U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33940128

Date: SEPT. 30, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a self-enrichment teacher, 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 U.S. Citizenship and Immigration Services (USCIS) has discretion to excuse job offers in this category – and thus related requirements for certifications from the U.S. Department of Labor (DOL) – if petitioners demonstrate that waivers of these U.S.-worker protections would be "in the national interest." Id.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established that she is an individual of exceptional ability. The Director also concluded that the Petitioner had not established 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). Exercising de novo appellate review, see *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the record does not support a national interest waiver because the Petitioner has not established that she is a person of exceptional ability. We will therefore dismiss the appeal.

I. LAW

To qualify for a national interest waiver, a petitioner must first show eligibility 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.[1] Section 203(b)(2)(B)(i) 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

[1] As the Petitioner has not claimed to qualify as a member of the professions holding an advanced degree, we need not address the separate requirements for that classification.

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, in and of itself, establish eligibility for this classification.[3] 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 a degree of expertise significantly above that ordinarily encountered in the field.

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,[4] 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. Regulatory Criteria for Exceptional Ability

The Director found that the Petitioner met at least three of the six categories of evidence as an individual of exceptional ability, but then found that the Petitioner ultimately was not an individual of exceptional ability based on the final merits determination. On appeal, the Petitioner argues she meets five categories of evidence as an individual of exceptional ability. Upon de novo review, we withdraw the Director's findings that the Petitioner met at least three of the criteria and find that she only meets one category. Therefore, we conclude that the Petitioner does not qualify for EB-2 classification as an individual of exceptional ability, and she is not eligible for the waiver.

On appeal, the Petitioner also contends that the Director was required to send her a notice and opportunity to respond if the Director was considering revoking their "approval" as an individual of exceptional ability pursuant to Matter of V-S-G- Inc., Adopted Decision 2017-06 (AAO Nov. 11, 2017). Matter of V-S-G- involved the revocation of an approval and its analysis is not applicable to the instant case because the Director's request for evidence did not constitute a finding of eligibility or approval of a petition. Alternatively, the Petitioner asks us to remand this case to the Director pursuant to Matter of Soriano, 19 I&N Dec. 764, 766 (BIA 1988) which allowed for a remand for the Director to consider new evidence that had not been previously considered. However, unlike in Matter

[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).

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

[4] See also 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 to be discretionary in nature).

of Soriano, the instant appeal does not include new evidence that the Director did not have an opportunity to review.

An official academic record showing that the individual has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional. 8 C.F.R. § 204.5(k)(3)(ii)(A).

Upon de novo review, we agree that the Petitioner has met this criterion. The Petitioner furnished documentation showing she satisfactorily completed 800 hours of an actor training course including 400 hours in dramatic interpretation, 80 hours in body expression, 80 hours in vocal expression, 60 hours in dramatic literature, 60 hours in the history of the performing arts, and 120 hours in interpretation for TV and cinema. We conclude that the furnished academic record meets this category, 8 C.F.R. § 204.5(k)(3)(ii)(A).

Evidence in the form of letter(s) from current or former employer(s) showing that the individual has at least ten years of full-time experience in the occupation for which he or she is being sought. 8 C.F.R. § 204.5(k)(3)(ii)(B).

To meet this criterion, the Petitioner relies on a variety of documents, including a document from a full-time employer for the period of January 2006 through February 2014 and a letter from an accountant confirming her activity as an entrepreneur and owner of a Dance Academy from February 2014 to the present.[5] However, the plain language of this criterion states the evidence must (1) be in the form of letter(s), (2) be from current or former employer(s), and (3) establish at least ten years of full-time experience. Upon review of the record, the Petitioner attempts to document employment from February 2014 through the filing of the waiver application with a letter from the Petitioner's foreign accountant, who was not the Petitioner's employer. This letter does not document full-time employment, but rather that the Petitioner is the owner of the company [redacted][6] We also note that one of the Petitioner's recommenders stated that the [redacted] closed its doors during the pandemic and went online. Without more, we cannot conclude that the Petitioner has met the required elements of this criterion to establish at least ten years of full-time experience in the occupation.

[5] The Petitioner also notes employment coaching dance at a public school and includes payment receipts for "private classes" she has started since September 2023. Because a petitioner must establish eligibility at the time of filing, we cannot consider employment experience earned after filing her petition as supporting evidence. See 8 C.F.R. § 103.3(b)(1) (stating that a petitioner must establish eligibility for the requested benefit at the time of filing). See also Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm'r 1971) (providing that "Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts.").

[6] The regulation at 8 C.F.R. § 204.5(g) states, in pertinent part, that "[e]vidence relating to qualifying experience . . . shall be in the form of letter(s) from current or former employer(s) . . . and shall include the name, address, and title of the writer, and a specific description of the duties performed."

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

The Petitioner provides a statement and letter from the union of professional dancers of the state of Rio de Janeiro indicating she is a union member and asserts that this proves she is a licensed professional to work as a self-enrichment teacher. Specifically, the letter states that the Petitioner has a professional registration number issued by the Ministry of Economy as a Classical Ballet Artist, and extension training in Tap Dancing in 2016 and she is up to date in her dues as of September 2022. Beyond the Petitioner's unsubstantiated assertion however, there is no evidence that being a member of this union is either a license to practice the asserted profession of self-enrichment teacher or a certification for a particular profession or occupation as required by the plain language of the regulation. As such, the Petitioner has not established eligibility under this criterion.

On appeal, the Petitioner also claims that to teach advanced ballet classes you need to have certificates issued by professional institutions and that her certification in Progressing Ballet Technique supports meeting her burden of proof for this category as a certification for a particular profession or occupation. The Petitioner has not provided evidence that such certification is required to teach ballet. We also note that a 2022 reference from a professor at [redacted] listing the Petitioner's courses, seminars, festivals, and events did not include the hours completed for 2018 certification in Progressing Ballet Technique, whereas the reference letter provided hours of work for seven other courses and seminars that the Petitioner participated in, ranging from 4 hours to 800 hours. A petitioner must support assertions with relevant, probative, and credible evidence. See Matter of Chawathe, 25 I&N Dec. at 376.

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

Although the Director concluded that the Petitioner met this criterion, we will withdraw that finding. On appeal, the Petitioner asserts that she commanded renumeration for services that demonstrate her exceptional ability. The Petitioner provided a copy of her income tax return vouchers for 2019, 2020 and 2021. The Petitioner states that "the average gross monthly salary in 2022 for a dance teacher in Brazil is R$ 1,058.49 per month or R$12,701.88 per year" and provides a snippet from catho.com, an employment search website in Brazil, for the position of dance teacher.

Upon de novo review, the catho.com website screenshot does not offer sufficient information or details to verify the applicability and accuracy of the stated salary information. For instance, the screenshot lacks such critical information as the job duties it reflects, the year or date range to which the data refers, how the data was compiled, the statistical significance of the data, the geographic location to which the data pertains, and other indications of the reliability and comparability of this data to the Petitioner's occupation.

For the foregoing reasons, the Petitioner has not established eligibility under this criterion.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The regulation at 8 C.F.R. § 204.5(k)(2) defines a "profession" as an occupation listed at section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32),[7] or an occupation whose minimum requirement for entry is a U.S. baccalaureate degree or its foreign equivalent.

In support of the criterion, the Petitioner relies on her union membership with the union of professional dancers of the state of Rio de Janeiro, [redacted] However, without evidence of the membership requirements, we cannot conclude that [redacted] is a professional association consistent with the regulatory definition at 8 C.F.R. § 204.5(k)(2). Therefore, the Petitioner has not established eligibility for 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).

In support of this criterion, the Petitioner asserts on appeal that she submitted recommendation letters written by the Petitioner's colleagues: professional dancers, a journalist, and dancer-choreographers as well as a 2022 expert opinion letter by [redacted], Professor of Music Education and Program Director of Strings at [redacted].[8] However, these letters and the expert opinion letter do not constitute evidence that the Petitioner has received recognition for achievements and significant contributions to the industry or field, as opposed to being held in high regard by her recommenders. The expert opinion letter restates the Petitioner's resume and provides general commentary on the importance of physical education, the dance industry and the importance of the arts and culture as well as the economics of the arts and culture industry.[9] The evidence that the Petitioner relies on in her appeal does not constitute 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). See Matter of Chawathe, 25 I&N Dec. at 376 (stating that a petitioner's assertions must be supported by relevant, probative, and credible evidence showing that those assertions are "probably" true). As such, the Petitioner has not established this criterion.

B. Comparable Evidence

Under 8 C.F.R. § 204.5(k)(3)(iii), a petitioner may submit comparable evidence to establish eligibility, if USCIS determines that the evidentiary criteria described in the regulations do not readily apply to the occupation. See generally 6 USCIS Policy Manual F.5(B)(2). When evaluating such comparable evidence, USCIS must consider whether the regulatory criteria are readily applicable to the occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation.

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[7] The occupations listed in this section are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

[8] [redacted] is not currently listed on the faculty of [redacted] The [redacted] website does not currently offer a Program for Strings.

[9] As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. Matter of Caron Int'l, Inc., 19 I&N Dec. 791, 795 (Comm'r 1988). However, we will reject an opinion or give it less weight if it is not in accord with other information in the record or if it is in anyway questionable. Id. We are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. Id.

Id. However, general assertions that a listed regulatory criterion does not readily apply to an occupation are not acceptable. Id. Similarly, general claims that USCIS should accept comparable evidence are not persuasive. Id. A petitioner must explain why the evidence submitted is comparable. Id. Here, while we acknowledge that the Petitioner's brief includes a section for "other evidence," she does not claim that any of the evidentiary criteria do not apply or how the listed evidence is comparable. As such, we cannot consider the additional evidence she provides as satisfying the regulatory requirements for exceptional ability.

C. Final Merits Determination

The Petitioner has had a career as a dancer, business owner, and self-enrichment teacher. But 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)(A) through (F). We, therefore, withdraw the Director's determination that the Petitioner has met at least three criteria. Further, since 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).

D. National Interest Waiver

While we agree with the Director that the Petitioner has not established that her endeavor is in the national interest, we decline to reach and hereby reserve remaining arguments concerning eligibility under the three Dhanasar prongs. 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).

It is dispositive of the appeal that the Petitioner has not established that she is an individual of exceptional ability. The appeal will be dismissed for the above stated reason. The burden of proof is on the Petitioner to establish that he or she meets each eligibility requirement of the benefit sought by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. at 375-376. The Petitioner has not done so here and, therefore, we conclude that she has not established eligibility for a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.