U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17738381

Date: MAY 25, 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 physical therapist, seeks second preference immigrant classification as an individual of exceptional ability 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 record did not establish that the Petitioner is eligible as an individual of exceptional ability. In addition, while the Director found that the Petitioner's proposed endeavor was of substantial merit, he concluded that it was not of national importance, and that the Petitioner was not well positioned to advance that endeavor. Finally, the Director concluded that, on balance, it would not be beneficial to the United States to waive the requirement of a job offer, and thus of a labor certification, in the Petitioner's case.

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. 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.

(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.

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.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

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). This, however, is only the first step, and the successful submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for this classification.[1] When a petitioner submits sufficient evidence at the first step, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the beneficiary is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(i)(3)(i).

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 EB-2 eligibility has been established, USCIS may, as a 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)

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

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]

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.[3]

II. ANALYSIS

The Petitioner is a physical therapist, and the record shows that he holds a valid license to practice as a physical therapist in Florida. Although he initially claimed eligibility as both a member of the professions holding an advanced degree and as an individual of exceptional ability, he did not address the former in response to the Director's request for evidence (RFE) and does not do so on appeal. We will therefore consider only his eligibility as an individual of exceptional ability below.

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[2] To establish that it would be in the national interest to waive the job offer requirement, a petitioner must go beyond showing their expertise in a particular field. The regulation at 8 C.F.R. § 204.5(k)(2) defines ·'exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute. individuals of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given petitioner seeks classification as an individual of exceptional ability, or as a member of the professions holding an advanced degree, they must go beyond demonstrating a degree of expertise significantly above that ordinarily encountered in their field of expertise to establish eligibility for a national interest waiver. *See Dhanasar*, 26 I&N Dec. at 886 n.3.

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

A. Individual of Exceptional Ability

As indicated above, in order to meet the initial evidence requirements for this classification, a petitioner must show that they meet at least three of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). In his decision, the Director determined that the Petitioner met the requisite three criteria through evidence of his bachelor's degree in physical therapy, physical therapist license, and membership in the American Physical Therapy Association, Florida Physical Therapy Association, and American Academy of Sleep Medicine. On appeal, the Petitioner asserts that he also meets a fourth criterion, at 8 C.F.R. § 204.5(k)(3)(ii)(F), through evidence of citations to his published paper and reference letters. However, as we agree that he has established that he meets the initial evidentiary requirement, we need not consider whether he also meets additional criteria. Rather, we will consider this evidence together with the balance of the record to determine whether the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field, and is therefore eligible for the requested classification.

In reviewing the totality of the evidence in a final merits determination, we consider the quality of the evidence.[4] The evidence of the Petitioner's educational credentials, training certificates and physical therapist license show that he possesses the minimum qualifications to perform in his field. Also, the evidence regarding his professional memberships does not demonstrate that the organizations have any membership requirements above those commonly found in physical therapists actively working in the field. Accordingly, none of this evidence shows that the Petitioner has exceptional ability in physical therapy.

The record also includes evidence that the Petitioner co-authored an article on the occurrence of [redacted] in patients with [redacted] disorders, which was published in the *Brazilian Journal of Pneumology* in 2006. He submitted evidence of more than thirty books, articles, editorials, letters and theses which cite to this article, showing that in the approximately twelve years since its publication, others in the medical field have referred to it in their own work. However, we note that some of these works were authored by the Petitioner's co-authors, and as such are less probative of the impact of this paper in the overall field of physical therapy. Also, others criticize the Petitioner's study for lacking a control group or involving a small number of study participants. In addition, as stated by the Director in his decision, the record does not include evidence showing the significance of this level or rate of citation to the paper, or any other indication that this work places the Petitioner significantly above others in the field of physical therapy.

On appeal, the Petitioner submits additional evidence from Google Scholar showing that this paper has been cited on forty-eight occasions since its publication, as well as a 2017 paper which reviewed the research productivity of doctor of physical therapy faculty at institutions in the southeast United States. We first note that where, as here, a Petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The Director's request for evidence specifically sought further information to demonstrate that he possesses a degree of expertise significantly above that ordinarily encountered in the field. We will therefore not consider this new evidence submitted on

[4] 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

appeal. In the alternative, were we to consider the new evidence, we would note while that the Petitioner treats the figure of "median citation count" from the 2017 paper as authoritative, it was based upon public data concerning a small group of physical therapy faculty members in the Southeast United States. The Petitioner does not adequately explain the relevance of this limited data to citations of the Petitioner's work, let alone its value in determining the significance of his work or how it elevates his standing within the field.

Turning to the reference letters submitted by the Petitioner, he asserts on appeal that these show that he has made significant contributions to the field of physical therapy and that these have been recognized by his peers, and specifically refers to a letter written by [redacted] of the [redacted] in Brazil.[5] [redacted] writes that the research project leading to the Petitioner's sole published paper was done under his supervision, and that the Petitioner "was one of the most enthusiastic and gifted students I have ever taught." While he goes on to note that the paper has been cited "over 35 times," he does not elaborate on the significance of the research itself or the amount of attention it has received in the field of physical therapy. [redacted] then praises many of the Petitioner's personal characteristics and his "nationally important track record of achievements" without explaining the national importance of his work or how it constitutes a track record of achievements.

Another letter was written by [redacted], CEO of [redacted] He also describes the Petitioner's paper has having "significant impact in the field," but does not explain the nature of the impact or how its significance has been manifested. In addition, [redacted] describes the Petitioner's treatment of a particular patient as an example of "the significance he has bestowed to the field," but does not elaborate on how the treatment of this patient affected or influenced other physical therapists, or otherwise elevated him above his peers. Further, he writes that the Petitioner stands out due to his "vast array of skill sets typically seen in executive medical settings," but he does not specify which skill sets possessed by the Petitioner place him above other physical therapists.

After review of the totality of the record, we agree with the Director's conclusion that the Petitioner has not established that he possesses a degree of expertise significantly above that ordinarily encountered in the field of physical therapy. He has therefore not shown that he is an individual of exceptional ability, or is otherwise eligible for the underlying EB-2 visa classification.

B. National Interest Waiver

Because the Petitioner has not established his qualification as an individual of exceptional ability, he is not eligible for a national interest waiver of the classification's job offer requirement. However, we will provide an analysis of his claims under the first prong of the *Dhanasar* framework.

The *Dhanasar* decision notes that in regard to the first prong, we focus on "the specific endeavor that the foreign national proposes to undertake."[6] Here, the Petitioner describes himself as a "physical therapy researcher," but at no stage of these proceedings has he presented more than a very brief description of the type of research he would conduct as part of his proposed endeavor in the United

[5] All of the reference letters in the record have been reviewed, including those not specifically mentioned in this decision.
[6] *Dhanasar*, 26 I&N Dec. at 889.

States. Without a detailed description of this aspect of his proposed endeavor, we cannot determine that it is of substantial merit or national importance.

The Petitioner's initial submission included a "Professional Plan and Statement," in which he indicated that his plan was to "work with a health care facility to provide expert advice and treatment to patients." He later wrote in this document that he would "educate other physical therapists/physiotherapists on proper techniques and treatments," as well as monitor them and assistants, but there is nothing in the record to suggest that these activities would go beyond the typical provision of health care to patients. He also presented evidence of a job offer to work as a physical therapist from [redacted] company, although the record is absent of evidence showing that this company is in the business of providing physical therapy services. More importantly, and as noted by the Director in his decision, the Petitioner has not established that the potential prospective impact of his provision of physical therapy care is of national importance. Much like the petitioner's proposed endeavor of teaching in the *Dhanasar* decision, the record does not indicate that these activities would impact the field of physical therapy on a broader level, beyond the impact it would have on the Petitioner's individual patients.

The Petitioner asserts on appeal that his work as a physical therapist "will broadly impact the nation, [and] produce significant national benefits, due to the ripple effects of his professional activities." However, as noted above, the focus in the first prong of the *Dhanasar* framework is on the specific endeavor being proposed. While the Petitioner's activity may add to the positive cumulative effect of the work of all physical therapists in the United States, he has not submitted evidence which supports his assertion that his specific proposed endeavor, the provision of care to individual patients, will rise to the level of national importance.

He also refers on appeal to the COVID-19 pandemic, noting that a previous Presidential Proclamation announcing the suspension of entry by immigrants into the United States did not apply to healthcare professionals such as him, and asserting that this was essentially a declaration of the national importance of his endeavor.[7] Although he mentions in his statement in response to the Director's RFE that he has seen patients who have tested positive for COVID-19, and that his knowledge of noninvasive ventilation management "make[s] me an essential professional to help treat patients with COVID-19," at no point has the Petitioner indicated that his specific proposed endeavor was the treatment of patients with COVID-19. Further, although his incidental treatment of such patients in the course of his activities as a physical therapist may address this national and international crisis at some level, it remains that the impact of this work would not reach beyond those individual patients to affect the field of physical therapy, the treatment of COVID-19 or national initiatives to address the pandemic more broadly. As such, we agree with the Director's conclusion that this aspect of the Petitioner's proposed endeavor is not of national importance, and therefore does not meet the first prong of the analytical framework.

In response to the Director's RFE, the Petitioner submitted a second "Personal Plan and Statement," which included for the first time his proposal to establish his own company, [redacted] He explained that this company would operate wheelchair accessible vans and

[7] Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak, Proclamation 10014 of April 22, 2020, 83 FR 23441 (Apr. 27, 2020).

RVs and would provide homebound patients with physical therapy services. Also submitted was a business plan for [redacted] which indicates that the business would initially serve a single county in Florida, and then expand to three additional Florida counties and the state of Utah. Although the company has yet to be established, the business plan indicates that it would initially employ four individuals, including the Petitioner, and would expand to seven individuals in its fifth year of operation. While he makes several assertions on appeal regarding the national importance of physical therapy services in general, the Petitioner does not suggest that his specific proposed endeavor in opening and running this business would be of national importance. We stated in *Dhanasar* that undertakings having a focus on one geographical area of the United States may be considered to be of national importance, but here the Petitioner has not shown that [redacted] would have a significant potential to employ U.S. workers or would have other substantial positive economic effects.

For all of the reasons discussed above, the Petitioner has not established that any aspect of his proposed endeavor would be of national importance, and thus he has not demonstrated his eligibility under the first prong of the *Dhanasar* framework. Accordingly, he has not established that he is eligible for, or otherwise merits, a waiver of the EB-2 classification's job offer requirement, and thus the requirement of a labor certification.

III. CONCLUSION

The Petitioner has not established that he qualifies as an individual of exceptional ability, or that he is otherwise eligible for the underlying EB-2 immigrant visa classification. In addition, he has not shown that that he is eligible for, or otherwise merits, a national interest waiver of that classification's requirement of a job offer. 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.