U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23072433

Date: JUN. 6, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a pharmaceutical research scientist, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree. *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 revoked the approval of the petition, concluding that the Petitioner willfully misrepresented facts on which the initial approval of her petition was based. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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.

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[1], 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.[2]

USCIS may revoke its approval of an immigrant visa petition "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. The realization that a petition was approved in error may be good and sufficient cause for revoking its approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). If the revocation will be based on any ground other than those specified in 8 C.F.R. § 205.1, then USCIS must issue a notice of intent to revoke (NOIR) and provide the opportunity to submit evidence in opposition thereto, before proceeding with a written notice of revocation (NOR). *See* 8 C.F.R. § 205.2(b) and (c).

An NOIR "is not properly issued unless there is 'good and sufficient cause' and the notice includes a specific statement not only of the facts underlying the proposed action, but also of the supporting evidence." *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987).

II. ANALYSIS

The Petitioner filed the Form I-140, Immigrant Petition for Alien Workers, on November 1, 2017, based on her proposed endeavor to continue her work as a research scientist developing pharmaceuticals to treat cancer and gastritis. The Director approved the petition on February 2, 2018. On December 11, 2018, the petition was returned to USCIS from the Department of State because the U.S. Consulate in Seoul determined that the Petitioner misrepresented elements of her career to USCIS. On January 23, 2020, the Director issued an NOIR. Following the Petitioner's response to the NOIR, the Director issued an NOR on September 9, 2021. On appeal, the Petitioner asserts that the evidence of record was misconstrued and that she did not misrepresent her accomplishments.

USCIS adjudicates petitions requesting national interest waivers according to the three-prong framework described in *Dhanasar*, below.

The first prong, 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. *Dhanasar*, 26 I&N Dec. at 889.

The second prong shifts the focus from the proposed endeavor to the individual. To determine whether they are well positioned to advance the proposed endeavor, we consider factors including, but not limited to: their education, skills, knowledge and record of success in related or similar efforts; a

[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).
[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals. *Id.* at 890.

The third prong requires a petitioner to demonstrate 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. In performing this analysis, we may evaluate factors such as: whether, in light of the nature of the individual's qualifications or the proposed endeavor, it would be impractical either for them to secure a job offer or to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from their contributions; and whether the national interest in their contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, establish 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. *Id.* at 890-91.

The U.S. Consulate in Seoul determined that the Petitioner fraudulently claimed to hold U.S. and Korean patents, that her published work had impacted the work of others in the field, and that she exaggerated claims of having received media attention and awards for her work. The Consulate advised that the Petitioner's misrepresentation of facts called into question the second and third prongs of *Dhanasar*. Upon review, we conclude that the NOIR contains several deficiencies and, therefore, did not provide the Petitioner with sufficient notice to effectively respond to the information presented. 8 C.F.R. § 103.2(b)(16)(i).

In the NOIR, the Director incorrectly referenced the issues[3] concerning the Petitioner's published work and her claims of having received patents and media attention in terms of her eligibility under the first prong of *Dhanasar*. However, these issues do not relate to the Petitioner's proposed endeavor, but to whether she is well positioned to advance the endeavor and to whether it would be beneficial to the United States to waive the requirements of a job offer. The Director also erroneously questioned the Petitioner's eligibility regarding *Matter of V-S-G- Inc.*[4] and the requirement that applicants for permanent residency or status adjustment file a Form I-485 Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j); no such requirement exists for a petitioner requesting a national interest waiver.[5] Further, the NOIR did not sufficiently detail the

[3] The Director did not address the issue of the Petitioner's awards.

[4] *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06 (AAO Nov. 11, 2017).

[5] The Instructions to Form I-485 Supplement J state:

> Individuals seeking or granted a National Interest Waiver of the job offer requirement and individuals seeking or granted classification as an alien of extraordinary ability under INA section203(b)(1)(A) do not need to file Supplement J. Because these employment-based immigrant visa categories are not tied to a specific job offer, individuals seeking or granted classification as an alien of extraordinary ability or seeking or granted a National Interest Waiver of the job offer requirement do not have to file Supplement J when filing Form I-485 or to request job portability under INA section 204(j).
>
> Instructions for Supplement J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 205(j), https://www.uscis.gov/sites/default/files/document/forms/i-485supjinstr.pdf.

elements of willful misrepresentation or discuss those elements within the context of the relevant derogatory evidence listed in the NOIR.[6]

Before the approval of a petition is revoked, the Petitioner must be afforded an appropriate opportunity to rebut derogatory evidence and present evidence in support of the petition. 8 C.F.R. § 205.2(b); *Matter of Estime*, 19 I&N Dec. at 451. Because that was not properly done so here, we will remand the matter to the Director to review the entirety of the record and to issue a new NOIR concerning the Petitioner's eligibility for the underlying EB-2 classification and whether she merits a discretionary waiver of the job offer requirement in the national interest.[7]

III. CONCLUSION

Considering the deficiencies discussed above, we will withdraw the Director's decision and remand this case for further consideration of whether the Petitioner meets all eligibility requirements. After further consideration of the eligibility issues, the Director shall issue a new NOIR in accordance with the applicable provisions. Following the Petitioner's response to the NOIR, or the expiration of the time period to respond, the Director shall issue a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

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[6] A finding of willful misrepresentation of material fact against a petitioner requires the following elements:
- The petitioner procured, or sought to procure, a benefit under U.S. immigration laws;
- The petitioner made a false representation;
- The false representation was willfully made;
- The false representation was material; and
- The false representation was made to a U.S. government official.

See generally 8 USCIS Policy Manual J.2(B), https://www.uscis.gov/policymanual; *see also Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288 (BIA 1975).

[7] We note that the NOR does not address the Petitioner's underlying eligibility for the EB-2 immigrant visa classification. On remand, the Director should analyze whether the Petitioner's master's degree received in Korea is the foreign equivalent of a U.S. master's degree. *See* 8 C.F.R. § 204.5(k)(2). Additionally, the NOR does not provide any analysis under the three-prong *Dhanasar* test, nor does it sufficiently analyze the materiality of the described misrepresentations.