U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27521539

Date: JUL. 5, 2023

Appeal of Texas Service Center Decision

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

The Petitioner seeks second preference immigrant classification as an advance degree professional, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. 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 a waiver of the required job offer and thus of the labor certification, would not 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 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. Next, a petitioner must then demonstrate they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver if the petitioner shows:

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

[1] *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).

II. ANALYSIS

A. EB-2 Classification

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability. In denying the petition, the Director did not decide whether the Petitioner met the EB-2 classification eligibility through either avenue. On appeal, the Petitioner asserts that he is eligible for the EB-2 classification as a member of the professions holding an advanced degree.

In order to show that a Petitioner holds a qualifying advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). On appeal, the Petitioner does not assert nor the does record show that he possesses a United States advanced degree or a foreign equivalent degree. *Id.* Alternatively, a petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Petitioner previously submitted his university diploma and course transcripts indicating that he earned a bachelor's degree in mechanical engineering from the University [redacted] in 2005. According to the letters from his former employers, the Petitioner worked for two different employers [J- and H-] during the time period from July 2006 to September 2015, performing services in progressively responsible positions within the mechanical engineering profession. Based on our review of the record , he qualifies as a professional holding the equivalent of an advance degree under 8 C.F.R. § 204.5(k)(3)(i)(B). As our determination is not dispositive of the appeal, we need not remand the matter to the Director in order to decide on the underlying immigrant classification.

B. National Interest Waiver

Collectively considering the evidence in the record, we conclude that the Petitioner has materially changed the nature of the proposed endeavor that he intends to pursue, should this petition be approved. This is important because in order to demonstrate that the Petitioner is eligible for a national interest waiver he must, among other things, provide evidence sufficient to show that he is well positioned to advance his specific proposed endeavor under the *Dhanasar* analysis. *See 5 USCIS Policy Manual* F.5, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5. In *Dhanasar*, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." *Dhanasar* at 889.

The petition was filed in August 2020. The Petitioner must establish eligibility at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). The Petitioner initially indicated in the Form ETA-750B submitted with the petition that he was to be employed as a "project manager" for his own startup company in the U.S., [redacted] [T-]. He provided a copy of T-'s articles of incorporation, which were filed in [redacted] 2020. According to part 6. of the petition, the Petitioner was to perform the following duties for T-:

> Research, design[], and implement wide HVAC [heat, ventilation, and air conditioning] preventative maintenance & repair solutions that enhance and support systems operational & performance. Ensures proper pressure relationships, temperature, humidity, & filtration is provided. Determine operational requirements & needs for developing solution and optimizing performance of existing HVAC, refrigeration & building automation equipment and systems. Prepare drawings & layouts for new and existing HVAC systems. Provide expertise with job designs & equipment selections.

The Director issued a request for evidence (RFE) noting that the initial evidence did not illustrate that the Petitioner would be well-positioned to carry out this endeavor through his activities with T-. The Director requested, among other things, evidence of the Petitioner's plans for T-, such as a model or detailed plan for future activities which would show how he intends to continue his work in the United States; interest in T-'s services from further clients or customers, and plans for funding T-'s startup operations. In response to the Director's RFE, the Petitioner submitted a statement outlining how he plans to carry out his proposed endeavor. He explained:

> Initially I have planned to carry out my endeavor to benefit the small businesses providing components and service for the HVAC. . . . [I] planned to carry out my endeavor through my own company and in [redacted] 2020 I have established [T-]. My plan was to work independently doing calculations at my home office and conducting on site visits for engineering assessments as needed. . . . [T]he interest of [my former employer H-] in my endeavor came at a moment of exceptional urgency for the national interest, which requires that I dedicate my entire time for the following years to the efficiency and safety of oil field explorations in the United States rather than to develop my own business. For these considerations, I have decided to disinvest from my own business and continue carrying out my endeavor as a full-time employee of [H-].

The Director denied the petition, in part, concluding that the Petitioner had not demonstrated that he is well position to advance his initially proposed endeavor, which involved providing HVAC services through T- to small businesses. We agree with the Director's ultimate conclusions for the following reasons.

In the RFE response, the Petitioner indicated his intention to "disinvest" from T- in order to take a full-time job opportunity with H-, his former employer, focusing his activities on oil drilling production within the energy-related economic sector, not in providing HVAC services to small business as initially planned. The letter from H-, also submitted in the RFE response corroborates the Petitioner's material change in his proposed endeavor, confirming that the Petitioner has been employed as a mechanical engineer with H- since January 2022. H- explains that in this capacity the Petitioner's "responsibilities are related to the [oil] well drilling. In our industry, wells means borings in the Earth through which natural gas and crude oil flow to the surface for further processing and distribution as fuel sources in the energy market." We also take administrative notice that T- is no longer an active domestic limited liability company in the location where it was founded. *See* the entity summary information for T- at https://www.sos.ok.gov/corp/corpInformation.aspx?id=[redacted]

The Petitioner did not accept his new position with H- until January 2022, one year and five months after he filed the petition. His initial description of the proposed endeavor involved providing HVAC services to small businesses through T-, not plans to seek employment as a mechanical engineer in the oil drilling industry. We conclude the Petitioner's RFE response presented a new set of facts regarding his 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.

Here, the Petitioner's pursuit of employment in the oil drilling industry 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.

On appeal, the Petitioner relies upon the evidence he previously submitted and asserts that he is well position to advance his proposed endeavor, but he does not address the concerns expressed by the Director regarding his lack of a plan to provide HVAC services through T-. It appears the Petitioner sought to address the Director's initial concerns regarding whether he was well-positioned to pursue his endeavor through T-, but in so doing, he has significantly changed his proposed endeavor. Accordingly, we conclude that the focus of his endeavor has 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).

In determining whether an individual qualifies for a national interest waiver, we must rely on the specific proposed endeavor to determine whether the foreign national is well positioned to advance it under the *Dhanasar* analysis. *Dhanasar* at 889-90. Because the Petitioner has not provided consistent information regarding his proposed endeavor, we cannot conclude that he meets the second prong, or that he otherwise merits a national interest waiver as a matter of discretion. For the sake of brevity, we will not discuss other deficiencies in the record with regard to the Petitioner's eligibility under *Dhanasar's* second prong.

Though unaddressed by the Director in the denial, we determine that the material change of the Petitioner's proposed endeavor also negatively impacts his eligibility under *Dhanasar's* first and third prongs. However, as the Petitioner's does not meet the second prong, further analysis of his eligibility under the first and third prongs outlined in *Dhanasar*, would serve no meaningful purpose. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); *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).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.