U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22240707

Date: SEP. 9, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not qualify as an individual of exceptional ability, and that she had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.[1]

On appeal, the Petitioner submits a brief asserting that she is an advanced degree professional and is eligible for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. 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.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or [individuals] of exceptional ability. –

[1] The Petitioner does not assert, nor does the record reflect that she qualifies for the EB-2 classification as a professional holding an advanced degree.

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an [individual's] services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an individual must meet in order to qualify as an individual of exceptional ability in the sciences, the arts, or business:

(A) 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 ability;

(B) 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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the [individual] has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(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.

Only those who demonstrate "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as individuals of exceptional ability. 8 C.F.R. § 204.5(k)(2).

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of*

Dhanasar, 26 I&N Dec. 884 (AAO 2016).[2] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[3], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

II. ANALYSIS

A. Area of Exceptional Ability

As a preliminary matter, we conclude that the Petitioner has not sufficiently identified the substantive nature of the occupation in which she is seeking to be employed through this petition, in order to show that she possesses a degree of expertise significantly above that ordinarily encountered in that field as an individual of exceptional ability. She indicated that her prospective job title is "entrepreneur," in the initially submitted Application for Alien Employment Certification, Form ETA-750 Part B, and in part 6 of the petition. She noted in part 6.3 of the petition that her nontechnical job description was described in an attachment to the petition. However, she did not provide an attachment or other evidence that explains what her prospective employment as an "entrepreneur" will specifically entail.

The Director requested clarification with supporting evidence regarding the occupational field in which the Beneficiary is seeking employment in a request for evidence (RFE). However, the Petitioner did not sufficiently address this aspect. In the RFE response the Petitioner contends through counsel that "USCIS should determine that the [Petitioner] is recognized as an individual of exceptional ability and possesses a degree of expertise significantly above that ordinarily encountered in [her] field of endeavor." However, the Petitioner did not identify therein the occupation or field of endeavor in which she would be employed should this petition be approved, beyond putting forth the aforementioned "entrepreneur" job title.

The Director denied the petition, determining in part that the Petitioner did not meet at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii), emphasizing therein that the nature of the Petitioner's asserted area of exceptional ability was not established by the evidence of record. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

In the appeal brief, the Petitioner indicates through counsel that her prospective endeavor involves seeking "employment in the field of accounting." She asserts that "[u]pon being granted permanent residency, she will operate a substantial business, which will result in substantial beneficial impact, the ripple effect of which will likely span across industries and, therefore, will be national in scope." Notably, the Petitioner has not submited any statements addressing her eligibility for the benefit sought in the petition, beyond the letters and the appeal brief provided by her counsel.

---

[2] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[3] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

Here, the Petitioner has not provided a description of the duties that she will perform in pursuit of her proposed endeavor, either as an "entrepreneur" or as an individual working in the "field of accounting." Additionally, the record is devoid of evidence or information about the newly referenced business that she alleges she will operate in the appeal brief, should this petition be approved. We conclude that the Petitioner has not provided sufficient evidence to establish what her prospective occupational field *actually is*, in order for us to determine that she possesses "a degree of expertise significantly above that ordinarily encountered" within that occupation. 8 C.F.R. § 204.5(k)(2). For these reasons, the Petitioner has not demonstrated that she is an individual of exceptional ability and that she qualifies for the EB-2 classification.

B. Evidentiary Criteria for Exceptional Ability

As discussed below, a review of the record also indicates that the Petitioner does not meet at least three of the relevant evidentiary criteria.

> *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.* 8 C.F.R. § 204.5(k)(3)(ii)(A)

The Petitioner submitted a school diploma and course transcript for her three-year vocational program of study in the field of accounting. The Director concluded that the Petitioner met this criterion. However as discussed - the Petitioner has not sufficiently documented what her area of exceptional ability actually is in order to demonstrate that her program of study relates to it. Accordingly, we withdraw the Director's determination in regard. The Petitioner has not established that she meets this regulatory criterion.

> *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.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The Director determined the Petitioner did not meet this criterion because her submitted foreign employment "workbooks," were not sufficient to establish the Petitioner has at least 10 years of full-time work experience in an occupation. He concluded that the Petitioner did not provide documentation from current or former employers that shows the Petitioner's dates of employment and the duties performed. The regulation at 8 C.F.R. § 204.5(g)(1), provides in pertinent part that "[e]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the [individual] or of the training received." We agree with the Director that the evidence provided does not include letters that comport with the evidentiary requirements for this criterion. The Director also noted that the Petitioner did not provide an explanation regarding how the Petitioner's employment history, as briefly annotated within her workbooks, relates to her asserted area of exceptional ability. As discussed, that critical aspect of the petition was not established by the record.

On appeal, the Petitioner alleges that she "has the requisite 10 years of experience in the occupation that is directly related to her proposed endeavor," but she does not address the Director's concerns about the submitted evidence which was discussed in detail within the denial, and the lack of evidence regarding the substantive nature of her asserted area of exceptional ability. Thus, the record does not support the

Petitioner's assertions that she possesses the requisite work experience to meet this criterion. This criterion has not been met.

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

In response to the Director's RFE, the Petitioner indicated that her "occupation does not require a license," noting "USCIS should consider comparable evidence, such as [the Petitioner's] past record in *his* field."[4] (Emphasis added). The Director determined that the Petitioner did not meet this criterion.

On appeal, the Petitioner reiterates that she meets this criterion through comparable evidence, but she does not identify the specific evidence, if any, in the record that should be considered as part of this determination. Further, 8 C.F.R. § 204.5(k)(3)(iii) provides that "[i]f the [regulatory] standards do not readily apply to the [petitioner's] occupation, the petitioner may submit comparable evidence to establish [her] eligibility." As previously discussed, the Petitioner has not provided evidence sufficient for us to determine what her occupation actually is. Therefore, the Petitioner has not adequately explained how the evidence required under this criterion *does not readily* apply to her occupation. The Petitioner has not met this criterion.

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

The Director determined the Petitioner did not meet this criterion because while the Petitioner submitted payroll documentation from her past employment, she did not provide salary data to demonstrate that the Petitioner's level of compensation when compared to others similarly employed was indicative of her asserted exceptional ability.

On appeal, the Petitioner asserts that the Director erred in his determination, but she does not identify the basis for her assertions regarding the Director's alleged error. When dismissing an appeal, we generally do not address issues that were not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be "waived."[5] Since the Petitioner did not address this issue with specificity on appeal, we deem the issue waived and conclude the Petitioner has not met this criterion.

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

Since the Petitioner did not raise this issue on appeal, we deem the issue waived and find the Petitioner has not established that she meets this regulatory criterion.

---

[4] The Petitioner, through counsel, mistakenly and repeatedly references the Petitioner in the male pronoun case in her RFE response and in the appeal brief. The record lacks an explanation for this inconsistency. Thus, we must also question the accuracy of the documents and whether the information provided is correctly attributed to this particular petitioner.

[5] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). The courts' view of issue waiver varies from circuit to circuit. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (finding that an issue referred to in an affected party's statement of the case but not discussed in the body of the brief is deemed waived); *but see Hoxha v. Holder*, 559 F.3d 157, 163 (3d Cir. 2009) (issue raised in notice of appeal form is not waived, despite failure to address in the brief).

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 Director concluded that the Petitioner did not meet this criterion, noting that in the RFE response the Petitioner directed USCIS to "please see additional evidence attached hereto" regarding this criterion, but the Petitioner did not provide evidence of her "recognition for achievements. . . ." to show that she met this criterion, either in the initial filing or in the RFE response.

On appeal, the Petitioner asserts that the Director erred in his determination, but she does not identify the basis for her assertions regarding error on the part of the Director. Since the Petitioner did not address this issue with specificity on appeal, we deem the issue waived and find the Petitioner has not established that she meets this regulatory criterion.

In summary, the record supports the Director's finding that the Petitioner did not meet at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for the exceptional ability aspect of the EB-2 classification.

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 appellate arguments regarding the remaining issues, including whether she is eligible for a national interest waiver. *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 M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not demonstrated that she qualifies as a member of the professions holding an advanced degree or 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.