U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22220539

Date: SEP. 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 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 of the Texas Service Center denied the petition, concluding that the Petitioner qualified 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. On appeal, the Petitioner submits a brief asserting that the Director erred in denying the petition.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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.
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> (B) Waiver of job offer –
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> (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.

Furthermore, 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).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[2] 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, 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] 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] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 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.[3]

II. ANALYSIS

The Director determined that the Petitioner's endeavor has substantial merit under the first *Dhanasar* prong, and that she is well-positioned to advance her endeavor under the second *Dhanasar* prong, but concluded that the Petitioner had not demonstrated the national importance of her particular proposed endeavor, or 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 Petitioner alleges on appeal that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, and erroneously applied the law, to [her] detriment." Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing immigration benefit requests.[4] Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions.[5] While the Petitioner asserts on appeal that she has provided evidence sufficient to demonstrate her eligibility for a national interest waiver, she does not further explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

For the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of her endeavor in order to establish her eligibility under the first prong of the *Dhanasar* analytical framework. The Petitioner initially provided statements about her proposed endeavor indicating:

> My career plan in the United States is to work with a health care facility to provide expert advice and treatment to patients. My extensive career, working with patients with a wide array of injuries and illnesses will be beneficial to the U.S. health industry, which is experiencing a high demand for physical therapists.
>
> . . . .
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> [I] can also help U.S. businesses develop cross-border projects abroad, particularly in Latin America. [I] can provide significant benefits facilitating business operations of U.S. health related corporations and U.S. investors interested in making investments

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.
[4] *See Matter of Chawathe*, 25 I&N Dec. at 375 (AAO 2010); *see also Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965).
[5] *See 1 USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-manual.

> and developing productive relationships in the lucrative physiotherapy field in the Brazilian and Latin American markets.
>
> . . . .

The Director issued a request for evidence (RFE), asking for more information and evidence to establish the national importance of the proposed endeavor. In response, the Petitioner submits a revised statement indicating that she will alternatively focus her endeavor on the creation and operation of a Pilates and physiotherapy clinic in Florida, as follows:

> The opening of my Pilates and physiotherapy clinic [V-] will have [a] significant positive impact on improving the availability of the physiotherapy service in the community and in the country as a whole. My clinic is a way of generating jobs for qualified professionals like physiotherapists, physiotherapist assistants, Pilates instructors, and even job creation for professionals such as attendants, secretaries, Physical Therapist (PT)-Aides and PT Techs.

The Petitioner submitted a business plan for V- which indicates that she will be the CEO for organization, and will be responsible for:

> [The] administration and management [of V-], in addition to supervising all operations. Also, as technical director, [the Petitioner] will be responsible for planning and supervising the projects and results, providing excellence in all services offered with the best knowledge and techniques of the area. Finally, as head physiotherapist [the Petitioner] will supervise and train the physiotherapy and rehabilitation professionals to ensure the best service.

The Petitioner's initial description of the proposed endeavor did not include plans to form such a company; instead, the Petitioner initially indicated that she would work as a physical therapist at a healthcare facility and provide consulting services to U.S. companies and investors who wish to develop cross-border projects in Brazil and other Latin America markets. We conclude the RFE response presented a new set of facts regarding the proposed endeavor, which is material to eligibility for a national interest waiver. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *see* also *Dhanasar*, 26 I&N Dec. at 889-90. The Petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). Here, the Petitioner's plans to establish a new company and perform services as a CEO for this entity presented after the filing date cannot retroactively establish eligibility. A petitioner may not make material changes to a petition that has already been filed to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which requires that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

It appears the Petitioner sought to address the Director's concerns regarding what organization would utilize her physical therapist skills and how her services would rise to the level of national importance, but in so doing, she has significantly changed her proposed endeavor. Notably, the Petitioner does not adequately explain how she would allocate her time between performing physical therapy services

(which was her initially stated endeavor), if any, and her proposed activities newly presented in the RFE response and reiterated on appeal, such as establishing and providing administrative and managerial oversight of her business.[6] Accordingly, we conclude that both the focus of her endeavor as well as her field of endeavor have materially changed. If significant material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. 8 C.F.R. § 103.2(b)(1). For these reasons, the petition may not be approved.

Moreover, even if the Petitioner had presented her plans to establish and operate her business at the time of filing, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of this endeavor under the first prong of the *Dhanasar* analytical framework. The Petitioner provided information about her new endeavor indicating that V- "will be focused on individuals (B2C – Business to Consumer), offering physiotherapy with a focus on rehabilitation for acute and chronic cases for the American population. However, [V-] will also be able to serve legal entities (B2B – Business to Business) through partnerships with different types of companies." In denying the petition, the Director concluded that the Petitioner had not demonstrated the national importance of her particular proposed endeavor, as the Petitioner's evidence did not show that her proposed work through the operation and management of V- would have broader implications at a level indicative of national importance.

On appeal, the Petitioner points to the business plan for V- that she submitted in her response to the Director's RFE asserting:

> Through her proposed endeavor, [the Petitioner] will promote a positive impact on nationally important issues such as U.S. population health, the reduction of hospital re-admissions, the provision of more effective pain treatment, reducing the risk of opioid use, supporting lung health as both a preventative and reactive measure in dealing with those infected with COVID-19, and positive economic results through increased efficiency in health spending.

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement we look to evidence documenting the "potential prospective impact" of her work. Although the Petitioner's statements reflect her intention to operate a business that will provide valuable Pilates and physiotherapy services to her clients, she has not offered sufficient information and evidence to demonstrate that the prospective impact of her proposed endeavor rises to the level 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. *Id.* at 893. Here, we conclude the record does not show that the Petitioner's proposed endeavor stands to sufficiently extend beyond her business and future clientele to impact the healthcare industry or U.S. economy more broadly at a level commensurate with national importance.

Furthermore, the Petitioner has not demonstrated that the specific endeavor she proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic

[6] Since the Petitioner did not discuss her initial plans to provide cross-border consulting services to U.S. companies and investors on appeal, we consider this aspect of her proposed endeavor to be abandoned.

effects for our nation. For example, the business plan asserts that the Petitioner will make an initial investment of $300,000 into V- and has lined up investors who will also invest capital in the start-up organization. However, the Petitioner has not provided evidence of her $300,000 investment and the capital that her investors assert they have committed to this project, nor has she provided an accounting of how this money will be allocated to cover V-'s start-up costs so that it may start developing the business in the manner alluded to in the petition.

The business plan states that V- is to commence operations in 2022 and forecasts that it will generate revenues exceeding $1,415,000 in its first year of operation, which will steadily climb each year to reach revenues of over $5,576,000 by the end of its fifth year of operation. The Petitioner estimates her business will create at least 62 jobs within this five-year timeframe. However, the plan does not sufficiently detail the basis for the revenue and staffing projections, nor does it adequately explain how the revenue and staffing projections will be realized. Here, the Petitioner has not demonstrated that her business will impact the nation at a level commensurate with national importance.

Furthermore, the Petitioner has not demonstrated that the specific endeavor she proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for our nation. Specifically, she has not shown that her company's future staffing levels would provide substantial economic benefits in Florida or the United States. While the Petitioner asserts that V- will hire 62 U.S. employees within five years, she has not offered sufficient evidence that the area where the company operates is economically depressed, that she would employ a significant population of workers in that area, or that her endeavor would offer the region or its population a substantial economic benefit through employment levels or business activity. Without sufficient information or evidence regarding any projected U.S. economic impact or job creation attributable to her future work, the record does not show that benefits to the regional or national economy resulting from the Petitioner's services would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id*. at 890. Accordingly, the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework.

Because the documentation in the record does not establish the national importance of her proposed endeavor as required by the first prong of the *Dhanasar* precedent decision, the Petitioner has not demonstrated eligibility for a national interest waiver. Further analysis of her eligibility under the third prong outlined in *Dhanasar*, therefore, would serve no meaningful purpose. It is unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976); *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).

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that she has not established she is eligible for or otherwise merits a national interest waiver as a matter of discretion. 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.