U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22022492

Date: AUG. 23, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, a legal analyst, seeks second preference immigrant classification as either an advanced degree professional or an individual of exceptional ability in the sciences, arts or business, 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). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center determined that the Petitioner qualifies for the underlying classification, but that the evidence did not establish he met the eligibility requirements under any of the three Dhanasar prongs. Therefore, the Director determined that the Petitioner had not established eligibility for a national interest waiver.

The matter is now before us on appeal. The Petitioner reasserts his eligibility, arguing that the Director did not review each piece of evidence properly and erred in the decision. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon de novo review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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 aliens of exceptional ability. –
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> (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.
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> (B) Waiver of job offer –
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> (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.

Section 101(a)(32) of the Act, 8 USC § 1101(a)(32), provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
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> Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating 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).

Furthermore, 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). 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). Dhanasar states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may grant a national interest waiver as matter of discretion. See also Poursina v. USCIS, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature). As a matter of discretion, the national interest waiver may be granted 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. See Dhanasar, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

The Director concluded 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 eligibility under the Dhanasar framework. While we do not discuss each piece of evidence individually, we have reviewed and considered each one.[1] On the Form I-140, Immigrant Petition for Alien Worker, which the Petitioner filed in May 2019, he provided the following information:

Part 5 - Additional Information About the Petitioner
Section 11. Occupation: Legal Analyst

Part 6 - Basic Information About the Proposed Employment
Section 1. Job Title: Legal Analyst
Section 2. SOC Code: 23-2011[2]

The Petitioner also indicated on his Form I-140 that his position as a legal analyst is full-time. In Section 3 of Part 6, which requests the "Nontechnical Job Description," the Petitioner stated, "assist lawyers by investigating facts, preparing legal documents, or researching legal precedent." In the supporting documents accompanying the petition, the Petitioner described his proposed endeavor as follows:

[1] We acknowledge the academic and experience evaluation from senior evaluator, [redacted] of [redacted] Evaluations, the opinion letter from [redacted] adjunct professor at [redacted] University, as well as numerous support letters from colleagues and professional acquaintances. However, none of these documents explain what the Petitioner's proposed endeavor is; instead, they focus on his eligibility for the underlying EB-2 classification, his eligibility under the Dhanasar framework, and his personal and professional qualifications and accomplishments, respectively.

[2] The Department of Labor's (DOL) Occupational Information Network (O*NET) Summary Report for the standard occupational classification (SOC) code 23-2011.00 corresponds to the occupation of "Paralegals and Legal Assistants." See https://www.onetonline.org/link/summary/23-2011.00.

- "[W]ork as a Legal Professional working as a foreign legal consultant in cross border, multinational trade, business and labor negotiations in the areas of law, business and other complex regulations and requirements affecting commercial activities and business results for U.S. companies and U.S. individuals doing business or planning to do business in Brazil . . . [; and]"
- "[H]elp U.S. companies and individuals doing business or planning to do business in Brazil to better seize market opportunities in one of the largest economies in the world and the largest economy in Latin America; as well as optimize the financial management and compliance of their operations in Brazil, reducing substantially their liability exposure."

In his professional plan and statement, the Petitioner described his proposed endeavor as, "advanc[ing] my career as a Legal Analyst in the United States – supporting cross-border business operations on behalf of the U.S. business industry," which involves "providing advice and concrete assistance to protect and support businesses operations and commercial activities in the country." He expects that "global corporations and government entities may seek my services, expertise and advice for expanding and improving their business and penetration in the foreign market . . . ."

The Director issued a request for evidence (RFE), notifying the Petitioner that the evidence provided in the initial filing did not establish that any of the three Dhanasar elements had been satisfied. In his RFE response, the Petitioner changed his occupational title from "Legal Analyst" to "Legal Business Analyst and Entrepreneur." While the title of his occupation alone does not establish that his proposed endeavor has substantially changed, we note that the Petitioner did not mention entrepreneurship as a feature of his initially described proposed endeavor. The RFE response further stated that the Petitioner created a new business called [redacted] in the United States with "specialized focus on foreign direct investments (FDI) with the Brazilian market and South America . . . ."

He also stated that he "intends to operate as an Entrepreneur in the State of Florida. His company will serve the Central Florida area, specializing in projects, installations, and maintenance of Heating, Ventilation, Air Conditioning and Refrigeration (HVACR) systems and focusing its efforts on complex commercial initiatives for American entities seeking to do business in Latin America, specifically in Brazil, and vice versa." While running his new company, the Petitioner stated that he can simultaneously keep supporting foreign companies and investors looking to expand their wealth and business services into the nation. The RFE response further indicated that he plans to pursue his new HVACR business while also assisting U.S. entities in conducting cross-border activities between the United States and Latin America, attracting foreign investors and helping them navigate the U.S. business environment, as well as advising U.S. companies and individuals on the best practices to follow within Brazil and Latin America. In addition, the Petitioner will offer business and legal solutions to U.S. companies and governmental entities interested in developing and improving foreign relations with Latin America.

In a new statement, the Petitioner described his work installing air conditioning systems that involve [redacted] and helping U.S. businesses expand their [redacted] while also serving Brazilian HVAC companies seeking to expand their business into the United States. In his business plan, he described his company's HVACR work as installing and maintaining HVACR systems in central Florida, offering system design, plans, and calculations; system installations for

new and repurposed spaces; performing routine and scheduled maintenance of equipment and systems; and servicing and repairing equipment and systems.

The Director noted that the initially proposed endeavor was very different from the Petitioner's proposed endeavor in response to the RFE. Specifically, the decision stated that the Petitioner deemphasized his role as a legal analyst, "instead choosing to emphasize the entrepreneurial and job creation elements of his occupation, which would also entail some unspecified degree of business consulting." The Director further remarked that according to the RFE response, the proposed endeavor is to serve as the head of an HVACR maintenance and installation company with business consulting and advising on the side. Although the decision acknowledged that the Petitioner's proposed endeavors shared some overlap, the decision notified the Petitioner that the endeavors were substantially different. Accordingly, the Director informed the Petitioner that he 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). We agree.

In Dhanasar, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." Dhanasar, 26 I&N Dec. at 889. Here, the proposed endeavor involves a wide variety of services and no apparent intention to narrow the Petitioner's focus to a specific proposed endeavor. The Petitioner initially proposed to work full-time as a legal analyst, whereas in response to the RFE, he proposed to run his own HVACR company, while offering some business and legal analyst services to U.S. and Latin American companies. As the Director indicated, the Petitioner has not articulated how much time he will spend starting and operating his HVACR business, as opposed to providing business and legal consulting services. In the initial filing, the Petitioner stated that his proposed endeavor as a legal analyst would be full-time, while in response to the RFE, it appears that the legal analyst occupation is secondary to activities concerning HVACR. In his RFE response, the Petitioner described little, if any, proposed endeavor activities relating to what he initially described on the Form I-140, which involved assisting lawyers by investigating facts, preparing legal documents, or researching legal precedent.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, the Petitioner cannot materially change the proposed endeavor. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking 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 Michelin Tire Corp., 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Furthermore, as previously explained, 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). If significant changes are made to the initial request for approval, the Petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Here, the Petitioner presented a new set of facts in his RFE response that were not articulated at the time of filing the petition. Furthermore, even if the Petitioner proposed to provide some legal analyst services while operating his HVACR company, these services would not be considered full-time as originally stated. Because the Petitioner materially changed his proposed endeavor, we cannot conclude that he has established eligibility at the time of filing.

On appeal, the Petitioner offers little clarification to address the Director's concern that he described two very different proposed endeavors. Instead, the Petitioner states that through his company he will serve any company or individual in need of his services. However, based upon the record, the Petitioner's services may include HVACR, legal, business, cross border business operations, market and investment, foreign relations, trade and commerce, financial management, and regulatory compliance, among others. Therefore, we conclude the Petitioner has not identified a specific or consistent proposed endeavor.

In determining whether an individual qualifies for a national interest waiver, we must rely on the specific proposed endeavor to determine whether (1) it has both substantial merit and national importance and (2) the foreign national is well positioned to advance it under the Dhanasar analysis. Because the Petitioner has not provided consistent information regarding his proposed endeavor, we cannot conclude that he meets either the first or second prong or that he has established eligibility for a national interest waiver.

III. CONCLUSION

The documentation in the record does not establish a consistent proposed endeavor. Therefore, the Petitioner has not demonstrated eligibility for a national interest waiver. Further analysis of his eligibility under the Dhanasar framework would serve no meaningful purpose.

Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the Dhanasar framework. 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).

The appeal will be dismissed for the above stated reason.

ORDER: The appeal is dismissed.