U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23069391

Date: NOV. 4, 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 and doula, who provides support to mothers during and after pregnancy, 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 qualifies for classification as a member of the professions holding an advanced degree, but that she 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

[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).

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

The Director determined that the Petitioner qualifies as a member of the professions with an advanced degree; her occupation qualifies as a profession, and she holds a baccalaureate degree and at least five years of progressive post-baccalaureate experience equivalent to a master's degree. Therefore, we need not examine the Petitioner's parallel claim of exceptional ability. 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.

The Beneficiary earned a bachelor's degree in physical therapy in 2005, and has since undertaken specialized training in obstetrics, sports physical therapy, and other fields such as acupuncture. She practiced physical therapy in Brazil from 2006 to 2017, both on her own and through clinics.

The Director concluded that the Petitioner had not satisfied any of the requirements of the *Dhanasar* framework. We conclude that the proposed endeavor likely has substantial merit, but for the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of her proposed endeavor under the first prong of the *Dhanasar* analytical framework.[3]

Initially, the Petitioner stated: "My career plan in the United States is to work with a health care facility to provide expert advice and treatment to patients." The Petitioner did not provide details about the proposed endeavor beyond describing the duties of a physical therapist and asserting that she will "[m]onitor and manage other therapists, assistants, and others involved in the diagnosis and recovery process." Thus, the proposed endeavor, as originally described, amounted to an intention to continue working as a physical therapist. The Petitioner did not specify a particular prospective employer, but asserted that demand for physical therapists exceeds the supply.

A professor of anatomy, physiology, and microbiology at the Swedish Institute provided an expert opinion letter, asserting that the Petitioner's proposed endeavor is of national importance because of "a major shortage of Physical Therapists in the United States," and because the Petitioner's "intimate knowledge of the Brazilian healthcare sector" would benefit "U.S. companies doing business or planning to do business in Brazil." The Petitioner's own description of her proposed endeavor did not explain how her work treating patients would affect trade between the United States and Brazil, or be relevant to U.S. companies doing business in or with Brazil. Every professional who trained abroad brings with them a knowledge of how the profession is practiced in their home country, but it is unclear how such knowledge brings national importance to her proposed endeavor. The Petitioner's knowledge of Brazilian health care is not a distinguishing factor that qualifies her for the special benefit of the national interest waiver.

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[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.

Also, the writer did not explain how the work of one physical therapist would alleviate a shortage at a nationally important level. The practice of physical therapy directly benefits a small number of individual patients, in a manner comparable to the proposed teaching activity of the petitioner in *Dhanasar*. In that decision, we stated: "While STEM teaching has substantial merit in relation to U.S. educational interests, the record does not indicate by a preponderance of the evidence that the petitioner would be engaged in activities that would impact the field of STEM education more broadly." We therefore concluded that the teaching element of the proposed endeavor lacked evidence of national importance. *Matter of Dhanasar*, 26 I&N at 893. The impact of the Petitioner's work, both as a therapist and as an instructor, appears to be similarly limited in scope.

The Petitioner submitted information establishing the overall importance of physical therapy, but the collective importance of all practitioners does not demonstrate the national importance of the Petitioner's specific proposed endeavor. The Petitioner also submitted background information about opioid abuse and trafficking, but while pain management is one goal of physical therapy, the Petitioner did not explain how her work as a physical therapist would have an impact on the opioid crisis that would rise to the level of national importance.

The Director issued a request for evidence, stating: "In determining national importance, the relevant question is not the importance of the industry in which the individual will work," but rather the individual's specific endeavor. The Director requested more details about the proposed endeavor, and stated that the Petitioner "did not offer sufficient evidence to demonstrate that the prospective impact of her proposed endeavor raises [*sic*] to the level of national importance."

In response, the Petitioner stated:

> My plan is to work as a Physical Therapist in the U.S. and share my methodology in applying fast and safe rehabilitation protocols that allow the patients to recover faster from the postpartum and resume their daily activities. I intend to develop effective techniques that will improve women's health care here in the country and change the way physical therapists are perceived in the delivery room.
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> . . . .
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> . . . After an assessment of each patient, I will design and implement a plan that will help to improve the health of the mothers, prevent future problems, and help them recover their bodies' shape and functionality.
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> Moreover, my experience has allowed me to share my knowledge and teach lectures and offer workshops in Brazil and the U.S. on relevant topics in women's health. . . .

The Petitioner submitted a business plan for [redacted] indicating that the company would begin operations in early 2022, and that the Petitioner "will be the CEO" (chief executive officer).[4] The business plan indicates that the company would offer "Physiotherapy Services, focused [on]

[4] Although the Petitioner referred to [redacted] as a limited liability company, which is a specific type of legal entity requiring registration with the local jurisdiction, the record does not show that [redacted] exists, or did exist at the time of filing, as a legal entity.

Pregnancy and Birth Physiotherapies, throughout the American territory," employing 13 people in its first year, reaching 31 after the fifth year, while creating 155 indirect jobs. The proposed organizational chart in the business plan refers to a "network of entrepreneurs and entrepreneurs [*sic*] associated with the company, whether in the form of partners or franchisees." The plan indicates that "the main benefit provided by THE COMPANY is the generation of new wealth in the American economy and society," and states that the Petitioner "intends to create . . . a technology-based and agile management company."

The Petitioner's own revised description of her proposed endeavor, excerpted above, differs significantly from the business plan. It does not include any mention of [redacted] or any general discussion of plans for the Petitioner to start her own business. As quoted in the indented passage above, the Petitioner stated that her "plan is to work as a Physical Therapist," rather than as the CEO of a therapy clinic.

The business plan is dated March 2021, more than two years after she filed the Form I-140 petition in April 2019. The initial filing from 2019 did not include evidence that the Petitioner planned to start such a company, involving a "network of entrepreneurs." The business plan marks a significant deviation not only from the Petitioner's initial claims in 2019, but from her revised statement dated March 2021, the same month as the business plan. The business plan amounts not to a revision of her proposed endeavor, but to what appears to be a fundamentally new claim. A petitioner must meet all eligibility requirements at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). 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 business plan for [redacted] has negligible evidentiary weight with respect to the proposed endeavor at the time of filing.

The Director denied the petition, stating that "the record does not establish that, beyond the benefits provided to its clients and employees, the Petitioner's proposed endeavor stands to have broader implications rising to the level of having national importance or that it would offer substantial positive economic effects." The Director concluded that "the petitioner has not demonstrated that the [proposed endeavor] has significant potential to employ U.S. workers or otherwise substantial positive economic effects," and that the Petitioner had not established that the proposed endeavor has "broader implications rising to the level of having national importance," "beyond the benefits provided to [the Petitioner's] clients and employees."

On appeal, the Petitioner asserts that her "proposed endeavor is national in scope, and will have broad implications for his [*sic*] served industries, as his [*sic*] work functions will produce substantially positive economic opportunities for the nation, due to the ripple effects of his [*sic*] professional activities." Apart from the misplaced masculine pronouns, this passage is vague and generic, with no specific discussion of the proposed endeavor, citing no evidence and providing no details about the claimed "ripple effects" of the Petitioner's intended work as a physical therapist.

The Petitioner has submitted ample information and evidence about the physical therapy *industry* as an aggregate whole, but the Petitioner has offered only vague speculation as to how her work in particular will have national importance.

On appeal, the Petitioner asserts that she had documented "a steep shortage in the U.S. of professionals in the field," but the Petitioner does not address the Director's specific determination that "a shortage of physical therapists in the United States does not render [the] proposed endeavor nationally important under the *Dhanasar* framewor[k]. In fact, such shortages of qualified workers are directly addressed by the U.S. Department of Labor [DOL] through the labor certification process."[5]

For the reasons discussed, we conclude that the Petitioner has not established the national importance of her 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.[6]

III. CONCLUSION

Because the Petitioner has not met the required first prong of the *Dhanasar* analytical framework, we conclude that she has not established eligibility for a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.

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[5] To the Director's observation, we add that DOL regulations include another provision for physical therapists, by including that occupation in Group I of Schedule A. A petition for a beneficiary in a Schedule A, Group I occupation does not require an individual labor certification, but such a petition must be filed by the intending U.S. employer. Further details appear in DOL regulations at 20 C.F.R. §§ 656.5 and 656.15 and 6 *USCIS Policy Manual* E.7. Schedule A Group I precertification is not a waiver of the job offer requirement. Rather, Schedule A Group I precertification and the national interest waiver are mutually exclusive processes with different procedures and evidentiary requirements. For these reasons, a shortage of workers in a Schedule A, Group I occupation is not a basis for a national interest waiver.

[6] *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).