U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25611604

Date: APR. 10, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, a marketing manager, seeks classification as a member of the professions holding an advanced degree or of exceptional ability. *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 EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). 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 qualified for classification as a member of the professions holding an advanced degree but that they had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petition 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.

Whilst 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 USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has

both substantial merit and national importance, (2) the noncitizen 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 noncitizen 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 noncitizen. To determine whether the noncitizen 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, progress towards achieving the proposed endeavor, and the interest of potential customers, users, investors, or other relevant entities or individuals are also key considerations.

The third prong requires the petitioner to demonstrate that, on balance of applicable factors, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. USCIS may evaluate factors such as whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen to secure a job offer or for the petition to obtain a labor certification; whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen 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 noncitizen's contributions; and whether the national interest in the noncitizen's contributions is sufficiently urgent to warrant forgoing the labor certification process. Each of the factors 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.

II. ANALYSIS

The Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus of a labor certification, would be in the national interest.

Initially in the Form I-140 the Petitioner stated that their proposed endeavor was to work as a marketing manager. Their professional plan and statement provided detail about their intent to continue to work in the field of marketing with American companies, specifically those looking to target Latin America and the Caribbean for business prospects. In support, the Petitioner provided several letters from U.S. employers attesting that they intended to hire the Petitioner as a marketing manager or similar job title. The Director considered the merit of the proposed endeavor but issued a request for additional evidence (RFE) to determine its national importance as well as eligibility under the remaining prongs of the *Dhanasar* framework.

The Petitioner's response significantly departed from the endeavor they proposed in their initial filing. In the response to the RFE, the Petitioner attempted to transform themselves from a marketing manager

to a CEO of an entrepreneurial marketing consultancy. The Petitioner changed the professional plan and statement by submitting a materially different update wherein they planned to open their own marketing consulting agency. The Petitioner's reversal introduced ambiguity into their proposed endeavor which prevented analysis into its substantial merit or national importance. So the Director correctly denied the petition. On appeal, the Petitioner makes substantially the same arguments as they did in the RFE but attempts to characterize the transfiguration of their proposed endeavor as a minor clarification and not the wholesale change that it is.

Our authority over the USCIS service centers, the office that adjudicated the immigrant petition, is comparable to the relationship between a court of appeals and a district court. Accordingly based on a de novo review we adopt and affirm the Director's decision that the Petitioner's inconsistent representations obscured the nature of their proposed endeavor rendering it impossible to evaluate its substantial merit or national importance. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Prado-Gonzalez v. INS,* 75 F.3d 631, 632 (11th Cir. 1996) (joining "every court of appeals that has considered this issue" holding that an appellate body may affirm the lower court's decision for the reasons set forth therein); *Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F3d. 5, 8 (1st Cir. 1996) (joining eight U.S. Courts of Appeals in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case). The Director gave individualized consideration of the evidence the Petitioner submitted with their initial petition and their RFE response.

A petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 Director's efficient analysis correctly homed in on the unavoidable fact that the Petitioner's proposed endeavor was ill-defined and amorphous due to the material and significant changes made when they responded to the RFE. The addition of the Petitioner's entrepreneurial business does not enhance the proposed endeavor. It transforms it into a wholly different one. The proposed endeavor changed from marketing manager employed by U.S. employers ideally with Latin American and Caribbean business interests to functioning as the CEO of their own entrepreneurial business. The *Dhanasar* framework cannot be applied to two dueling proposed endeavors. A petitioner must identify the specific endeavor they propose to undertake. *See Matter of Dhanasar*, 26 I&N Dec. at 889. It is not possible to determine the substantial merit and national importance of an endeavor when a Petitioner cannot consistently articulate the nature of the endeavor.[1]

[1] On appeal, the Petitioner invokes their right to due process alleging that the Director's denial deprived them of further review and a fair chance to obtain the immigration benefit. The Petitioner's initial petition had deficiencies that warranted further investigation, prompting the Director to issue an RFE. The Petitioner responded to the RFE with documentation reflecting a wholesale material change. The Director correctly denied the petition and this appeal follows. It is not apparent what action the Petitioner finds violative of due process. In any event, we have no authority to entertain constitutional due process challenges to lawful USCIS action. *Cf. Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002). Even if we did have that authority, the parties must demonstrate a showing of "substantial prejudice" to prevail on a due process

And the Director further found that the record does not satisfy the second or third *Dhanasar* prongs. A Petitioner cannot be appropriately evaluated for how well they are situated to advance a proposed endeavor when the proposed endeavor is not evident. And the absence of a well-defined proposed endeavor can render balancing the benefit to the United States to waiving the job offer requirement and consequently a labor certification impossible.

Because the Petitioner has not established that the proposed endeavor has substantial merit or national importance, as required by the first *Dhanasar* prong, they are not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or third *Dhanasar* prong. *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).

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that the Petitioner does not merit a favorable exercise of discretion to waive the requirement of a job offer, and therefore a labor certification.

ORDER: The appeal is dismissed.

challenge. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004). The Petitioner has not shown any violation of the regulations that resulted in "substantial prejudice."