U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20299725

Date: AUG. 18, 2022

Appeal of Texas 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 Texas Service Center denied the petition and dismissed a subsequent combined motion to reopen and reconsider, concluding 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.[1] On appeal, the Petitioner submits a brief asserting that he is eligible for a national interest waiver. This brief includes a statement indicating that "[t]he unfavorable decision has not been or is not subject of any judicial proceeding." *See* 8 C.F.R. § 103.5(a)(1)(iii)(C).

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.

[1] The Director also dismissed the subsequent motion because it was not accompanied by a statement about whether or not the unfavorable decision has been the subject of any judicial proceeding. *See* 8 C.F.R. § 103.5(a)(1)(iii)(C). The required statement on judicial proceedings under 8 C.F.R. § 103.5(a)(1)(iii)(C) is a procedural rule that helps U.S. Citizenship and Immigration Services identify those cases involving judicial proceedings so they can be held in abeyance pending the outcome of litigation involving the originally filed petition. *See, e.g.* Memorandum from Richard E. Norton, Assoc. Comm'r for Examinations, Immigration and Naturalization Service, *Adjudication of Petitions and Applications which are in Litigation or Pending Appeal* (Feb. 8, 1989). The brief accompanying the Petitioner's appeal addresses the Director's ground for dismissal by confirming that his petition is not and has not been the subject of any judicial proceeding.

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

> (2) Aliens who are members of the professions holding advanced degrees or aliens 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 alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

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). *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.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

---

[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).

The third prong requires the petitioner to demonstrate 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. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate 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.[3]

II. ANALYSIS

The record indicates that the Petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. For the reasons discussed below, we conclude that the Petitioner has not sufficiently demonstrated the national importance of his proposed endeavor under the first prong of the *Dhanasar* analytical framework.

With respect to his proposed endeavor, the Petitioner indicated that he intends to establish a limited liability company, [redacted] "headquartered in Florida with one owner, [the Petitioner]. [The petitioner] will be the sole investor and will be involved in the day to day operations as the General Manager." The record includes the 2018 business plan for [redacted] ("prepared by [redacted] which states that the Petitioner's proposed company "will be a well outfitted fitness studio housed in 10,000 square feet and expanded into the nearby beaches for outdoor events. . . . We offer 4 boutique style exercises and one great new sport for our clients." The business plan claims that "sales and profitability will increase each year to fund the expansion to another 2 gyms. There is an idea we may franchise but that is not included in the first five years of business."

The Petitioner's business plan contains industry and market analyses, information about his proposed company and its services, financial forecasts and projections, marketing strategies, and a description of company personnel. Regarding future staffing, the Petitioner's business plan anticipates that [redacted] will employ 20 personnel in years one and two, 40 in year three, and 60 in years four and five, but he did not elaborate on these projections or provide evidence supporting the need for these additional employees. In addition, while his plan offers sales projections of $1,017,921 in year one, $1,708,589 in year two, $2,678,085 in year three, $3,967,264 in year four, and $4,587,513 in year five, he did not adequately explain how these specific sales forecasts were calculated.

The Petitioner also provided a June 2018 letter from [redacted] of [redacted] stating:

> I prepared [redacted] business plan with their growth and cost projections. In my professional opinion, [redacted] is a viable business with conservative growth targets and realistic cost of sales.

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

> I used the U.S. Bureau of Economic Analysis (BEA) Regional Input-Output Modeling System (RIMS II) Multipliers (www.bea.gov) to calculate the direct and indirect job creation for the three locations [redacted] plans to open in the next 5 years.
>
> . . . .
>
> [redacted] will create 21 total jobs in the first year of operation. In Year 3, they will open a second location creating an additional 35 jobs for a total of 56 jobs. In Year 4, [redacted] will open another gym creating another 27 direct and indirect jobs. By Year 5 with all three gyms in full operation, [redacted] will create a total of 96 jobs.

On motion to the Director, the Petitioner presented a September 2020 letter from [redacted] repeating that she "prepared [redacted] business plan with their growth and cost projections" and explaining the methodology used in calculating the "96 jobs" she projected to be directly and indirectly created by [redacted] The Petitioner also submitted a copy of the BEA's RIMS II User's Guide which discusses the basic concepts and information needed to use its modeling system.

Furthermore, the record includes information about adult obesity causes and consequences, the value of physical activity, the epidemic of childhood obesity, the economic impact of obesity in the United States, physical activity guidelines, the rise in obesity among adults, and the "Move Your Way" campaign to increase physical activity. In addition, the Petitioner provided articles discussing small businesses' effect on U.S. economic activity, small businesses' contribution to local economies, the value of small business to the U.S. economy, Small Business Administration initiatives, and small businesses as incubators for innovation and employment growth. He also submitted information about the growth of the global wellness industry, losses in productivity attributable to an overweight and obese workforce, economic costs of obesity, dietary guidelines for Americans, and dietary and behavior modifications for achieving a healthy lifestyle. The record therefore supports the Director's determination that the Petitioner's proposed endeavor has substantial merit.

In the decisions denying the petition and dismissing the motion, the Director determined that the Petitioner had not demonstrated the national importance of his proposed endeavor. The Director stated that the Petitioner had not shown that his undertaking offers "broader implications rising to the level of national importance" as opposed to mainly impacting [redacted] individual clients. The Director also indicated that the Petitioner had not demonstrated that his proposed work stands to provide "substantial economic effects to at least a region of the United States."

In his appeal brief, the Petitioner contends that he has demonstrated the national importance of his proposed endeavor under the preponderance of evidence standard and that the Director's decision was in error because it applied the "wrong standard of proof to the case." With respect to the standard of proof in this matter, a petitioner must establish that he meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010). In other words, a petitioner must show that what he claims is "more likely than not" or "probably" true. To determine whether a petitioner has met his burden under the preponderance standard, USCIS considers not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989).

The Petitioner argues that his proposed endeavor "has national importance because it is a business that will create jobs and positively impact the economy" and because it addresses the negative public health consequences associated with obesity and being overweight. He contends that [redacted] will be fundamental for its clients so they can make incremental modifications in their behaviors to achieve a sustainable healthy lifestyle." The Petitioner further states that his "company will promote growth in the economy of Florida and the U.S. with the direct and indirect creation of jobs for local professionals." He also claims that [redacted] will generate "close to $1 million in State and Federal taxes" by year five.[4] In addition, the Petitioner indicates that his undertaking stands to create "at least 96 jobs"; "generate federal, state, and payroll taxes"; introduce "personalized healthy lifestyle services . . . to diminish and prevent . . . diseases, related to bad eating and exercise habits"; and reduce "the risk of becoming obese and developing related diseases."

In determining national importance, the relevant question is not the importance of the field, industry, or profession in which the individual will work; instead we focus on the "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we further noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Id.* We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890.

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement we look to evidence documenting the "potential prospective impact" of his work. While the Petitioner's statements reflect his intention to provide valuable health and wellness services for his company's clients, he has not offered sufficient information and evidence to demonstrate that the prospective impact of his proposed endeavor rises to the level of national importance. In *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893. Here, we conclude the record does not show that the Petitioner's proposed endeavor stands to sufficiently extend beyond his company and its future clientele to impact the personalized physical fitness training field, the wellness industry, U.S. public health interests, or the U.S. economy more broadly at a level commensurate with national importance.

Furthermore, the Petitioner has not demonstrated that the specific endeavor he proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for our nation. Specifically, he has not shown that his company's future staffing levels and business activity stand to provide substantial economic benefits in Florida or the United States. While the sales forecast for [redacted] indicates that the Petitioner's company has growth potential, it does not demonstrate that the benefits to the regional or national economy resulting from his undertaking would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890. In addition, although the Petitioner and the consultant who prepared his company's business plan contend

[4] The record, however, does not support this assertion. Under "Year 5" of the "Pro Forma Profit and Loss" statement on page 22 of the [redacted] business plan, the statement lists "Payroll Taxes" as "$65,016" and "Taxes Incurred" as $389,668.

that his company "will create at least 96 jobs, stimulating the American economy," he has not offered sufficient evidence that the area where his company will operate is economically depressed, that he would employ a significant population of workers in that area, or that his endeavor would offer the region or its population a substantial economic benefit through employment levels, business activity, or tax revenue.[5] Accordingly, the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework.

Because the documentation in the record does not establish the national importance of his proposed endeavor as required by the first prong of the *Dhanasar* precedent decision, the Petitioner has not demonstrated eligibility for a national interest waiver. Further analysis of his eligibility under the second and third prongs outlined in *Dhanasar*, therefore, would serve no meaningful purpose.

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that he has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[5] The Petitioner's evidence does not specify where the created direct and indirect jobs' workplaces would be located, and whether those job creations would have substantial positive economic effects in the context of those areas.