U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24979397

Date: FEB. 3, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a fitness instructor, seeks employment-based second preference (EB-2) 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 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 Petitioner qualifies for a national interest waiver. 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 visa 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.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

"Profession" is defined as of the occupations listed in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32),[1] as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. 8 C.F.R. § 204.5(k)(3).

[1] The listed occupations are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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,[2] 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

The Director determined that the Petitioner qualifies as a member of the professions holding a baccalaureate degree and the required five years of progressive post-baccalaureate experience equivalent to 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 a labor certification, would be in the national interest. In denying the petition, the Director concluded that the Petitioner had established the substantial merit of the proposed endeavor, and shown that she is well-positioned to advance it, but that the Petitioner had not shown the national importance of the proposed endeavor or that, on balance, the United States would benefit from waiving the job offer requirement.

The Petitioner worked as a fitness teacher and coordinator for various employers in Brazil between 1998 and 2018, including as a self-employed personal trainer, teaching Pilates, water aerobics, and other fitness techniques. She entered the United States in 2018 as an F-1 nonimmigrant student, to study English as a second language.

When she filed the petition in December 2019, the Petitioner stated that she "seeks to contribute to the physical well-being of the U.S. public by working as the Fitness and Wellness Coordinator of her company" which she established shortly before the filing date. The Petitioner submitted a partial printout of the listing for fitness and wellness coordinators on the Department of Labor's O*NET website.[3] On part 6 of the petition form and again in a separate letter, the Petitioner listed seven tasks of that position, all of them taken essentially verbatim from the tasks listed on O*NET:

- Teach fitness classes to improve strength, flexibility, cardiovascular conditioning, and general fitness of participants;

[2] *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).

[3] The Petitioner also submitted a printout from the Department of Labor's Occupational Outlook Handbook relating to "Fitness Trainers and Instructors." This printout indicates that the "typical entry-level education" for such positions is a "high school diploma or equivalent." If the Petitioner intends to work in this occupation, then she does not qualify as a member of the professions. *See* 8 C.F.R. § 204.5(k)(2). If, on the other hand, the Petitioner does not intend to work in this occupation, then the background evidence about the occupation is not relevant to this proceeding. Because we are dismissing this appeal for other reasons, we need not explore this issue in further detail.

- Organize and oversee health screenings or other preventive measures, such as mammography, blood pressure, or cholesterol screenings or flu vaccinations;
- Develop fitness or wellness classes, such as yoga, aerobics, strength training, or aquatics, ensuring a diversity of class offerings;
- Select and supervise contractors, such as event hosts or health, fitness, and wellness practitioners;
- Manage or oversee fitness or recreation facilities, ensuring safe and clean facilities and equipment;
- Develop and coordinate fitness wellness programs and services; [and]
- Maintain wellness and fitness related schedules, records, or reports.

The Petitioner submitted two documents under the heading "Proposed Employment." The first is a certificate from the Florida Department of State, showing that the Petitioner had organized a limited liability company. The second comprises printouts from a promotional website for her personal training business. Text on the website reads: "As a certified trainer, I offer a wide range of fitness services and training styles. Choose from a wide array of existing training options or design your own." The website indicates that the Petitioner offers "muscle building," "group fitness" and "private training." The submitted printout does not mention "health screenings or other preventive measures, such as mammography, blood pressure, or cholesterol screenings or flu vaccinations."

A. Substantial Merit and National Importance

The first prong of the *Dhanasar* 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. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Matter of Dhanasar*, 26 I&N Dec. at 889.

The Director concluded that the Petitioner had established the substantial merit, but not the national importance, of the proposed endeavor. We agree, for the reasons explained below.

The Director stated that the Petitioner had not shown the national importance of her proposed endeavor, because she did not establish that her proposed endeavor will result in "significant job creation," "furtherance of human knowledge," "medical advances," or "significant cultural impact."

On appeal, the Petitioner states that she submitted evidence "to establish that [her] proposed endeavor holds potential prospective impact, including national implications in the field of healthcare, significant potential to employ U.S. workers, substantial positive economic effects, and enhancement of social welfare." The Petitioner's appeal relies heavily on information from her business plan, which we will discuss below.

Because the Petitioner's initial submission provided few details about the proposed endeavor beyond the Petitioner's intention to provide fitness instruction, the Director issued a request for evidence (RFE), asking for more evidence and information to establish that the proposed endeavor satisfies the *Dhanasar* framework.

In response to the RFE, the Petitioner stated she has established a fitness studio with a "physical space where she provides . . . a wide range of services including group training, personal training, online classes, postural assessments, [P]ilates, [and] spinning." The Petitioner asserted that the online classes "bring[] personalize[d] physical training and treatments to citizens all over the country."

In her RFE response, the Petitioner noted that USCIS announced "unique considerations for persons with advanced degrees in science, technology, engineering, and math (STEM) fields." The Petitioner also observed: "According to O*Net OnLine, Athletic Trainers are listed under STEM occupations." O*NET lists "Athletic Trainers" under Standard Occupational Classification (SOC) code 29-9091.00.[4] The Petitioner had previously submitted the O*NET printout for "Fitness and Wellness Coordinators," with SOC code 11-9039.02, and claimed job duties within the latter category. The Petitioner did not establish that O*NET lists fitness and wellness coordinators under STEM occupations, nor did she demonstrate that her intended occupation falls within both SOC codes. The SOC code for "Fitness Trainers and Instructors," as mentioned in the Petitioner's initial submission, is 39-9031.00. The assignment of three different SOC codes, with three different group prefixes, shows that the Department of Labor does not consider the positions to be identical or interchangeable.[5] Because the Petitioner has not established that her occupation, as originally described, qualifies as a STEM occupation, we need not discuss the "unique considerations" for such occupations. As we will discuss further below, in other contexts, the Petitioner seeks to classify her occupation under "Amusement and Recreation."

The Petitioner cited statistics about the impact of physical fitness on obesity, mental health, and other areas of concern, which attest to the substantial merit of her proposed endeavor but do not meet the Petitioner's burden to establish that her proposed fitness-related endeavor thereby has national importance.

We concluded that the petitioner in *Dhanasar* "has not established by a preponderance of the evidence that his proposed teaching activities meet the 'national importance' element of the first prong." *Id.* at 893. The burden is on the Petitioner to establish that that her instructional work will have an impact beyond the customers receiving that instruction. National statistics about health and obesity do not establish national importance, unless the Petitioner is also able to establish that her work will affect enough people to meaningfully improve those statistics.

A new business plan, submitted in response to the RFE, asserts that the Petitioner's proposed endeavor will have a "national-level impact" because she "has developed a unique skillset pertaining to fitness and physical education, physical activity for health conditions, and business management." The business plan does not elaborate or explain how the Petitioner's skills are "unique" in her field, such that her impact will significantly exceed that of others providing fitness instruction to individuals and small groups.

We note that the proposed endeavor includes online sessions, and therefore the Petitioner could, in principle, serve customers anywhere in the United States. But while online sessions expand the

[4] *See* https://www.onetonline.org/link/summary/29-9091.00.
[5] SOC code prefix 11 relates to "Management Occupations"; prefix 29 relates to "Healthcare Practitioners and Technical Occupations"; and prefix 39 relates to "Personal Care and Service Occupations." *See* "May 2021 Occupation Profiles" at https://www.bls.gov/oes/current/oes_stru.htm.

geographical reach of the Petitioner's activity, they do not necessarily increase the number of customers. The Petitioner can only perform a finite number of one-on-one sessions in a given day, week, or year, whether the sessions take place in person or virtually. The business plan states that the Petitioner's company "provides group training sessions" for groups of "up to five clients," but the plan does not directly state the number of planned customers, or show that this number will significantly affect health statistics. Even then, those customers could well include individuals who had previously trained at other centers. Movement of customers from one facility to the next would have no net effect on the cited statistics, and the Petitioner has not shown that it is nationally important for such customers to train at her facility rather than those of competitors.

The new business plan was drafted in late 2021. The Petitioner does not claim or establish that the business plan existed in an earlier form when she filed the petition in December 2019. We must therefore consider to what extent the business plan adheres to, or deviates from, the proposed endeavor as the Petitioner initially described it.

Material revisions to the proposed endeavor cannot retroactively establish eligibility at the petition's filing date. A petitioner must meet all eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). A petitioner may not make material changes to a petition that has already been filed in an effort 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) (requiring that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition).

The business plan indicates that 64.2 million Americans belonged to health clubs in 2019, and that there were over 103,000 such establishments in 2021, with thousands more projected to open each year. The Petitioner has not demonstrated that her business, in particular, will have national importance in such a landscape. This is a key consideration, because the Petitioner must establish the national importance of her specific proposed endeavor, rather than the national importance of the fitness industry overall.

We note that the business plan does not indicate that the Petitioner's business will provide "mammography, blood pressure, or cholesterol screenings or flu vaccinations," or identify planned staff members qualified to provide those services as initially identified.

The Petitioner had previously indicated that her proposed endeavor will address a shortage of fitness instructors. The business plan projects that the company will employ nine trainers by its fifth year of operations. The Petitioner did not show that this number would appreciably affect national statistics. Also, the business plan indicates that the Petitioner "will make it a priority to hire skilled professionals," meaning that she will draw on the existing pool of already-qualified trainers rather than add to their number. The business plan indicates that the Petitioner will provide additional training to her staff, but she has not demonstrated that her "unique skillset" will have an appreciable impact on the industry, or shown how her skills significantly differ, in terms of practical impact, from those already found in the U.S. workforce.

In terms of the planned economic impact of the proposed endeavor, the business plan states:

> In Year 2, the Company will open additional fitness studios in [redacted] and [redacted] expanding its target area. In Year 3, [the Company] will establish a franchise program. The Company plans to have a total of four franchises in California, Georgia, and New York by the end of Year 5.

The plan proposes "a total of 19 employees, stimulating the U.S. economy both by creating new jobs and increasing the amount of payroll [and income] taxes paid."

When the Petitioner initially described her proposed endeavor, she did not indicate any plan to open a chain of fitness centers or to operate a multistate franchise. As such, these elements of the proposed endeavor appear to be material changes that the Petitioner introduced after the fact in an attempt to bring the proposed endeavor into conformity with the *Dhanasar* framework. The plan includes an overview of the Petitioner's past career, but this history does not show experience managing a chain of fitness centers with additional franchise operations.[6]

In terms of job creation, the business plan cites "national job multipliers published by the Econom[ic] Policy Institute" (EPI), indicating that "100 direct jobs in the Arts, Entertainment, and Recreation Industry generate a total of 378.5 indirect jobs." Citing these figures, the business plan states: "Since [the Petitioner] will create 19 direct jobs by the end of Year 5, the total indirect jobs . . . would reach 72." Separately from the EPI figures, the business plan indicates that the Regional Input-Output Modeling System (RIMS II) multipliers for "Other Amusement and Recreation Industries in Florida" project "a final-demand impact in employment, equivalent to 414 jobs in Year 5." The Petitioner did not submit the multiplier evidence itself or show that her proposed endeavor falls under the categories named. The Petitioner did not address or explain the significant discrepancy between the EPI and RIMS II figures.

Many of the Petitioner's arguments rest on general information or assumptions about her field. Because there is no blanket waiver for individuals in that field, such assertions cannot suffice to meet the Petitioner's burden of proof. Individuals in the Petitioner's occupation are presumptively subject to the job offer requirement, including labor certification. Arguments based on the aggregate importance or economic impact of all workers in an occupation do not, on their face, establish that workers in that occupation are entitled to an exception from that statutory requirement.

The Petitioner submitted two "Expert Opinion Letter[s]" from university faculty members. Both letters describe record evidence and conclude that the Petitioner is eligible for the national interest waiver. The letters do not introduce new facts into the record; they simply discuss other record evidence.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony, but USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). USCIS may give less weight to questionable opinions. *Id.* The two submitted letters include several instances of identical or very similar language. For example, one letter ends with this assertion:

[6] This apparent lack of experience could have implications for whether the Petitioner is well-positioned to advance the proposed endeavor, but we have reserved that issue because the appeal will be dismissed on other grounds.

> [The Petitioner] possesses considerable experience and expertise in this highly specialized field. The evidence also shows that her proposed endeavor has significant national and even global impact and also a matter of national concern, stimulates economic growth and positively influences individual and societal wellbeing. As [the Petitioner's] proposed endeavor is in an area that furthers US interests and [the Petitioner] offers contributions of such value through her proposed endeavor, on balance it would benefit United States [sic] to have her, even assuming that other qualified US workers are available.

The other letter concludes with a very similar passage:

> [The Petitioner] possesses considerable experience and expertise in a highly specialized field. The evidence also shows that her proposed endeavor has significant national impact, stimulates economic growth, and positively influences individual and societal well-being through job creation. As [the Petitioner's] proposed endeavor is in an area that furthers US interests and [the Petitioner] offers contributions of such value, it would benefit United States [sic] to have her, even assuming that other qualified US workers are available.

Identical language in letters "suggests that the letters were all prepared by the same person and calls into question the persuasive value of the letters' content." *Hamal v. U.S. Dep't of Homeland Security*, No. 19-2534, slip op. at 8, n.3 (D.D.C. June 8, 2021).

The Petitioner also submitted letters from customers who explained why they preferred the Petitioner to other fitness trainers. Their satisfaction shows that the Petitioner's work has been effective for individual clients, but does not extrapolate into national importance.

We agree with the Director's conclusion that the Petitioner has not met her burden to establish the national importance of her proposed endeavor. Her appellate brief essentially repeats previous claims and does not establish error in the Director's decision.

Because the Petitioner has not met the required "national importance" element of the first prong of the *Dhanasar* analytical framework, we conclude as a matter of discretion that she has not established eligibility for a national interest waiver. Because this issue determines the outcome of the Petitioner's appeal, we reserve the appellate arguments regarding the remaining issue of the 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).

ORDER: The appeal is dismissed.