U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22661096

Date: NOV. 2, 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 manufacturer of cleaning products, seeks to classify the Beneficiary, its president, as a member of the professions holding an advanced degree or 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 employment-based, "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 Texas Service Center denied the petition, concluding that the Petitioner does not qualify for the underlying classification and had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Director dismissed the Petitioner's combined motion to reopen and reconsider, but then moved to reopen the proceeding. In a second decision, the Director concluded that the Beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the Petitioner had not established that a waiver of the job offer requirement would be in the national interest. The matter is now before us on appeal.

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. –

> (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, USCIS may, as a 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.

The first prong, regarding 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

[1] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

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. CHRONOLOGY

The Beneficiary earned a bachelor's degree at the University of Cairo in 1987. He ran an office supply business in Egypt before relocating to Germany in 1991, where he worked in the travel industry, eventually starting his own company in that field in 1998. In 2006, the Beneficiary began trading chemicals. In 2009, the Beneficiary entered the United States and incorporated the petitioning entity, although the company did not begin doing business until 2011. He is currently in the United States as an E-2 nonimmigrant treaty investor.

The Petitioner filed the Form I-140 petition in August 2018. The Director issued a request for evidence (RFE) in January 2019. The Petitioner submitted a response to the RFE in April 2019.

The Director denied the petition in June 2019. The Petitioner filed a combined motion to reopen and reconsider in July 2019. While the motion was pending, the Petitioner submitted new evidence in September 2020, although the regulations make no provision for a petitioner to supplement a pending motion in this way. The Director dismissed that motion in February 2021.

In June 2021, the Director moved to reopen the proceeding, and issued a second RFE. The Petitioner responded to the RFE in September 2021. The Director denied the petition a second time in October 2021, and the Petitioner appealed the decision in December 2021.

III. ANALYSIS

The issue before us 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. As outlined below, we agree with the Director that the Petitioner has not sufficiently demonstrated eligibility for a national interest waiver under the *Dhanasar* analytical framework.

The proposed endeavor, in this petition, is the continued operation of the Petitioner's manufacturing facility, which manufactures cleaning products such as soap, detergent, and hand sanitizer. The Director determined that the Petitioner had established the substantial merit of the proposed endeavor, but not its prospective national importance.

The substantial merit of the Petitioner's proposed endeavor is not in dispute. For the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of his proposed endeavor under the first prong of the *Dhanasar* analytical framework.[3]

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

[3] While we may not discuss every document submitted, we have reviewed and considered each one.

In *Dhanasar*, we explained the "national importance" element of the first prong of the framework:

> In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. An undertaking may have national importance for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. But we do not evaluate prospective impact solely in geographic terms. Instead, we look for broader implications. Even ventures and undertakings that have as their focus one geographic area of the United States may properly be considered to have national importance. . . . An 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 889-90.

In a statement submitted with the initial filing of the petition in 2018, the Petitioner stated that its "products are blended and packaged in the U.S. by American workers from raw chemicals and supplies produced in the U.S. by American workers and sold nationwide to be used by American workers in cruise ships, hotels and dry cleaners." The Petitioner asserted that the Beneficiary's "outstanding contributions . . . supports [*sic*] dozens of businesses, hundreds of jobs and generates several million in total economic activity."

The Petitioner asserted that "business exploded in 2017 and 2018 doubling gross revenues as the company expanded into ports nationwide," but the growth shown on tax returns in the record does not amount to a doubling of gross revenues in 2017-2018:

Year	2014	2015	2016	2017	2018
Gross receipts	$172,966	$199,148	$203,560	$230,504	$283,650
Gross profit	109,454	134,534	133,529	144,628	189,030
Taxable income	1658	6445	4590	4859	25,937[4]

The Petitioner states that the Beneficiary's "endeavors . . . aim to advance U.S. economic activity and job creation." Because the Beneficiary's endeavor comprises the petitioning company, which has already been doing business for several years, it is appropriate to consider the company's performance at the time of filing. The record does not show significant employment creation. Information submitted with the petition indicates that, seven years after the company began operations, the Petitioner's workforce in 2018 consisted of six part-time contractors who earned, on average, $214 per week.

In the 2019 RFE, the Director stated: "The petitioner has not established that the beneficiary's proposed work has implications beyond his prospective employer, their business partners, alliances,

[4] The record contains two versions of the 2018 tax return, with different depreciation claims. The earlier, unsigned version, dated March 6, 2019, shows $2180 in depreciation and taxable income of $86,362. The later, signed version, dated May 20, 2019, shows $62,605 in depreciation and taxable income of $25,937.

and/or unidentified clients/customers at a level sufficient to demonstrate the national importance of his endeavor." The Director noted that the Petitioner did not report paying any salaries on its recent income tax returns, and that the Petitioner had not otherwise established that the Beneficiary's endeavor has created a significant number of U.S. jobs. The Director likewise determined that the Petitioner had not established the company's economic significance or corroborated its claims regarding the scope of its economic impact.

In response, the Petitioner stated that it "has conclusively demonstrated that it currently employs U.S. workers (both directly and indirectly) and has had substantial positive economic effects." The Petitioner asserted that its references to "hundreds of jobs" and "several million [dollars] in total economic activity" "were made in reference to the indirect impact that [the Petitioner] has on its suppliers, clients, and distributors." The Petitioner cited previously submitted letters from customers and distributors, but those letters do not corroborate the Petitioner's claims regarding the scope of its economic impact. The two quoted letters are similar in their overall structure, and contain some identical passages, such as the following two sentences, which the Petitioner quoted in his response to the 2019 RFE: "Our relationship with [the Beneficiary] and [the Petitioner] has proved extremely beneficial as they offer superior products at an affordable price. This has allowed us to increase our profits without sacrificing quality and grow our business." The identical language in the submitted letters partially undermines their probative value.[5] Similarities aside, the letters do not provide sufficient details to support the Petitioner's claims regarding hundreds of jobs and millions of dollars of economic activity.

The Petitioner submitted additional letters, several of which also include similar or identical passages such as the one quoted above, seeking to itemize the impact of the Petitioner, and thus of the Beneficiary, on other companies. For instance, a shipping supply company asserted that its profits from reselling the Petitioner's products enabled the hiring of three employees. *Dhanasar* contemplated "*significant* potential to employ U.S. workers" on a level commensurate with "*substantial* positive economic effects." *Id.* at 890. The Petitioner did not establish the significance of this level of employment. Congress did not broadly exempt every noncitizen employer from the job offer requirement, and the Petitioner's creation of a small number of jobs does not create a presumption of eligibility.

Two similarly-worded letters from dry cleaning companies indicate that supplies from the Petitioner "are about 40% less expensive than products from other companies." The two companies extrapolated the 40% savings to "40% of our monthly gross profit," resulting in several thousand dollars of savings per month, sufficient to fund the salaries of about half their employees. But the math does not support this conclusion. One company states that it spends "about $400.00" per month on the Petitioner's products; the other claims to spend "about $600.00" per month. A 40% cost savings on such expenses would increase monthly profits by a few hundred dollars, not thousands as claimed.

The Petitioner submitted an economic impact report prepared by a project manager at the [redacted] International Business Accelerator of the University of [redacted] at [redacted] describing the

[5] Identical language in letters "suggests that the letters were all prepared by the same person and calls into question the persuasive value of the letters' content." *Hamal v. U.S. Dep't of Homeland Security*, No. 19-2534, slip op. at 8, n.3 (D.D.C. June 8, 2021).

Petitioner's business and providing background information about the industry in which the Petitioner operates. The report indicates that "the company provides employment to four workers" and "will also impact indirect U.S. jobs," but the report does not project the extent of indirect job creation. Instead, the report provides national statistics regarding the manufacture of raw materials used in the Petitioner's industry. The Petitioner has not shown that its operations consume a significant proportion of those materials. The report states "employment is expected to increase . . . to 37,637 workers in 2018," but this figure relates to the entire "Chemical Manufacturing industry," rather than the Petitioner and the companies it affects.

The Director denied the petition in June 2019, based on part on the conclusion that the Petitioner had not established the national importance of the proposed endeavor. On motion from that decision, the Petitioner asserted that the Director had not given sufficient weight to the Petitioner's projections of future growth, as presented in the economic impact report described above. According to those projections, the Petitioner planned to increase its gross profit to $610,550 by 2023. The Petitioner did not establish that sales at this level would result in "significant potential to employ U.S. workers or [have] other substantial positive economic effects," as contemplated by *Dhanasar*.[6] Furthermore, this projection relied on assumptions about growth and expansion which had not yet taken place, and the Petitioner did not establish the reliability of those assumptions, or the feasibility of the Petitioner's plans to "[r]each out to . . . over 11,000 dry cleaning businesses" in Texas.

The Petitioner submitted an economic impact assessment from the [redacted] The Petitioner claimed: "The assessment states that the beneficiary has contributed to 32 direct jobs, 103 indirect jobs, and $72.9 million annual economic activity." But this is not an accurate description of the assessment.

The assessment used statistical "multipliers" to calculate the "Annual Economic Impact of 32 New Jobs." This "impact was calculated using . . . an input-output model . . . using federal data sources." The "inputs" consisted of NAICS code 325611, which refers to "Soap and Other Detergent Manufacturing," and a starting figure of "32 new jobs," which "are assumed to be full-time." Based on those inputs, the model calculated 103 "Indirect and Induced Jobs" and "Annual Economic Impact" of $72.9 million. The one-page document does not cite any source for the "32 new jobs figure" other than the Petitioner itself. Furthermore, the discussion on the assessment, including five disclaimers, makes it clear that the assessment is not an analysis of the Petitioner's real-world, existing impact. Rather than a finding that the Petitioner *has* created 32 new jobs, the assessment is a mathematical model, based on the *initial assumption* that a soap or detergent manufacturing company created 32 new full-time jobs in the [redacted] area via "new money flowing into the region." The Petitioner, however, has not shown that the company has created any full-time jobs since it opened in 2011. As noted above, the company has never reported salaries or wages on its income tax returns, and its staff consists of a small number of contractors whose remuneration is too low to realistically reflect full-time employment. The business plan in the record projected that the Petitioner would pay $218,400 in salaries in 2023, an amount far too small to cover 32 full-time jobs. Absent some evidentiary justification for the "32 new jobs" figure, the Petitioner has not established the relevance of the [redacted] assessment.

[6] *See Matter of Dhanasar*, 26 I&N Dec. at 890.

The regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that we may, for good cause shown, allow a petitioner additional time to submit a brief on appeal. There is no comparable provision to allow a petitioner to supplement a motion after it has been filed. Nevertheless, in September 2020, the Petitioner sought to supplement its then-pending motion with evidence regarding its production of hand sanitizer during the early months of the COVID-19 pandemic in 2020.

A petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). The Petitioner's activities during 2020 cannot retroactively establish eligibility as of the petition's August 2018 filing date.

The Director dismissed the Petitioner's motion to reopen in February 2021, without disturbing the underlying denial decision from 2019. The Director subsequently reopened the proceeding and issued an RFE in June 2021, stating that the financial documentation from 2011 to 2018 did not support optimistic projections regarding the Petitioner's potential for substantial positive economic effects.

In response, the Petitioner focused on arguments relating to the COVID-19 pandemic. As explained above, circumstances that arose in 2020 cannot show that the Petitioner met all eligibility requirements at the time it filed the petition in 2018.

The Director denied the petition for a second time in October 2021, stating that the Petitioner had not adequately substantiated its claims regarding job creation and other economic benefits. The Director also noted that circumstances surrounding the COVID-19 pandemic cannot establish eligibility as of the petition's filing date in 2018.

On appeal, the Petitioner asserts that, although the petition was filed before the COVID-19 pandemic, "the prevention of disease and illness [were] relevant before March 2020." General assertions about sanitation and hygiene speak to the intrinsic merit of the Beneficiary's endeavor, which the Director has consistently acknowledged throughout this proceeding. Substantial merit and national importance, however, are two separate elements within the first prong of the *Dhanasar* framework. Employment in an industry with substantial merit does not inherently give national importance to that employment. The Petitioner must instead submit sufficient evidence to meet its burden to demonstrate national importance. Furthermore, at the time of filing, the Petitioner did not assert that sanitation and hygiene lent national importance to his endeavor. The arguments the Petitioner made in 2021 hinged, to a large extent, on changes that the company made in 2020 in order to address the pandemic. Many of the Petitioner's products in 2018, such as rust removers and dry cleaning agents, concerned areas with no direct relationship to public health.

The Petitioner maintains that it "clearly did not abandon its economic claims, but rather, bolstered the overall national importance argument with a second, alternative analysis" regarding public health. As discussed below, the Petitioner does not establish that the Director erred with regard to those initial economic arguments.

Regarding the economic benefit from the Beneficiary's endeavor, the Director noted that the Petitioner had employed a small number of part-time contractors, while reporting "consistently . . . meager profits" on its tax returns. The Director acknowledged that the report from the [redacted] International Business Accelerator "paints a very optimistic future" for the Petitioner, but concluded that the

submitted evidence "was insufficient to establish that the beneficiary . . . has the potential to create a significant number of jobs or other substantial positive economic effects."

The Petitioner asserts that the Director focused on the modest growth and small profits shown on the tax returns up to 2018, but disregarded "the 2019 to 2021 financial data," submitted in response to the 2021 RFE, which "clearly established that the projections from the Report were in fact credible." The Petitioner bases this assumption on figures from two years. For 2019, the Petitioner forecast $377,565 in gross sales; the actual figure was $341,018. For 2020, the Petitioner forecast $429,815 in gross sales, and realized the substantially higher amount of $653,668. 2020, however, coincided with a steep increase in demand for soap and hand sanitizer, documented in the Petitioner's post-filing submissions.

The Petitioner has not shown that the upward trend continued past 2020. The Petitioner notes gross income of $259,491 during the first half of 2021, "putting [the company] on pace to exceed $500,000 in gross revenue for 2021." But the Petitioner's projection for 2021 was $656,575 in gross sales. If the figures for the first six months held for the rest of the year, the Petitioner's gross income would have been $518,982, about 21% below the forecast. The aggregated figures from 2019, 2020, and part of 2021 do not establish the accuracy of the forecast. Even then, the Petitioner has not met its burden of proof to establish that the above figures amount to substantial positive economic effects as contemplated in *Dhanasar*, and they do not show that the petition was approvable at the time of filing.

For the reasons discussed, we conclude that the Petitioner has not established the national importance of his proposed endeavor. Because this issue, by itself, determines the outcome of the appeal, we decline to reach, and hereby reserve, the appellate arguments regarding the remaining prongs of the *Dhanasar* framework.[7]

IV. CONCLUSION

Because the Petitioner has not met the required first prong of the *Dhanasar* analytical framework, we conclude that he has not established eligibility for a national interest waiver as a matter of discretion. Furthermore, the Petitioner has not met its burden of proof to establish that the Beneficiary qualifies for the underlying immigrant classification. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.

[7] *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).