U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25052933

Date: FEB. 9, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneur, seeks classification as an individual of exceptional ability in the sciences, arts or business. 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 Nebraska Service Center denied the petition, concluding that the record does not establish that the Petitioner qualifies for classification as 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). 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. To qualify as an individual of exceptional ability in the sciences, arts, or business, the Form I-140, Immigrant Petition for Alien Workers, must be accompanied by at least three of the six criteria provided at 8 C.F.R. § 204.5(k)(3)(ii). However, if the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not readily apply to the occupation sought, a petitioner may submit comparable evidence to establish eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

II. ANALYSIS

Prior to denying the Form I-140, the Director sent a request for evidence (RFE), informing the Petitioner that the record does not establish that she qualifies for second-preference classification as either a member of the professions holding an advanced degree or an individual of exceptional ability. In response to the RFE, the Petitioner asserted that she satisfies the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(C), (E)-(F). The Petitioner did not assert that she qualifies as a member of the professions holding an advanced degree or that the criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not apply to her, as provided by 8 C.F.R. § 204.5(k)(3)(iii), thereby waiving those issues. In the decision, the Director found that the record satisfies none of the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii). On appeal, the Petitioner reasserts that she satisfies the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(C), (E)-(F). For the reasons discussed below, the Petitioner has not established that a waiver of the requirement of a job offer is warranted.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) requires "[a]n official academic record showing that the [noncitizen] 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." The record contains copies of a degree in meteorology granted to the Petitioner from the [redacted] University and an academic transcript, along with English translations of the documents. However, the Director concluded that, regardless of whether the Petitioner's degree is equivalent to a U.S. bachelor's degree, the specialty of meteorology does not match the proposed endeavor's specialty as an entrepreneur in the field of child education services. Therefore, the director concluded that the record did not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

On appeal, the Petitioner asserts that her degree in meteorology "is relevant to [her] proposed endeavor. The degree has supplied [her] with the skills and knowledge that will be instrumental in implementing the proposed endeavor." The Petitioner further asserts, "The course work required by the [redacted] University in the Hydrometeorology program is substantially equivalent to the required course work leading to a Bachelor's Degree from an accredited institution of higher learning in the United States."

The record does not support the Petitioner's assertion on appeal that her degree in meteorology is relevant to her proposed endeavor. The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(A) requires a qualifying degree or similar award "relating to the area of exceptional ability." The English translation of the academic transcript in the record indicates that the Petitioner's degree course work included many subjects that do not appear to relate to the proposed endeavor's field of child education services, including courses in philosophy, economics, chemistry, hydromechanics, cartography, and meteorology. The Petitioner does not elaborate on appeal how the course work she completed for her degree in meteorology supplied her with skills and knowledge that will be instrumental in implementing her proposed endeavor in child education. Because the record does not establish the Petitioner has a degree relating to the specialty, it does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

Next, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires "[e]vidence in the form of letter(s) from current or former employer(s) showing that the [noncitizen] has at least ten years of full-time experience in the occupation for which he or she is being sought." The Director acknowledged that

the Petitioner submitted four reference letters in response to the RFE; however, the Director found that the record omits letters from two of the Petitioner's reported prior employers and further found that "[n]one of the evidence provided suggest the [Petitioner] has had any experience in children's education." Therefore, the Director concluded the record did not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

On appeal, the Petitioner summarizes the names of her prior employers and the periods during which she worked for the respective companies or organizations. The Petitioner further asserts, "Based on the documentation in the record, [she] clearly established that this criterion has been met, and USCIS erred in finding otherwise." However, the Petitioner does not elaborate on appeal how the Director erred.

The Petitioner's recitation of her employment history on appeal is misplaced. The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires "[e]vidence in the form of letter(s) from current or former employer(s)," not a petitioner's own summary of her employment history. Furthermore, the regulation requires the letters to show that the experience gained at the respective employers was "in the occupation for which he or she is being sought," not merely experience in any occupation. As the Director discussed, none of the letters from the Petitioner's former employers submitted in response to the RFE appear to relate to children's education. One letter summarizes the Petitioner's duties relating to "provid[ing] aeronautical information to Estonian Airspace users"; another letter summarizes the Petitioner's duties relating to "[r]ailway logistics for the transportation of customer cargo"; another letter summarizes the Petitioners general clerical and receptionist duties"; and one letter simply states, in a single sentence, that the Petitioner "worked as a [f]orecaster-technician in [a]viation meteorology department" during a 23-month period, without elaborating on her duties. Because the letters from current or former employers in the record do not establish that the Petitioner has at least 10 years of full-time experience as a children's education entrepreneur, the occupation for which she is being sought, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

Next, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C) requires "[a] license to practice the profession or certification for a particular profession or occupation." The Director acknowledged that the record contains several professional certificates but that she "provided no evidence to show these certificates are actually required for the profession of entrepreneur in the children's education services." Because the proposed endeavor's profession does not require the certifications in the record, the Director found that the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

On appeal, the Petitioner summarizes the certifications she has received and asserts, "Based on the documentation in the record, [she] clearly established that this criterion has been met and USCIS erred in finding otherwise." However, the Petitioner does not elaborate on appeal how the Director erred.

The Petitioner's assertion on appeal that her certifications satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii) (C) is misplaced. The record contains an undated business plan, indicating that the Petitioner intends to provide "graphic design service to children educational material, curriculums [sic], toys and tools manufacturers, and children education applications developers." The business plan further indicates that the Petitioner intends to "provide tutoring service in [m]ath and [p]hysics." Although public school teachers must have a state-issued certification or license, there is no such requirement for private school teachers, private tutors, or individuals who provide graphic design

services to children educational material. *See, e.g.*, Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Kindergarten and Elementary School Teachers (Oct. 4, 2022), https://www.bls.gov/ooh/education-training-and-library/kindergarten-and-elementary-school-teachers.htm#tab-4. The Petitioner does not assert, and the record does not support the conclusion, that the proposed endeavor as a private tutor and graphic designer of children's educational materials requires the type of license to practice or certification for the profession as contemplated by 8 C.F.R. § 204.5(k)(3)(ii)(C). Furthermore, the Petitioner does not elaborate on how the various certifications she has received would satisfy such a requirement, if it existed. Therefore, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C).

Next, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional organizations." The Director acknowledged that the Petitioner asserted that she is a member of the [redacted] and the [redacted]; however, the Director found that the record does not "fully explain how a person becomes a member in these associations." Therefore, the Director found that the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

On appeal, the Petitioner reasserts that she is a member of [redacted] however, she does not provide any additional documentary evidence regarding the requirements to become a member of [redacted] or [redacted]

We note that, in support of the Form I-140, the Petitioner submitted a copy of a receipt for the Petitioner's purchase of "individual membership – faculty and administrators – one year," indicating that the Petitioner joined [redacted] on October 19, 2020, with an expiration date of June 30, 2021. However, the record does not establish whether the Petitioner renewed her [redacted] membership and continued to be a member as of the Director's August 2022 decision. A petitioner must establish eligibility for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1). Because the record does not establish that the Petitioner continued to be a member of [redacted] through adjudication, it does not establish eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(E) and we need not address her prior membership further.

We also note that the RFE response contains a copy of "account details," indicating that the Petitioner became a member of [redacted] on May 4, 2022, and that her "associate" membership would expire at the end of December 2022. Although the Petitioner asserts that she is a member of [redacted] the record does not contain similar documentation of that membership.

A petitioner must establish eligibility for a requested benefit at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Because the record establishes that the Petitioner became a member of [redacted] in May 2022, after the 2020 petition filing date, and because her membership in a professional association is material to whether she satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E), that membership presents a new set

of facts that does not establish eligibility and we need not address it further. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katibak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. Because the record does not contain documentary evidence that, at the time of filing and continuing through adjudication, the Petitioner was continuously a member of at least one professional organization, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E).

Last, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." The Director acknowledged that the record contains "generic recognition letters that do not provide[] any explanation to how the [Petitioner] made significant contributions to the industry in the area [of] exceptional ability." Therefore, the Director found that the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

On appeal, the Petitioner asserts that a letter from a board member of [redacted], a former employer, satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). Specifically, the Petitioner asserts that the statements contained in that letter that she increased the company's profits by expanding the company's freight transportation capabilities and establishing new relationships with companies in Europe, Ukraine, Kazakhstan, Georgia, Lithuania, Poland, and Latvia satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

The Petitioner's reliance on the letter from the [redacted] board member's letter on appeal is misplaced. The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F) requires "[e]vidence of recognition for achievements and significant contributions to the industry or field" of the proposed endeavor. *Id.* The Petitioner does not elaborate on how her achievements and contributions to her prior freight transportation employer demonstrate achievement and significant contributions to the industry or field of exceptional ability in child education services in general, or as a graphic designer of children's educational materials and children's tutor more specifically. Furthermore, even if the [redacted] board member's letter related to the industry or field of exceptional ability in children's education, which it does not, the letter specifically addresses how the "company has increased its profits" while the Petitioner worked as a railway freight manager; it does not describe "achievements and significant contributions to the industry or field [of railway freight transportation]," contemplated by the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). The Petitioner does not otherwise identify documentary evidence, and the record does not support the conclusion, that the Petitioner has received recognition for achievements and significant contributions to the industry of field of exceptional ability in child education services. Accordingly, the record does not satisfy the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F).

In summation, the Petitioner has not established that she qualifies as an individual of exceptional ability and she does not assert, in the alternative, that she qualifies as an advanced degree professional; therefore, she is not eligible for second-preference classification. Section 203(b)(2) of the Act. We reserve our opinion regarding any remaining issues. *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).

III. CONCLUSION

As the Petitioner has not met the requisite second-preference classification, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.