U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23071466

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 transportation engineer, seeks classification as a member of the professions holding an advanced degree and 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 had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

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 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)

[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).

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

The Petitioner earned a bachelor's degree in civil engineering at [redacted] University in Brazil in 2002. The résumé submitted with the petition lists two employers. He worked for [redacted] in [redacted] Brazil, in several capacities: as a trainee from June 1994 to November 1995; a PAC operator from November 1995 to December 1999; a traffic operator from December 1999 to April 2008; and as a traffic manager from April 2008 to June 2012. In 2010, he founded [redacted], a company in [redacted] engaged in "[r]etail trade of glass" and "[i]nterior decoration services," and served as its commercial manager.

The Petitioner entered the United States in 2017 as the F-2 spouse of an F-1 nonimmigrant student. At the time he filed the petition in April 2019, the Petitioner was not authorized to work in the United States, and, according to his résumé and other materials in the record, apparently had not worked in the field of transportation engineering for about seven years. After he obtained employment authorization, the Petitioner worked in what he described as "the tourism industry," mostly renovating hotel rooms.

A. Eligibility for the Underlying Classification

The Director denied the petition based solely on the Petitioner's request for a national interest waiver of the job offer requirement, and we will address that issue below. But first we will address the threshold requirement that the Beneficiary must qualify for classification under section 203(b)(2) of the Act, either as a member of the professions holding an advanced degree or as an individual of exceptional ability in the sciences, arts, or business. The Petitioner has submitted evidence relating to each of these two sub-classifications. The Director did not address this issue in the decision notice, and therefore there has been no finding regarding the issue, either favorable or unfavorable.

1. Member of the Professions Holding an Advanced Degree

To show that the beneficiary is a professional holding an advanced degree, the petitioner must submit either: (A) an official academic record showing that the beneficiary has a United States advanced degree or a foreign equivalent degree; or (B) an official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree, and letters from current or former employer(s) showing that the beneficiary has at least five years of progressive post-baccalaureate experience in the specialty. 8 C.F.R. § 204.5(k)(3)(i). "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 into the occupation.

As an engineer, the Petitioner qualifies as a member of the professions, but he does not claim to hold an advanced degree. He instead relies on his bachelor's degree and post-baccalaureate experience.

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

But the Petitioner has not shown that he has at least five years of post-baccalaureate experience as a transportation engineer. At [redacted], the Petitioner held the title of traffic operator from 1999 until 2008, when he became a traffic manager. The Petitioner earned his engineering degree in 2002, and received his engineer's license that same year. Because the Petitioner did not yet hold engineering credentials in 1999 when he started working as a traffic operator, we cannot conclude in the absence of further information that he worked as a transportation engineer after 2002, while he still held the title of traffic operator. The record does not document that his experience in what would appear to be a non-professional occupation qualifies as experience in the specialty of transportation engineering.

A letter from [redacted] specifies that the Petitioner worked as a traffic manager until June 26, 2012; it does not specify when the Beneficiary began working in that capacity. But the Petitioner himself asserted that he began working as a traffic manager in April 2008. These dates indicate slightly more than four years of experience as a traffic manager. The Petitioner's subsequent employment was in an area with no demonstrated relation to transportation engineering. Therefore, the information in the Petitioner's initial submission does not show at least five years of progressive post-baccalaureate experience in the specialty of transportation engineering.

After the Director issued a notice of intent to deny (NOID), the Petitioner's response included a new résumé, in which he claimed to have worked as a civil engineer for [redacted] from 2002 to 2008. The Petitioner did not explain why he did not mention this claimed employment on the earlier version of his résumé, or on Form ETA 750 Part B, Statement of Qualifications of Alien, which instructed him to list "any . . . jobs related to the occupation" in which he now seeks employment.

The Petitioner did not submit any evidence from [redacted] to corroborate this new claim of relevant employment experience as required by 8 C.F.R. § 204.5(g)(1), which requires evidence of past employment in the form of letters from the employers. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). An uncorroborated claim has no weight as evidence and cannot satisfy the Petitioner's burden of proof.

Furthermore, this newly claimed employment from 2002 to 2008 entirely overlaps with his previously claimed employment for [redacted] The Petitioner does not explain why he omitted this claim from several previously submitted forms and documents purporting to detail his employment experience. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). While not a basis for denial in the matter before us, the Petitioner must address this issue in any further filings in which his claimed employment for [redacted] is a factor.

2. Exceptional Ability

To show that the beneficiary is an individual of exceptional ability in the sciences, arts, or business, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) requires evidence to meet at least three of six threshold criteria. Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record establishes exceptional ability, defined at 8 C.F.R. § 204.5(k)(2) as a level of expertise significantly above that ordinarily encountered. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part

review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The Petitioner claimed to satisfy all six of the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii). Review of the evidence indicates that the Petitioner meets the facial requirements of three criteria, pertaining to academic degree, licensure, and recognition (here, in the form of letters from peers at [redacted]). Therefore, we proceed to the final merits determination, as described below.

> Meeting the minimum requirement by providing at least three types of initial evidence does not, in itself, establish that the beneficiary in fact meets the requirements for exceptional ability classification. Officers must also consider the quality of the evidence. 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 the beneficiary has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
>
> . . . .
>
> The petitioner must demonstrate that the beneficiary is above others in the field; qualifications possessed by most members of a given field cannot demonstrate a degree of expertise significantly above that ordinarily encountered. The mere possession of a degree, diploma, certificate or similar award from a college, university, school, or other institution of learning is not by itself considered sufficient evidence of exceptional ability.
>
> Furthermore, formal recognition in the form of certificates and other documentation that are contemporaneous with the beneficiary's claimed contributions and achievements may have more weight than letters prepared for the petition recognizing the beneficiary's achievements.

6 *USCIS Policy Manual* F.5(B)(2).

Here, the Petitioner's degree and licensure appear to be basic credentials, and thus qualifications possessed by most members of his field, and as such they do not demonstrate a degree of expertise significantly above that ordinarily encountered in his field. The evidence of recognition is in the form of letters from former co-workers, describing projects that the Petitioner successfully completed. Under the guidance cited above, these letters have less weight than evidence of formal recognition such as certificates and other documentation that exists independently of the petition. The submitted materials demonstrate that the Petitioner is a competent and qualified transportation engineer, but they

do not establish that the Petitioner has a degree of expertise significantly above that ordinarily encountered among transportation engineers.

For the above reasons, the Petitioner has not met his burden of proof to establish eligibility for classification under section 203(b)(2) of the Act. The Petitioner must address this issue in any further filings.

B. National Interest Waiver

The Petitioner's initial submission included a "Professional Plan & Statement," which reads, in part:

> My career plan in the United States is to continue my career working with an American traffic engineering firm where I will develop strategic partnerships involving new businesses in the U.S. in order to help grow a company's engineering portfolio. I will provide indispensable guidance regarding large-scale projects involving construction and transportation engineering. I would love to work extensively . . . in the managerial and procurement aspect of the engineering process. This will serve to increase the security in construction projects and benefit a client financially. . . .
>
> . . . .
>
> My specific endeavor will potentially impact the U.S. in the following ways:
>
> - Develop large and highly complex transportation engineering projects to improve traffic flow, efficiency and safety;
> - Maintain high quality and safety standards;
> - Advance the proposed endeavor of applying my expertise and skills in the field of transportation engineering to seize market and investment opportunities for U.S. companies in the lucrative Brazilian and Latin American markets;
> - Train and guide newer generations of transportation engineers;
> - Generate U.S. tax revenue and create jobs for Americans.

The Director concluded that the Petitioner established the substantial merit of his proposed endeavor, and that he is well positioned to undertake that endeavor, but that the Petitioner had not shown the endeavor to be of national importance or that, on balance, it would be beneficial to the United States to waive the job offer requirement. As outlined 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]

In the denial notice, the Director acknowledged the substantial merit of the Petitioner's proposed endeavor, but concluded that the Petitioner had not established its national importance. The Director noted that the overall importance of the Petitioner's occupation does not establish the national importance of the Petitioner's particular proposed endeavor. The Director concluded that "the petitioner would be limited to serving the clientele of an engineering company," and that while the

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

"proposed endeavor may potentially extend beyond the organization and its clients," the Petitioner did not "explain and demonstrate how the petitioner['s] proposed endeavor will extend to the level of national importance." The Director stated that the Petitioner did not "demonstrate that his proposed endeavor has national or even global implications," "has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for our nation."

The Petitioner submitted background information concerning infrastructure modernization and foreign workers in science, technology, engineering, and mathematics (STEM) fields. These materials addressed the substantial merit aspect but did not establish the national importance of the Petitioner's proposed endeavor in particular.

The Director issued a notice of intent to deny the petition, stating that the Petitioner did not submit evidence "that provides specific insight into what he intends to do as a Transportation Engineer." In response, the Petitioner asserted that "[h]is proposed endeavor is essential to the country's economic and social development, as well as addresses a national shortage of engineering professionals." A claimed shortage of transportation engineers does not give national importance to the proposed endeavor of one such engineer. The labor certification process, itself, takes into account a U.S. employer's inability to recruit qualified U.S. workers. The Petitioner does not explain why a stated shortage in his field should, itself, be grounds for waiving that process.

The Petitioner discussed "transportation infrastructure investments in [redacted]," and stated: "I think that working directly for [redacted] can provide me with great opportunities to continue my career, using my knowledge in transportation engineering, because I believe that [redacted] will actively participate in the urban planning of the city of [redacted]." The Petitioner did not submit any evidence that [redacted] seeks to employ him in this manner. We acknowledge that the Petitioner seeks a waiver of the job offer requirement, which would apply in the context of labor certification. But here, the Petitioner specifically states that his proposed endeavor involves "working directly for [redacted]." He bears the burden of proof to show that [redacted] intends to employ him. If [redacted] has no such plans, then the proposed endeavor cannot come to fruition. The Petitioner did submit a letter from an official of [redacted] commenting on the Petitioner's contract work on a renovation project, but the official did not state that [redacted] has offered the Petitioner a job or intends to do so.

The Petitioner also provided statistics about the transportation infrastructure in [redacted], Florida, but did not explain how he would be responsible for that system or explain what he would do that would have national importance. It is not sufficient to assert an intention to work in a city with a large and complicated transportation system; the Petitioner bears the burden of establishing how his work would rise to the level of national importance.

On the subject of the Petitioner's future plans, it bears noting that the record does not contain any persuasive evidence that the Petitioner has worked in the field of transportation engineering since he left [redacted] in June 2012. His only demonstrated employment in Brazil after 2012 was as the commercial director of a company he and his spouse established, which sold "glass and mirrors for civil construction and interior design."

After the Petitioner obtained employment authorization in 2019, he worked "as an on-site Superintendent of hotel renovation projects." The claimed relevance to transportation engineering is

that the projects included "adapt[ing] parking lots to the new reality of self-driving cars, electric vehicles . . . and charging stations." This work bears little relation to the background materials that the Petitioner submitted in an effort to establish the national importance of his proposed endeavor, such as articles describing the hazards of aging bridges and other infrastructure.

The Petitioner also stated: "since April of 2021 . . . I am currently involved in a large and ongoing renovation project for the [redacted] in [redacted], FL." He did not explain how this work involved transportation engineering. The aforementioned [redacted] official indicated in a letter that this project involved renovation of hotel rooms rather than transportation infrastructure. The Petitioner's employment in hotel renovations since 2019 does not readily establish his intention to pursue further employment in transportation engineering. He has not explained what steps, if any, he has taken to pursue employment in transportation engineering since he secured employment authorization, and he has not explained why he has worked for several years in unrelated fields both in Brazil and in the United States. This lengthy interruption in the Petitioner's employment as a transportation engineer, including employment in an unrelated field, raises questions about whether he actually intends to work as a transportation engineer in the United States.

The Director denied the petition, stating that the Petitioner "has not shown that benefits to the regional or national economy resulting from his proposed endeavor would reach the level of 'substantial positive economic effects' contemplated by Dhanasar."

On appeal, the Petitioner asserts that he has established, by a preponderance of the evidence, the national importance of his work "as a Transportation/Civil Engineer, which will affect nationally important objectives, explicitly the industrial and construction sectors." The Petitioner initially described his occupation as "transportation engineer," and he must establish eligibility as of the petition's filing date. *See* 8 C.F.R. § 103.2(b)(1). His documented work on other kinds of construction projects occurred in the United States, after he filed the petition and obtained employment authorization. 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). The record does not reveal why the Petitioner has not been involved in transportation engineering in the United States, but we cannot credit his expansion of the proposed endeavor to include the hotel renovation work he has undertaken after he filed the petition.

Rather than provide detailed information about how his specific proposed endeavor would have national importance, the Petitioner has provided general information about his occupation. The Petitioner cites "the recent Infrastructure Bill passed by the Congress and signed by President Biden." At issue here is not the intrinsic importance of transportation engineering, but rather the national importance of the Petitioner's specific proposed endeavor. When asked to explain and document how his proposed endeavor, in particular, would have national importance, the Petitioner responded with evidence that indicates he is now employed in a different field, supervising hotel renovation crews.

Because the Petitioner has not met his burden of proof to establish the national importance of his proposed endeavor, he has not established eligibility for the national interest waiver. Detailed

discussion of the remaining prongs of the *Dhanasar* framework cannot change the outcome of this appeal. Therefore, we reserve those issues.[4]

III. 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. The Petitioner has also not met his burden of proof to establish eligibility for the underlying immigrant classification. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.

[4] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions 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).