U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28788228

Date: DEC. 26, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a medical health services manager proposing to start her own home health care company, seeks an employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability as well as a national interest waiver of the job offer requirement attached to this 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 record did not establish that the proposed endeavor was of national importance and that, on balance, it was not in the interest of the United States to waive the job offer requirement. 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 petitioner must first demonstrate qualification for the underlying EB-2 immigrant classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1]

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

Meeting at least three of the six categories, however, does not alone establish eligibility for the exceptional ability classification.[2] If a petitioner satisfies at least three of the six categories for establishing exceptional ability, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[3], grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

II. ANALYSIS

A. EB-2 Classification: Exceptional Ability

The Director did not address whether the Petitioner met the criteria for having an advanced degree but concluded that she did meet the standard for exceptional ability. To establish exceptional ability, the Petitioner must meet at least three of six criteria under 8 C.F.R.§ 204.5(k)(3)(ii), and then establish a degree of expertise significantly above that ordinarily encountered in the field under 8 C.F.R. § 204.5(k)(2). The Director concluded that the Petitioner had established the following three criteria: she holds a degree, she has a license to practice medicine, and she has 10 years of full-time experience in the occupation. We agree with the Director that the record shows she has a degree, and she is licensed to practice her profession in Brazil; however, we conclude the Petitioner has not proven 10 years of full-time experience in the occupation because the record contains inconsistent dates of employment.

With her initial filing, the Petitioner submitted evidence showing her work experience. This included her resume, letters from her past and current employers, and an expert opinion letter. The Petitioner's resume, along with letters from her employers, list her first employment starting September 25, 2012, with [redacted] As her petition was filed on May 6, 2022, this is proof of approximately 9 years and 7 months of experience in the occupation. In addition, the expert opinion letter also states that the Petitioner is, "a professional with nine years of experience." This is less than the required 10 years of full-time experience in the occupation under 8 C.F.R. § 204.5(k)(3)(ii)(B).

[2] U.S. Citizenship and Immigration Services (USCIS) has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

[3] *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).

The Director then issued a request for evidence (RFE), requesting additional documentation to satisfy the exceptional ability criteria, one being "[e]vidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought." 8 C.F.R. § 204.5(k)(3)(ii)(B). The evidence submitted in response to the RFE includes a revised resume and employer letter, now showing a different initial start date with [redacted] as March 2012. However, a petitioner may not make material changes to a petition that has already been filed in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). Changing the start date of her employment is a material change to make a deficient petition conform to USCIS requirements to meet the 10-year requirement. We will evaluate the petition using the original facts, which means the Petitioner does not satisfy this criterion of the exceptional ability analysis.

We agree with the Director, that the evidence in the record does not satisfy the remaining three criteria that the Petitioner has: commanded a salary, which demonstrates exceptional ability, membership in professional associations, or recognition for achievements and significant contributions to the industry or field. 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we conclude that she has not met three of the six required criteria to meet an exceptional ability determination. However, as the record does not establish by a preponderance of the evidence that the Petitioner is eligible for a national interest waiver as a matter of discretion, we will reserve the issue of the Petitioner's eligibility for the EB-2 classification including whether she qualifies as an advanced degree professional. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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 the applicant did not otherwise meet their burden of proof).

B. National Interest Waiver

The first prong of the *Dhanasar* analytical framework, substantial merit and national importance, focuses on the specific endeavor that the individual 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.

1. Substantial Merit

The Director's decision concluded that the Petitioner's proposed endeavor, to open a business in the field of home health care, met the substantial merit determination. We agree.

The Petitioner provides a business plan in which she proposes to open and run a home health care company as a medical health services manager to provide companion care, personal care, and palliative care for clients. The Petitioner's business plan includes a strategic market analysis showing that there is a growing demand for these services, that there is potential for a positive economic impact with this proposed endeavor, and the Petitioner will share her medical experience and knowledge. We conclude the record establishes the proposed endeavor has substantial merit.

2. National Importance

In analyzing the potential prospective impact of the proposed endeavor, the Director's decision concluded that the Petitioner did not satisfy the requirement of national importance. We agree.

For a national importance determination, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on the "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we further noted that "we look for broader implications" of the specific proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Id.* We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890.

On appeal, the Petitioner submits a brief and resubmits her business plan, resume, and expert opinion letter. The Petitioner's initial plan was to expand her proposed endeavor to the entire state of Florida through a franchise network within the first five years. In her appeal brief, the Petitioner emphasizes the *Dhanasar* analysis, that the proposed endeavor should have national or even global implications within a particular field. Then she states that her new plan is to franchise throughout the United States in the first five years. However, a petitioner must establish eligibility for the benefit at the time the petition is filed. 8 C.F.R. § 103.2(b)(1). As discussed above, this is a material change to the original proposed endeavor, and we will evaluate the proposed endeavor as originally submitted. *Matter of Izummi*, 22 I&N Dec. at 176.

The Petitioner provides statistics and information about the national importance of the general field of home health care and small businesses, their economic impacts, impacts on local economy, tax collection, and the job opportunities her proposed endeavor could directly and indirectly provide. However, evidence of the importance of the industry or profession in general does not satisfy the standard of national importance. While some of this information is probative of meeting the substantial merit analysis we discussed above, such evidence does not establish how the Petitioner's specific proposed endeavor, as a medical health services manager of her own home health services company stands to impact the broader field or otherwise establish its national importance.

The Petitioner states that her company has the potential to employ U.S. workers by directly employing 10 employees initially, and by year 5 she plans to indirectly employ as many as 114 people. The information the Petitioner provides shows that this is the average number of jobs indirectly created in the health care and social assistance field, however it does not show how the Petitioner's specific endeavor will achieve this goal. In addition, the record does not establish how the Petitioner's specific endeavor would affect the regional or national economy to reach the level of "substantial positive economic effects" beyond the Petitioner's company and clients intended by *Dhanasar*. *Dhanasar*, 26 I&N Dec. at 890. The Petitioner discusses how home health care and small businesses as a whole can have substantial and positive economic effects but does not establish how her specific endeavor will do so.

In addition, the record does not show how the Petitioner's proposed endeavor could have "national or even global implications within a particular field." *Id* at 889. Her business plan describes the type of service her proposed endeavor would provide. She will provide personal care, companion care, and palliative care for clients at their homes. Here, the Petitioner has not provided sufficient documentary evidence to show that her proposed endeavor would impact the home health care industry more broadly rather than benefiting those she proposes to directly serve. We conclude the Petitioner has not shown that her proposed endeavor stands to sufficiently extend beyond her potential clients to impact the home care medical field at a level commensurate with national importance. Without sufficient documentary evidence of the broader impact, the Petitioner's proposed endeavor does not meet the national importance element of the first prong of the *Dhanasar* framework.

The Petitioner provides an expert opinion letter from [redacted], assistant professor at [redacted]. In addressing the first prong of the *Dhanasar* framework, the author similarly discusses the importance of the healthcare industry in general; its contributions to the economy, and how it enhances societal welfare, but does not show how the Petitioner's specific endeavor will reach beyond her company and clients in its contributions. The expert opinion letter also states that the proposed endeavor will contribute to the national economy through job creation and taxes. However, as with the Petitioner's brief and business plan, there is no additional evidence to show how this will be done, or that it could have national implications.

USCIS may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding a foreign national's eligibility. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*, *see also Matter of D-R-*, 25 I&N Dec. 445, 460 n.13 (BIA 2011) (discussing the varying weight that may be given expert testimony based on relevance, reliability, and the overall probative value). Here, much of the content of the expert opinion letter lacked probative value with respect to the national importance of the Petitioner's proposed endeavor.

Lastly, the Petitioner mentions at the end of her brief that the Director also found that she did not meet the third prong of *Dhanasar* and the Director did not request additional evidence in the RFE for the third or the second prongs. Although 8 C.F.R. § 103.2(b)(8)(iii) gives USCIS the discretion to issue an RFE, neither the Act nor the regulations compels us to do so. Moreover, the Director issued an RFE and the decision provided adequate notice regarding the deficiencies in the petition, yet the Petitioner has not submitted sufficient documentation to establish eligibility for a national interest waiver.

While we do not discuss each piece of evidence individually, we have reviewed and considered the record in its entirety. As the proposed endeavor does not meet the national importance standard, the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework. Therefore, the Petitioner has not demonstrated eligibility for a national interest waiver. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the *Dhanasar* framework. *See Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

III. CONCLUSION

As the Petitioner has not met first prong of the *Dhanasar* analytical framework; in that her proposed endeavor is one of national importance, we conclude that the Petitioner 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.