U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22415857

Date: SEP. 15, 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 an individual of exceptional ability, 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 for the EB-2 classification, 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.

On appeal, the Petitioner submits a brief asserting that she is an individual of exceptional ability and is eligible for a national interest waiver. In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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. –
>
> (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.

A petitioner must provide documentation that satisfies at least three of six regulatory criteria to meet the initial evidence requirements for this classification. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See Kazarian* v. *USCIS,* 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); *See* USCIS 6 Policy Manual F.2, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2.

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).[1] *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[2], 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

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability. On appeal, the Petitioner does not assert nor does the record establish that she is eligible for the EB-2 classification as a member of the professions holding an advanced degree. Therefore, she must show that she qualifies as an individual of exceptional ability.

A. Area of Exceptional Ability

As a preliminary matter, we conclude that the Petitioner has presented insufficient and inconsistent evidence regarding the nature of the occupation in which she is seeks employment in the petition.[3] 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, and 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 that explains what her prospective employment as an "entrepreneur" will specifically entail with the petition, other than her resume in which she indicates that she is "looking for a challenging, fast-paced environment with the corporate field to utilize my accounting and analytical skills and develop my skill set further whilst adding value to my employer." She also listed photography as one of several hobbies that she engages in.

The Director determined that the record did not sufficiently detail the substantive nature of her prospective employment as an "entrepreneur," and he issued a request for evidence (RFE) asking for a detailed description of the Petitioner's proposed employment, supporting by documentary evidence. In response, the Petitioner provided a statement indicating that her "proposed future employment [will be] as an entrepreneur in the field of photography," indicating:

> [The Petitioner] intends to establish her diverse photography business in the United States, leveraging her accounting and photography expertise. The company, which will be

[1] 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*).

[2] *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).

[3] While we may not discuss every document submitted, we have reviewed and considered each one.

> headquartered in Florida, will offer exceptional photography services and sell framed photographs to customers of U.S. restaurants, helping to advertise and promote the restaurant's meals, services, and events.

On appeal, the Petitioner reiterates the Petitioner's intention to establish and operate a photography business in the United States. The Petitioner's initial description of her proposed endeavor did not include plans for employment in the field of photography; instead, the Petitioner initially indicated that she would seek employment in the accounting field with a U.S. corporation. We conclude the RFE response and appeal brief present a new set of facts regarding the occupation in which the Petitioner seeks employment through this petition, which is material not only to establishing eligibility as an individual of exceptional ability, but also to her eligibility for a national interest waiver. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *see* also *Dhanasar*, 26 I&N Dec. at 889-90.

The Petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). Here, the Petitioner's intention to seek employment in the field of photography presented after the filing date cannot retroactively establish eligibility. A petitioner may not make material changes to a petition that has already been filed to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which requires that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. We conclude that the Petitioner has not provided sufficient and consistent evidence to establish what her prospective occupational field will be, in order to demonstrate that she possesses "a degree of expertise significantly above that ordinarily encountered" within that occupation. 8 C.F.R. § 204.5(k)(2). The Petitioner must resolve this inconsistency and ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, 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

The Petitioner asserted that she meets at least three of the regulatory criteria for classification as an individual of exceptional ability. In denying the petition, the Director determined that the Petitioner fulfilled only the academic record criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A). In the appeal brief, the Petitioner maintains that she also meets the licensure criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C), and the recognition for achievements and significant contributions criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

As discussed, the Petitioner asserted at the time of filing the petition that she is seeking employment in the accounting occupation. We reviewed and considered the evidence of record within the context of this occupation to determine whether the Petitioner satisfies at least three of six regulatory criteria to meet the initial evidence requirements for this classification, but conclude for the following reasons that she has not done so.

> *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 "Diplom Spetsialista" diploma for a program of study in the field of accounting, issued by the [redacted] University of Economics in Belarus in 2017. The Petitioner has met this criterion.

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

On appeal, the Petitioner indicates that "USCIS should have found that the [Petitioner] qualifies for classification as a person of exceptional ability via comparable evidence as presented in the record," but she does not identify or discuss the specific evidence, if any, in the record that should be considered as part of this determination. 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."[4] 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 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 evidence of record was insufficient to meet this criterion. 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. The Petitioner has not established that she meets this 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).

[4] *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).

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.