U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22794254

Date: OCT. 31, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a former customs official, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director denied the petition, concluding that although the record showed that he qualified as a member of the professions holding an advanced degree, it did not establish that a waiver of the job offer requirement, and thus a 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.

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.

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.[1] *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) 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

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[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.

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 former customs official who was employed by the [redacted] (China) Customs Office for nearly 18 years. He proposes to establish a company in the United States to provide consulting services regarding Chinese customs policy and practice to businesses in the U.S. and act as a customs clearance agent for them.

The Director determined that due to the evidence of the Petitioner's bachelor's degree in economics and customs administration from the University of [redacted] and a letter from the [redacted] Customs Office regarding his employment from July 2001 through March 2019, he qualifies as a member of the professions holding an advanced degree. Upon review we agree, leaving the sole issue on appeal to be whether he merits a national interest waiver of a job offer requirement. For the reasons discussed below, we conclude that the Petitioner has not established that he does.

A. Substantial Merit and National Importance of the Proposed Endeavor

As noted above, when reviewing evidence under the first prong of the *Dhanasar* framework, we focus on the specific endeavor that the petitioner proposes to pursue. In his decision, the Director determined that the Petitioner's statement of his proposed endeavor lacked sufficient specificity, and noted that in responding to the request for evidence (RFE) the Petitioner indicated that he would establish a company and provide services in logistics. He relied upon this perceived deficiency, and the Petitioner's employment status at the time of filing, in determining that the Petitioner had not established the substantial merit of his proposed endeavor. After review, we disagree with this part of the Director's analysis, as the Petitioner's statement primarily expanded upon his initial description of his endeavor, which included the establishment of a business to provide customs consulting services. In addition, the analysis in the first prong under the *Dhanasar* framework is prospective, focusing on the merits of the proposed endeavor, and is not limited by a petitioner's occupation or educational status at the time of filing. As with all those applying for a national interest waiver, the Petitioner's current and prospective employment is considered under the first prong only as they illustrate the

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

capacity in which he intends to work. We will therefore review the record and the Petitioner's claims regarding the substantial merit of his endeavor.

Under the *Dhanasar* framework, the merit of a proposed endeavor may be demonstrated in a range of areas, including business and entrepreneurship. In his initial filing, the Petitioner made several broad assertions, such as that "US policy is dominated by welcoming China into the global economic & educational system" and "America has much to gain from offering it's perceptive [*sic*] to a China that is attempting to develop a more transparent and accountable economic and educational systems." However, he offered no evidence to support these assertions or explain why they related to his specific endeavor, even in responding to the Director's RFE, despite a specific request for such evidence. To reiterate, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Here, the record includes no evidence to document the potential prospective impact of his proposed endeavor.

In addition, the Director noted in his decision that the Petitioner had not established that his proposed endeavor would have broader implications in his field, significant potential to employ U.S. workers, substantial positive economic effects, or would broadly enhance societal welfare or cultural or artistic enrichment. The Petitioner does not address on appeal how his proposed establishment of a customs consulting firm, service as a customs clearance agent, and host of annual conferences on Chinese customs and tax regulations would have any of these impacts or otherwise be of national importance. In *Dhanasar,* we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Dhanasar*, 26 I&N Dec. at 893. Here, the record does not show how opening and operating a consulting firm stands to sufficiently extend beyond the Petitioner's own proposed company and clientele, to impact the import and export industry or the U.S. economy more broadly at a level commensurate with national importance.

As the Petitioner has not established that his proposed endeavor will have substantial merit or be of national importance, he does not meet the first prong of the *Dhanasar* framework.

B. Well Positioned to Advance the Proposed Endeavor

In the second prong of the *Dhanasar* framework, the focus shifts from the proposed endeavor to the petitioner and their positioning to advance the endeavor they propose. Here, the Director noted in his decision that the despite the Petitioner's years of work as a customs official in China, he was unemployed at the time of filing and had not presented a sufficient plan and supporting evidence regarding the consulting firm he proposed. Specifically, he indicated that the record included no evidence of interest in the proposed company from potential customers or investors, or of any progress in the starting up of such a company.

On appeal, the Petitioner states that his current nonimmigrant status in the United States does not allow for employment authorization, which explains his current employment status. However, he does not explain the lack of any business plan, or any evidence that he has made progress towards the startup of his business. The *USCIS Policy Manual* describes several categories of evidence that an entrepreneur may submit in support of a request for a national interest waiver, including ownership and an active or central role in a U.S.-based entity, documents showing a future intent to invest by an

outside investor, incubator or accelerator participation, intellectual property, and relevant growth metrics for the startup company.[4] While not all of those categories of evidence may readily apply to the Petitioner's proposed company, this list reflects the types of evidence that may be submitted in support of an entrepreneurial endeavor, and here the record is deficient. That section of the *USCIS Policy Manual* also lists degrees, licenses, and letters of experience as examples of evidence to document a petitioner's knowledge, skills, and experience to advance their endeavor, and the record does include that type of evidence. Although some of these types of evidence are present in the record and show that the Petitioner has the necessary education and experience in Chinese customs policy and practice relating to his endeavor, it does not demonstrate that he has any experience as an entrepreneur or in running a business.

The Petitioner argues on appeal that the Director overlooked the evidence of his achievements as a customs official, which he states included his receipt of awards for his work performance, his authorship of professional articles in his field, articles written about him and his service as a reviewer for competitions. We first note that evidence regarding his receipt of awards and service as a reviewer was not submitted in support of this petition. USCIS must decide each case on its own facts with regard to the sufficiency of the evidence presented. *Matter of Frentescu*, 18 I&N Dec. 244, 246 (BIA 1982); *Matter of Serna*, 16 I&N Dec. 643, 645 (BIA 1978). While the documents that are in the record support his experience and achievements as a customs official, this comprises only one aspect of the analysis of his positioning to advance his proposed endeavor. Other relevant factors in the second prong of the *Dhanasar* framework include a record of success as an entrepreneur, a model or plan for future activities, and the interest of other relevant parties in his proposed endeavor. As noted in the Director's decision, the evidence regarding these factors is either absent or insufficient to show that the Petitioner is well positioned to advance his endeavor. Accordingly, we conclude that the Petitioner has not met the second prong of the *Dhanasar* framework.

C. Whether on Balance it Would be Beneficial to the United States to Grant a Waiver

As explained above, the third prong of the *Dhanasar* framework requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. The *Dhanasar* decision spells out possible factors to be weighed under this prong, including the impracticality of obtaining a labor certification and the urgency of the national interest in an individual's contributions. On appeal, the Petitioner asserts that the nature of his achievements as a customs officer warrant a waiver even assuming the availability of qualified U.S. workers. However, because the Petitioner has not established the substantial merit or national importance of his proposed endeavor as required in the first prong of the framework, and has not shown that he is well positioned to advance that endeavor, we conclude that it would not be in the national interest to grant him a waiver of the job offer requirement.

III. CONCLUSION

The record establishes that the Petitioner qualifies as a member of the professions holding an advanced degree, and he is therefore eligible for the underlying EB-2 visa classification. But it does not support the substantial merit or national importance of his proposed endeavor, not does it show that he is well

[4] 6 *USCIS Policy Manual* F.5(D)(4)

positioned to advance his endeavor. Accordingly, he has not demonstrated that any national interest in his proposed endeavor is such that a waiver of the EB-2 visa classification job offer requirement should be waived.

ORDER: The appeal is dismissed.