence of recognition for achievements *and* significant contributions to the industry or field." As such, materials that identify an individual's achievements but not significant contributions to the industry or field cannot suffice to satisfy the regulatory requirements. *See Matter of Echeverria*, 25 I&N Dec. 512, 518 (BIA 2011) (holding that the use of the conjunction "and" in a series of regulatory requirements "is a clear indication" that one "must satisfy each of the [listed] requirements"). While we acknowledge the Petitioner's assertions on appeal that she has "affected the broader industry" because she has "secured numerous trademarks for her original business management and brand identities, earned respect, attention, and support of several prominent figures in the industry, been featured in important media with national reach, and won several awards," the evidence does not show that she has made a significant contribution to the industry. Therefore, the Petitioner has not established eligibility for this criterion.

On appeal, the Petitioner asserts she also submitted sufficient evidence to meet the salary criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) and maintains she qualifies for EB-2 classification as an individual of exceptional ability.

Evidence that the individual has commanded a salary, or other renumeration for services, which demonstrates 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*.[6] The Petitioner provided an August 24, 2023, employment verification letter, which shows her payments from 2020 to July 2023 are as follows as a top executive:

Year of 2020: RMB 638,000 yuan
Year of 2021: RMB 313,000 yuan
Year of 2022: RMB 332,000 yuan
Year of 2023 (as of July): RMB 676, 715

[5] We also note that the record lacks any independent information as to the requirements associated with these awards and certificates, only descriptions from the Petitioner explaining the respective awards and certificates.
[6] *See generally* 6 USCIS Policy Manual, *supra*, at F.5(B)(2).

A new letter was provided on February 27, 2024, which confirms the payments for 2020-22, but updates Year 2023 to RMB 2,524,715 yuan. The new figure references her total remuneration for 2023, which includes 1,848,000 yuan in shareholder dividends.

The Petitioner also submitted a printout from Payscale for the average chief executive officer salary in China, records of shareholder dividends paid to the Petitioner, and a printout of the U.S. Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics related to chief executives in food services and drinking services in the United States.

The printout from Payscale shows that the average base salary for a chief executive officer in China is RMB 1,504,325 a year in 2023, based on "18 salary profiles." Notably, the printout also shows that the highest pay for a chief executive officer in China is RMB 4 million a year, which is significantly more than the Petitioner's highest total remuneration (which included dividend payments) of RMD 2,524,715 in 2023. [7] Regardless, the information from Payscale relies on salary alone, and does not indicate that it includes shareholder dividends and, therefore, is not a proper comparison. Further, the printout does not offer sufficient information or details to verify the applicability and accuracy of the stated salary information. For instance, the printout lacks such critical information as the date range to which the data refers, how the data was compiled, the statistical significance of the data, and other indications of the reliability and comparability of this data to the Petitioner's occupation.

Moreover, the BLS wage data reflects that the mean salary nationwide in the United States for chief executives in "Food Services and Drinking Places" was $136,650 in May 2022. However, the Petitioner has not established the relevance of the U.S. mean salary at a time when she was not working in the United States.

For the foregoing reasons, the Petitioner has not demonstrated that she has commanded a salary indicative of exceptional ability in satisfaction of this criterion.

B. Final Merits Determination

Even though the Petitioner has not established that she meets three of the six evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii), we nonetheless have reviewed the record in the aggregate and agree with the Director that the record does not establish the Petitioner possesses a degree of expertise significantly above that ordinarily encountered in her field.

In reviewing the totality of the evidence in a final merits determination, we consider the quality of the evidence.[8] While we acknowledge the evidence demonstrates the Petitioner has education, training, experience, and a successful career in the restaurant industry, this evidence does not establish she possesses expertise significantly above that ordinarily encountered in the field.

[7] We note that profits earned by a business entity of which the Petitioner is a shareholder do not provide evidence of the Petitioner's income because a corporation and an individual are two separate legal entities. *See Matter of Soffici*, 22 I&N Dec. 158, 162 (Assoc. Comm'r 1998). This is true even if the individual is the sole shareholder of the business. *See id.* at 161-63.

[8] *See also* 6 USCIS Policy Manual, *supra*, F.5(B)(2).

On appeal, the Petitioner states that she "has set herself apart from a business management standpoint, culturally with award winning dishes, and among other international culinary enterprises" and that "[h]er achievements are above and beyond her peers in the field, as especially exemplified by these three awards," Recognition by [redacted] Gold Award in China [redacted] Festival, and Top 10 Most Popular Global Food Restaurants in [redacted] However, the record lacks any independent information as to the requirements associated with these awards and certificates, only descriptions from the Petitioner explaining the respective awards and certificates. Thus, the awards do not establish she has a degree of expertise significantly above that ordinarily encountered in the field.

Moreover, as noted above, the Petitioner asserts that she has "affected the broader industry" because she has "secured numerous trademarks for her original business management and brand identities, earned respect, attention, and support of several prominent figures in the industry, been featured in important media with national reach, and won several awards." However, she does not show how such evidence demonstrates her expertise is significantly above others in her field.

The record, including the evidence discussed above, does not establish the Petitioner's eligibility as an individual of exceptional ability as it does not demonstrate that she meets three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) or that she has obtained a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).[9]

C. National Interest Waiver

The Petitioner has not established that she is eligible for the EB-2 classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the remaining issues, including whether she is eligible for a national interest waiver. *See INS v Bagamasbad*, 429 U.S. 24, 25 ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reached"); *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 demonstrated that she qualifies as an individual of exceptional ability under section 203(b)(2)(A) of the Act. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.

[9] *See also* 6 USCIS Policy Manual, *supra*, F.5(B)(2).