U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21110114

Date: JUNE 16, 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 finance manager, 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, 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. On appeal, the Petitioner submits additional documentation and a brief asserting that she is eligible for a national interest waiver.

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 withdraw the Director's decision and remand the matter for further review of the record and issuance of a new decision.

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 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.

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). *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[1], 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.

[1] *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 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.

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.[2]

II. ANALYSIS

A. Member of the Professions Holding an Advanced Degree

In denying the petition, the Director did not address the Petitioner's eligibility as a member of the professions holding an advanced degree. In order to show that a petitioner holds a qualifying advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, a petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

The Petitioner submitted her diploma from the University [redacted] in Brazil, but she did not provide an "official academic record" listing her coursework. She also presented an academic evaluation from Silvergate Evaluations which concludes that she holds the foreign "equivalent of Bachelor's Degree in Economics from an accredited institution of higher education in the United States." The academic evaluation vaguely references the number of years of the Petitioner's coursework and the nature of her coursework, but it does not indicate the specific

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

courses she completed or her academic credit hours. The absence of the Petitioner's university transcript listing her coursework undermines the evidentiary value of the academic evaluation. In our discretion, USCIS may discount or give less weight to an evaluation of a person's foreign education where that opinion is not in accord with other information or is in any way questionable.[3] Without providing her official academic record from [redacted] the Petitioner has not shown what coursework the evaluator examined in arriving at their conclusion and therefore the evaluation is of little value in this matter.

Furthermore, the Petitioner's diploma from [redacted] lists two dates: January 14, 2014 ("grants the title of Bachelor of Science in Economic Sciences") and December 17, 2014 ("grants her the present Diploma, in order that it may enjoy all the legal rights and prerogatives." The Director should evaluate the record to determine the actual date of the Petitioner's graduation from [redacted] Upon determining the Petitioner's date of graduation, the Director should consider her progressive work experience from after her graduation until the time of filing.[4] With respect to the Petitioner's five years of progressive post-baccalaureate experience in her specialty, she must demonstrate such experience at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1).

The Director's decision did not address the absense of the Petitioner's "official academic record" from [redacted] listing her coursework, conclude if her diploma is the foreign equivalent of a U.S. baccalaureate degree, or analyze if the Petitioner has demonstrated at least five years of progressive post-baccalaureate experience in her specialty at the time of filing. Accordingly, the Director should consider these issues and determine if the Petitioner qualifies as a member of the professions holding an advanced degree.

B. Exceptional Ability

The Petitioner has not made any representations indicating that she qualifies for classification as an individual of exceptional ability.[5]

C. National Interest Waiver

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. On the Form I-140, the Petitioner initally indicated that she intended to work as a "Finance Manager" with the following job description: "Inform investment decisions by analyzing financial information to forecast business, industry, or economic conditions. Compile, analyze, and report data to explain economic

[3] *See Matter of Caron International,* 19 I&N Dec. 791, 795 (Comm'r 1988); *see also Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

[4] The Form I-140, Immigrant Petition for Alien Worker, in this matter was filed on March 25, 2019.

[5] A petitioner seeking classification as an individual of exceptional ability must present documentation that satisfies at least three of the six categories of initial evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). However, meeting the minimum requirement by providing at least three types of initial evidence does not, in itself, establish that the Petitioner meets the requirements for exceptional ability classification. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. The officer must determine whether or not the petitioner, by a preponderance of the evidence, has demonstrated that she has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See* 6 *USCIS Policy Manual* F.5(B), https://www.uscis.gov/policy-manual.

phenomena and forecast market trends, applying mathematical models and statistical techniques." The Petitioner's initial filing included her Form ETA-750B, Statement of Qualifications of Alien, identifying her U.S. employer as [redacted] and her occupation as "Finance Manager."

In response to the Director's request for evidence (RFE), the Petitioner provided a May 2021 "Professional Declaration" discussing her employment history and plans for work in the United States:

> In 2018, I decided to move to the United States and le[n]d my expertise to the U.S. financial scene. . . . I joined [redacted], an interior design firm based in [redacted] FL. In my role as financial manager, I was responsible for handling the financial transactions of the organization, analyzing financial reports, and monitor[ing] investment activities. I also strategized effective techniques to boost the organization's financial performance and identify business opportunities to increase revenues.
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> . . . .
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> In April 2020 I was hired as a FP&A (Financial Planning and Analysis) Manager of [redacted] a [redacted] financial consulting company, [a] position I retain up to the present day. [redacted] focuses on providing high efficiency and profitability for their clients through process standardization and automation, as well as implementation of [redacted] projects.
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> . . . .
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> Since joining the company, I have been directly working with one of the biggest clients in the U.S., [redacted] healthcare services company.... I am currently in the [redacted] consolidation role, working with [redacted] workflow to automate the central data report, a VBA and Access project for a rebate report.

The Petitioner further asserts that she plans "to contribute to the overall U.S. economy by allowing U.S. companies to adopt strategies that will lead them to expand operations and generate more jobs." In addition, she states: "Now more than ever, through the COVID-19 crisis, I will have the opportunity to directly serve companies in need of financial restructuring assisting in their recovery from the severe economic impact they have suffered as a result of the ongoing pandemic." As the Petitioner's work for [redacted] and its client, [redacted], materialized after the filing of the petition, and therefore would not establish her eligibility at the time of filing, it does not assist her in establishing that she meets the requirements set forth in the *Dhanasar* framework.[6]

[6] The petition in this matter was filed on March 25, 2019, and the Petitioner has the burden of proof to establish eligibility for the requested benefit at the time of filing. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (providing that "Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts"). Further, 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).

1. Substantial Merit and National Importance of the Proposed Endeavor

The first prong of *Dhanasar* focuses on the specific endeavor that the Petitioner proposes to undertake. In the decision denying the petition, the Director concluded that the Petitioner had not demonstrated the national importance of her proposed endeavor.

In her appeal brief, the Petitioner contends that she has demonstrated the national importance of her proposed endeavor under the preponderance of evidence standard and that the Director's decision was in error because it "applied a stricter standard of proof." With respect to the standard of proof in this matter, a petitioner must establish that she 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 her 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 Director's decision correctly addressed the Petitioner's arguments relating to our non-precedent decisions that pre-date the *Dhanasar* precedent decision. The non-precedent decisions referenced by the Petitioner were not published as a precedent and therefore do not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Here, the Petitioner has not established that the facts of the instant petition are analogous to those in the non-precedent decisions.

Furthermore, the Director was correct in determining that the Petitioner arguments relating to the "shortage of STEM professionals in the United States" and "business continuity during COVID-19" were insufficient to demonstrate the national importance of her proposed endeavor as a financial manager. For example, we are not persuaded by the Petitioner's claim that her proposed endeavor has national importance due to the shortage of STEM professionals. Here, the Petitioner has not established that her proposed endeavor would impact or significantly reduce the claimed national shortage. Further, shortages of qualified workers are directly addressed by the U.S. Department of Labor through the labor certification process. Likewise, the Director's decision correctly noted that "the COVID-19 pandemic did not exist at the time of filing and thus cannot be considered here." *See* 8 C.F.R. § 103.2(b)(1).

The Petitioner argues that the Director's decision erred in stating that she had "prior employment" with [redacted][7] Additionally, the Petitioner contends that the Director's decision ignored an expert opinion letter from [redacted], a professor at [redacted] University, provided in support of her endeavor's national importance. We agree with the Petitioner's assertion that her evidence was not given due consideration in the Director's decision. An officer must fully explain the reasons for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons

[7] [redacted] is a client of the Petitioner's current employer, [redacted] We note, however, that the Petitioner's work for both companies post-dates the filing of the petition. *See* 8 C.F.R. § 103.2(b)(1).

for denial to allow the respondent a meaningful opportunity to challenge the determination on appeal). Here, the Director's decision did not adequately address the evidence submitted with the petition or in response to the RFE.

The Director should analyze the Petitioner's evidence to determine if her proposed endeavor has national or global implications in the financial management field, significant potential to employ U.S. workers, or other substantial positive economic effects. If the Director concludes that the Petitioner's documentation does not meet the national importance requirement of *Dhanasar*'s first prong, his decision should discuss the insufficiencies in her evidence and adequately explain the reasons for ineligibility.

2. Well Positioned to Advance the Proposed Endeavor

Relating to *Dhanasar*'s second prong, the Director concluded that "it is more likely than not that [the Petitioner] is well positioned to advance the endeavor." However, the decision does not identify the evidence and sufficiently explain the basis for this determination.

3. Balancing Factors to Determine Waiver's Benefit to the United States

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. The Petitioner's response to the Director's RFE argued that there is a shortage of U.S.-based financial managers, that she "will provide unique contributions" in finance to U.S. companies, and that "there is an opportunity cost of not allowing her to reside in the United States" to provide her skills and professional experience. While the Director's decision adequately addressed the Petitioner's labor shortage argument, it did not offer a response to her other arguments. If the Director determines that the Petitioner's documentation does not meet this prong, his decision should address all of her arguments and evidence, and explain the relative decisional weight given to each balancing factor.

III. CONCLUSION

We withdraw the Director's decision and remand the matter for further review and entry of a new decision. On remand, the Director should review all evidence submitted to date (including the claims and documentation submitted on appeal), determine if the Petitioner qualifies for classification as a member of the professions holding an advanced degree, and analyze the Petitioner's arguments and evidence to determine if she meets all three requirements set forth in the *Dhanasar* framework. The Director may request any additional evidence considered pertinent to the new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and entry of a new decision.