U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24734710

Date: MAR. 9, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a photographer, seeks 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. 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 did not establish that the Petitioner qualifies for the classification sought. 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 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. 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 that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[1] If a petitioner satisfies the initial criteria, we will then conduct a final merits determination to decide

[1] 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* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

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.

Once a petitioner demonstrates EB-2 eligibility, 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.

II. ANALYSIS

The Petitioner initially claimed to qualify for classification as a member of the professions with an advanced degree. After the Director issued a notice of intent to deny (NOID), the Petitioner asserted an alternative claim of exceptional ability and she has not further pursued her initial claim to be a member of the professions holding an advanced degree. We therefore consider the initial claim to be abandoned. When an appellant does not offer argument on an issue, that issue is abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998). *See also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (holding that the plaintiff abandoned his claims as he failed to raise them on appeal to the Administrative Appeals Office).

To establish eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). If the above standards do not readily apply to the individual's occupation, the petitioner may submit comparable evidence to establish eligibility. 8 C.F.R. § 204.5(k)(3)(iii). If an individual meets at least three of the regulatory criteria, we then consider the totality of the material provided in a final merits determination and assess whether the record shows a degree of expertise significantly above that ordinarily encountered in the individual's field. *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). *See also, generally,* 6 *USCIS Policy Manual* F.5 (B)(2), https://www.uscis.gov/policy-manual.

The Petitioner claims to have submitted evidence to satisfy four of the regulatory criteria, as discussed below.

> *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).

We agree with the Director that the Petitioner's bachelor's degree in photography satisfies this 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 Petitioner claimed to satisfy this criterion. A petitioner must meet all eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). The Petitioner filed the petition in early April 2021, shortly before she reached the age of 26. Therefore, to satisfy this criterion at the time of filing, the Petitioner would have to have begun working full-time no later than early April 2011, at age 15.

The Petitioner did not submit employers' letters meeting the regulatory requirements. Her own résumé and other statements do not show at least ten years of full-time experience. Rather, the Petitioner claimed only intermittent employment from September 2012 to 2017, and for less than six months from August 2020 to January 2021. The Petitioner did not establish that this claimed employment was full-time as the regulation requires. Also, the Petitioner was a student in New York from 2017 to 2019, in F-1 nonimmigrant status which would have significantly limited her ability to consistently work full-time as a photographer throughout her time in the United States.

Based on the above information, the Director concluded that the record lacks required evidence of employment, and observed that the Petitioner's earliest claimed employment was less than ten years before she filed the petition.

On appeal, the Petitioner states, without elaboration, and without further evidence, that she "has the requisite 10 years of experience in the occupation. . . . Based on the documentation in the record, the Beneficiary clearly established that this criterion has been met, and USCIS erred in finding otherwise." The Petitioner does not identify any specific evidence in the record that would establish the necessary experience and show that the Director erred.

The Petitioner has not documented at least ten years of full-time employment as a photographer.

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

In the denial notice, the Director acknowledged the Petitioner's submission of a membership card from Professional Photographers of America (PPA) dated 2022, but concluded that the Petitioner had not shown that she was a member of any association at the time of filing in April 2021.

On appeal, the Petitioner correctly observes that the initial submission in April 2021 included documentation of her PPA membership; she later submitted an updated membership card issued in 2022. This evidence overcomes the Director's specific determination regarding the date of membership. But the Petitioner has not shown that PPA qualifies as a professional association.

A "professional association" is a group of professionals organized for education, social activity, or lobbying, such as a bar association. *Association*, *Black's Law Dictionary* (11th ed. 2019). A "profession," in turn, is defined as any occupation that requires at least a U.S. baccalaureate degree or its foreign equivalent for entry into the occupation. 8 C.F.R. § 204.5(k)(3).[2]

The Petitioner has not shown that employment as a photographer requires at least a baccalaureate degree.[3] She herself claims to have worked as a photographer for several years before she earned such a degree. Therefore, the record does not establish that an association of photographers qualifies as a professional association.

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[2] The definition also includes the occupations listed in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), but "photographer" is not one of the occupations listed there.

[3] The Department of Labor's O*NET website indicates that most occupations in photography require a level of training or education below a bachelor's degree. *See* https://www.onetonline.org/link/summary/27-4021.00.

The Petitioner has not established membership in professional associations as the regulation requires.

> *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, without further comment, that the Petitioner satisfied this criterion. We disagree.

The Petitioner had not set forth any specific claim in this regard. The first time she claimed this criterion, in her response to the NOID, the Petitioner stated that she satisfied this criterion because: "The educational background, professional experience, and superb skills of the Beneficiary enabled the Beneficiary to contribute to her field and will allow him [sic] to continue to do so in the future." This general statement does not identify any specific evidence of recognition; any specific achievements or significant contributions; or the parties or entities conveying that recognition. The Petitioner added: "Please see exhibits previously submitted." The Petitioner did not say which previously submitted exhibits supported this very vague and general claim. Her initial submission did not include any claim of exceptional ability or any materials identified as evidence of recognition for achievements and significant contributions to the field.

The Petitioner cannot meet her burden of proof by asserting, without further explanation, that unidentified evidence in the record meets the regulatory requirements. Therefore, we withdraw the Director's conclusion that the Petitioner satisfied the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(F).

For the above reasons, the evidence does not establish that the Petitioner satisfies at least three of the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii).

III. CONCLUSION

The Petitioner has not established that she qualifies for EB-2 classification as an individual of exceptional ability. The national interest waiver is limited to individuals eligible for EB-2 classification. Therefore, we need not consider the evidence and arguments that the Petitioner presented in support of her national interest waiver claim.

ORDER: The appeal is dismissed.