U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25733801

Date: JULY 25, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a healthcare professional in dentistry or the field of oral health, 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. *See 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 of the Texas Service Center denied the petition, concluding that the record did not establish 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, 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 concluded that the Petitioner's substantially meritorious proposed endeavor did not rise to a level of national importance as required by *Dhanasar's* first prong. On appeal, the Petitioner contends that the Director did not evaluate all the submitted evidence under the preponderance of the evidence standard and instead imposed "novel substantive and evidentiary requirements beyond those set forth in the regulations." They state on appeal that the evidence they submitted in the record prior to and at appeal demonstrated that the Petitioner meets all three prongs under the *Dhanasar* framework and merits a discretionary waiver of the job offer, and thus the labor certification, in the national interest. But we agree with the Director's conclusion that the Petitioner has not sufficiently demonstrated the national importance of their proposed endeavor under the first prong of *Dhanasar's* analytical framework.

A. The Petitioner's Due Process Claim

On appeal, the Petitioner asserts that the Director's denial of their petition "deprived [them] of Due Process rights and fair treatment" because they were not given "the opportunity to present additional evidence and cure any questions raised by the adjudicating Officer."

The Petitioner did not identify any specific procedural irregularity that deprived them of notice and opportunity to be heard. The Director issued the Petitioner a notice of intent to deny (NOID) on April 18, 2022. The NOID gave notice to the Petitioner and specified the deficiencies and concerns in the Petitioner's initial filing. It also provided the Petitioner a non-exhaustive list of documentation and material which they could submit to address the petition's deficiencies and an opportunity to provide it to USCIS. So it appears that USCIS followed the applicable regulations and procedure in adjudicating this petition. *See* 8 C.F.R. § 103.2(b)(8).

And 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). But even if we did have that authority, the parties must demonstrate a showing of "substantial prejudice" to prevail on a due process challenge. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004). The Petitioner has not shown any violation of the regulations or process that resulted in "substantial prejudice."

B. Substantial Merit and National Importance

To satisfy the *Dhanasar* analytical framework's first prong, the Petitioner must demonstrate that their proposed endeavor has both substantial merit and national importance. This prong 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 a proposed endeavor has national importance, we consider its potential prospective impact. In support of their claim that they can satisfy the *Dhanasar* analytical framework's first prong, the Petitioner provided articles from major media, professional, and industry publications that addressed the lack of affordable dental care and dental insurance in the United States, nationwide and regional labor shortages in the dental health profession, inequalities in the availability of dental care across different demographic populations, and serious health outcomes that can be linked to a lack of adequate dental care. The record here supports the Director's determination that the Petitioner's proposed endeavor, which aimed to develop the field of dentistry in the United States by addressing gaps in access to dental care in the United States and promoting general oral hygiene, had substantial merit.

But, when evaluating national importance, we shift the focus from the importance of the field or industry within which a petitioner will work to "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 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.

In Part 6 of the initial petition, the Petitioner described their endeavor as being a "healthcare professional in the field of dentistry" who would "conduct research dealing with the understanding of human diseases and the improvement of human health." But the Petitioner's "professional plan and

statement" did not indicate their intent to pursue any dental research. The Petitioner expressed their proposed endeavor in the initial petition as a healthcare professional (healthcare executive or healthcare administration) in the field of dentistry. In their response to the Director's NOID, they elaborated that they would "establish a dental clinic services firm" initially in one location in the State of Mississippi to "support hub-zones and economic depressed areas following the COVID-19 pandemic crisis" and expanding to other locales in Mississippi and Arizona yearly thereafter.

The evidence the Petitioner submitted does not sufficiently reflect by a preponderance of the evidence that the proposed endeavor rises to a level of national importance. The record contains documentation of a dearth of dental professionals. This shortage has led to the existence of many "dental deserts," or dental health professional shortage areas designated by the U.S. Department of Health and Human Services (HHS). At the outset, although the Petitioner provided several listings for commercial office space which could house a dental clinic, the record did not contain evidence that any, one, or all the listings were in shortage areas or areas designated as targeted due to high unemployment rates in the populations. The evidence did reflect that the listings described properties located in areas designated by the Small Business Administration as HUBZones. The HUBZone program's goal is to promote business growth in underutilized business zones with the goal of awarding 3% of federal contract dollars to companies that are HUBZone certified. Joining the HUBZone program makes a business eligible to compete for certain federal contracts in the "set-aside" category. There are several required qualifications to participate in the program, but the most dispositive requirement for purposes of our analysis is that the business seeking to participate in the HUBZone program must be at least 51% owned by U.S. citizens, a community development corporation, an agricultural cooperative, an Alaska Native corporation, a Native Hawaiian organization, or an Indian tribe. Whilst it is unknown and the record is silent about what if any federal programs exist in the "set-aside" category for dental clinics, the record is crystal clear that the Petitioner would wholly own and control the proposed endeavor, and that the Petitioner is not a U.S. citizen, a community development corporation, an agricultural cooperative, an Alaska Native corporation, a Native Hawaiian organization, or an Indian tribe. So the fact that the properties the Petitioner was considering fell within the geographical reach of the HUBZones program was wholly irrelevant to the question of whether the Petitioner's endeavor rose to a level of national importance.

And it is unclear from the evidence in the record that the work of a single healthcare professional in the field of dentistry, irrespective of that proposed endeavor's success or failure, would have a significant impact on the field beyond its immediate sphere of influence. The evidence in the record does not highlight how the work of one professional could have broader implications that address the paucity of dental professionals that prompted HHS to designate individual geographical areas serving populations of individuals with limited access to dental care. And if in fact these shortages can be addressed by adding additional able, willing, qualified, and available international workers like the Petitioner, they would be better addressed through the U.S. Department of Labor's (DOL) labor certification process. The labor certification process permits U.S. employers to test the labor market to document the lack of able, available, qualified, and willing U.S. workers for positions with U.S. employers.

The record also contains insufficient evidence to support the positive economic effects the Petitioner expects their proposed endeavor to realize. The Petitioner roots the potential positive effects of their unrealized clinic or clinics in multiple locations in their potential for job creation and tax revenue

generation. But the record contains insufficient documentation to support the Petitioner's projection that they would pay approximately $8,030,000 in wages to prospective future employees. The record is similarly silent about the other potential positive economic effects identified by the Petitioner, such as tax payments, which inhibits an evaluation of whether the Petitioner's indicated benefits from taxation rise to the level of national importance.

The Petitioner also indicated in the record that their hiring and training plans would lead to knowledge proliferation in the field of dentistry. This dental knowledge proliferation is akin to teaching activities. In *Dhanasar*, we considered a petitioner's teaching activities and concluded that teaching activities do not rise to the level of having national importance because they do not impact a field of endeavor more broadly than the immediate effect or influence on the cohort receiving the teaching. *See Dhanasar*, 26 I&N Dec. at 893. The record does not adequately support that the Petitioner's dental knowledge proliferation through their hiring and training plan will have a impact on the practice of dentistry in the United States. The record does not have a cognizable or detailed plan for reaching an audience wider than the individuals it will purportedly hire and train in the future.

The manifest thrust of the Petitioner's claim of eligibility for the act of discretion to waive the requirement of a job offer, and thus a labor certification, in the national interest comes from the Petitioner's claims regarding their profession's importance, their past career as a dentist in their home country, and their dedication to their field. But these attributes, critical as they may be for an endeavor's success, are not germane to the question of whether a proposed endeavor elevates to a position of national importance. We are not concerned with the individual petitioner when evaluating the first prong of the *Dhanasar* analytical framework; we are focused on the petitioner's proposed endeavor. The success of the endeavor, or attributes that could tend to make the endeavor more successful, are consequently not as important as determining whether the proposed endeavor itself stripped away from a petitioner, has attributes that would highlight the prospective positive impact of its broader implications or positive economic effects rising to a level of national importance.

B. Other Areas of Concern.

Since the Petitioner did not demonstrate the national importance of their proposed endeavor, that issue standing alone requires the dismissal of their appeal. However, our review of the record uncovered additional issues that should be examined and addressed should there be future proceedings in this matter.

The Petitioner initially proposed to continue working in their field as a healthcare professional in dentistry or the oral health field for U.S. dental offices. But the record developed initially contained evidence and documentation which demonstrated that the Petitioner's proposed endeavor was essentially a job search. And the purpose of an NIW is not to facilitate a petitioner's U.S. job search.

As stated above, the Director's NOID solicited additional evidence and clarification of the Petitioner's proposed endeavor to determine whether it holds substantial merit and national importance. In response to the NOID, and perhaps having conceded that their initial endeavor could not support a national interest waiver under the *Dhanasar* framework, the Petitioner submitted a "Definitive Statement," a revised resume, and a new business plan outlining the Petitioner's plan to open their own network of dental offices.

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 to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc Comm'r 1998). Revisions submitted in response to an RFE constituting a materially different endeavor introduce ambiguity which prevents analysis into a proposed endeavor's substantial merit or national importance. So the Petitioner's extensive revisions raised serious questions about the true nature of the Petitioner's proposed endeavor. *See also Matter of Ho*, 19 I&N Dec. 582 at 591 ("Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition").

And we note the Petitioner's apparent ineligibility for classification as a member of the professions holding an advanced degree for implications related to any future filings. Specifically, the Petitioner's educational evaluation reflects that they have not earned the single source equivalent of a U.S. bachelor's degree or higher because their equivalency was determined after the combination of their education with their work experience. The regulation does provide an alternative pathway to demonstrating categorical eligibility as an advanced degree professional if a petitioner demonstrates they have earned the single source equivalent of a U.S. bachelor's degree followed by five years of progressively responsible work experience. Whilst the Petitioner has submitted evidence five years of work experience in the record, there is no evidence in the record of the Petitioner having earned the single source equivalent of a U.S. bachelor's degree or higher. And the record contained insufficient evidence to evaluate the Petitioner's eligibility for EB-2 classification as an individual of exceptional ability. The Petitioner should be prepared to address their categorical eligibility for EB-2 classification in any future proceedings requiring a petitioner to demonstrate eligibility as an advanced degree professional or individual of exceptional ability.

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that they do not merit a favorable exercise of discretion to waive the requirement of a job offer, and therefore a labor certification. And we reserve the issue of whether the Petitioner demonstrated categorical eligibility for EB-2 classification as well as eligibility for a discretionary national interest waiver under the remaining prongs of the *Dhanasar* analytical framework. *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). So we dismiss the Petitioner's appeal.

ORDER: The appeal is dismissed.