U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33377560

Date: SEP. 11, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a sales operation manager entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability in the sciences, arts, or business. *See* 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, 8 U.S.C. § 1153(b)(2)(B)(i). 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 Petitioner did not establish that she qualifies for the underlying visa classification or merits a discretionary waiver of the job offer requirement "in the national interest." The Director dismissed a subsequent combined motion to reopen and reconsider. 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 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.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three

of which must be satisfied, for an individual to establish exceptional ability:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
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> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; or
>
> (F) 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).[1]

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] We then consider the totality of the material provided in a final merits determination and assess whether the record shows that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[3] *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe,* 25 I&N Dec. at 376.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they 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 the statute nor the pertinent regulations define the term "national interest," *Matter of*

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[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[2] *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https: //www.uscis.gov/policy-manual.

[3] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual, supra*, at F.5(B)(2).

Dhanasar, 26 I&N Dec. 884 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that 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.

Id. at 889.

II. ANALYSIS

The Petitioner proposes to be a sales operation manager and intends to offer courses in the field of sales. In her initial cover letter, the Petitioner states that she will accomplish the following goals:

> "I will promote business development in the business field ultimately contributing to the markets in the United States. I will use my knowledge and expertise to expand communication channels in national and international markets, multiplying sales through my consulting expertise by playing a critical role in the marketing process in different segments that involve technical sales, directly impacting several companies and revenues in the United States."

With respect to the underlying EB-2 classification, the Petitioner submitted evidence to support her argument that she meets three of the six criteria of evidence for exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner argued that she had at least ten years of full-time experience in the occupation at 8 C.F.R. § 204.5(k)(3)(ii)(B), commanded a salary demonstrating exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(D), and had recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations at 8 C.F.R. § 204.5(k)(3)(ii)(F). However, the Director concluded that the Petitioner did not meet any of the six criteria. The Director further found that the Petitioner did not merit a discretionary waiver of the job offer requirement "in the national interest." In dismissing the subsequently filed motion, the Director found that the evidence submitted with the motion did not establish the requirements for filing and affirmed their decision to deny the petition. As discussed below, we agree with the Director.

On appeal, the Petitioner reasserts that she is an individual of exceptional ability by satisfying the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B), (D), and (F), and that she establishes by a preponderance of the evidence that she qualifies for the national interest waiver. The Petitioner explains in detail why she is not eligible under the remaining three criteria. After reviewing the evidence in the record, the Petitioner has not demonstrated that she satisfies at least three of the six initial evidentiary criteria and is not otherwise eligible for the requested benefit.[5]

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

[5] While we do not discuss each piece of evidence in the record individually, we have reviewed and considered each one.

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 claims she has more than ten years of experience as a businesswoman and she has created her own business named [redacted] which sells American products to residents in Brazil. The Petitioner submitted several letters of recommendation describing her qualities as a sales specialist, her experience in sales and social media management and her communication skills and interpersonal relationships. The Petitioner's resume indicates that she worked as a businesswoman and a sales manager for at least 10 years. However, the Director determined that the Petitioner did not explain how the evidence she submitted was comparable to that required under 8 C.F.R. § 204.5(k)(3)(ii)(B), or why any of the evidence mentioned in the regulatory criteria could not be obtained. On appeal, the Petitioner resubmits the same letters as below. However, these recommendation letters do not indicate the Petitioner's job responsibilities for the businesses and whether the Petitioner worked full-time. The Petitioner's statements referencing the recommendation letters are not sufficient to demonstrate this criterion. The Petitioner must support her statements with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

We further note that two of the recommendation letters described the Petitioner's skills as a personal shopper and a real estate rental manager. However, these jobs are not related to her occupation as a sales operations manager and are not sufficient to demonstrate she has at least ten years of full-time experience as a sales operations manager. Because the record does not demonstrate that she has at least ten years of full-time experience in her occupation, the Petitioner has not established that she meets the plain language of the criterion.

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

To meet this criterion, the Petitioner submitted information from Salario BR – publicly available data showing that the average salary for professional sales consultants at the master level was BR$3,360.21. The other corresponding salaries were at the trainee, junior, full, and senior levels, covering small, medium and large companies. She also submitted tax documents for 2021 and 2022. In 2022, the Petitioner received a salary of $52,676.00. The 2022 tax documents for [redacted] show the company's gross revenue of $431,082.00 with a profit of $53,208.00.

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 and not just "above average" earnings in her occupation. The Director noted that the Salario BR survey was limited to a sampling of 200 salaries and did not list the year that the salary was validated. Consequently, the Petitioner did not provide a proper analysis of her earnings.

On appeal, the Petitioner has not offered documentation showing that her earnings were indicative of exceptional ability relative to others in the field because the Salario BR information was not contemporaneous with information in the years for which the Petitioner documented in her 2022 salary. Thus, the Petitioner has not offered documentation showing that her earnings are indicative of exceptional ability relative to other sales operation managers. In addition, she presents information

related to sales consultants. This evidence is insufficient to demonstrate that she has commanded a salary or other remuneration for services which demonstrates exceptional ability for sales operations managers. Without more, the Petitioner has not established the average salary for a sales consultant is a proper basis for comparison with the Petitioner's income as a sales operations manager. The Petitioner must support her statements with independent, relevant evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

> *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).

To satisfy the plain language of the criterion, the Petitioner is required to demonstrate that she has been recognized by peers, governmental entities, or professional or business organizations for achievements and significant contributions. In support of this criterion, the Petitioner points to the recommendation letters describing her qualities, experience, work accomplishments, communication skills and interpersonal relationships. However, as the Director correctly observed, this evidence does not demonstrate that she has been recognized by peers, governmental entities, or professional or business organizations for achievements and significant contributions to the industry or field.

On appeal, the Petitioner argues that she meets this criterion because of her resume, her employment authorization card, Salario BR, and the financial records related to [redacted] We note that the Petitioner registered [redacted] however registering a business does not show recognition for achievements or significant contributions to her industry. The letters of recommendation attest to the Petitioner's competence, valuable skillset, expertise and work contributions. However, they do not provide information on how the Petitioner's experience in the field equates to achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. Moreover, the recommendation letters were not accompanied by any corroborative evidence of the impact of the alien's work, such as examples of implementation of her strategies, methodologies or innovations, or how the Petitioner's work has otherwise been recognized in the field or that it has been recognized beyond the work done for her customers. USCIS may, in its discretion, use such letters as advisory opinions submitted by expert witnesses. However, USCIS is ultimately responsible for making the final determination of the individual's eligibility. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). Without documentation showing that the Petitioner has been recognized by peers, governmental entities, or professional or business organizations for achievements and significant contributions to the industry or field, USCIS cannot conclude that the Petitioner meets this criterion.

8 C.F.R. § 204.5(k)(3)(iii) states that if the above standards do not readily apply to the occupation, the Petitioner may submit comparable evidence to establish eligibility. The Petitioner submitted a resume, business plan, and other documents related to [redacted] However, the Petitioner did not persuasively explain why the standards do not readily apply to her occupation. As such, this evidence will not be considered in the context of "comparable" evidence.

Because the Petitioner has not established that she meets at least three of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F), 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). Consequently, we conclude that the evidence does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability.

III. CONCLUSION

The Petitioner has not established her qualification for the EB-2 classification as an individual of exceptional ability in the sciences, arts, or business, and is therefore ineligible for a national interest waiver. While the Petitioner asserts on appeal that she meets all three of the prongs under the *Dhanasar* analytical framework, we reserve our opinion regarding these issues. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (noting that "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).

The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.