U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25759536

Date: MAR. 15, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a general and operations manager, seeks classification as a member of the professions holding an advanced degree. 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 denied the petition, concluding that the Petitioner qualified for classification as a member of the professions holding an advanced degree but that the Petitioner had not established 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 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. 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.

While 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).[1] *Dhanasar* states that, after a petitioner has established

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

eligibility for EB-2 classification, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the noncitizen's proposed endeavor has both substantial merit and national importance; (2) that 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 he or she 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; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the 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, USCIS may evaluate factors such as: whether, in light of the nature of the noncitizen's qualifications or the proposed endeavor, it would be impractical either for the noncitizen to secure a job offer or for the petitioner 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. In each case, the factor(s) 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.[2]

II. ANALYSIS

The Director found that the Petitioner qualifies as a member of the professions holding 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 of a labor certification, would be in the national interest. For the reasons discussed below, the Petitioner has not established that a waiver of the requirement of a job offer is warranted.

Initially, the Petitioner described the endeavor as a plan "to continue using my skills, expertise, and knowledge to work as a [g]eneral [o]perations [m]anager for U.S. institutions, as well as for foreign entities looking to expand their wealth and business portfolio in the United States." The Petitioner also generally asserted that his "efforts will ultimately result in increased business revenue, employment of U.S. workers, and contribution to the country's gross domestic product."

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

In a statement dated June 2020, the Petitioner specifically discussed his "role as [b]usiness [c]onsultant at [redacted] a business consulting company operating in [redacted] Florida, with a plan "to launch a new consulting firm in another U.S. state." The Petitioner stated, "Should the present petition be approved, I will expand my roles at [redacted] and I will be in charge of managing and setting up the firm's new U.S. location." He noted that, while working as a business consultant at [redacted] his "clients have been able to commence operations and generate jobs across several U.S. regions, including Texas, Minnesota, Iowa, Delaware, Florida, [and] Massachusetts, among others." The Petitioner referenced a pending client project that is "due to generate up to one hundred (100) direct jobs for U.S. workers." The Petitioner further stated, "Apart from my roles at [redacted], I will also offer my skills on a consultancy basis, in which capacity I will support U.S. businesses seeking to expand their clientele and business into diverse economic regions, such Latin [sic] America, as well as foreign companies and/or investors wishing to introduce their products, services, wealth, and business to the U.S. market." He also asserted that, as a consultant, he will "offer external management services to small and medium-sized companies in the U.S. which require the services and management of an operations executive, but are unable to employ someone in that role on a full-time basis due to their internal structure or the current financial condition of their business." The Petitioner did not initially indicate that he planned to found a new business or hire workers for such a new business; instead, he appeared to plan to work as a freelance consultant in addition to setting up a new [redacted], location.

In response to the Director's request for evidence (RFE), the Petitioner asserted, for the first time, that he plans "to continue developing a [b]usiness [d]evelopment and [i]nvestment [c]onsulting [c]ompany, [redacted] in the state of Florida." The Petitioner also submitted a business plan for his new business dated August 2022, after the 2020 petition filing date, indicating that it would employ various numbers of workers within the first five years of operations. We note, however, that the record also contains a copy of a certificate from the Florida Secretary of State, indicating that the Petitioner filed articles of organization for his business in July 2020, as of the petition filing date. The record does not clarify why the Petitioner initially omitted reference to the business he had already founded in his description of the endeavor submitted at the time of filing.

A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. *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 in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Whether the Petitioner planned to found a new company and hire new workers is material to the first *Dhanasar* prong because it contemplates endeavors that have broader implications, such as "significant potential to employ U.S. workers or . . . other substantial positive economic effects, particularly in an economically depressed area." *Dhanasar*, 26 I&N Dec. at 889-90. Because the Petitioner asserted, for the first time, in response to the Director's RFE that he plans to found a new company and hire new workers, rather than to work as a freelance consultant in addition to his position at [redacted], the plan to found a new business and hire new workers presents a new set of facts that cannot establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*,

14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. Because the Petitioner's plan to found a new business and hire new workers cannot establish eligibility, we need not address it further.

We note, however, that the business plan presents inconsistent or implausible information about the number of employees to be hired, the work location, and the company's financial viability, which would reduce its credibility even if it could establish eligibility, which it cannot. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of a petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition.). For example, in section 1.6 of the business plan, the table of jobs created planned for the first five years of operation (beginning in 2023) indicates that the company would create 24 new positions during that period. However, the table of "Positions Creation" in section 3.8 provides a total of 26 paid "professionals who will be working at The Company in the next 5 years of operation." The business plan's inconsistent information regarding the number of positions to be created raises questions regarding the accuracy of the plan in general. *See id.* The business plan also indicates that the business "is currently operating in [redacted] but it will expand and open its headquarters in [redacted] Florida." Publicly available information provided by the Florida Secretary of State indicates that, in 2023, the business's principal address remains a private residence in [redacted], Florida. The record does not reconcile whether the Petitioner intends for up to 26 workers to work at the same private residence, nor does it reconcile how doing so would be feasible. *See id.* Additionally, the information provided in the business plan undermines the company's financial viability. Section 1.3 specifically identifies the Petitioner as the company's owner and general manager. The table in section 3.8 indicates that the full-time general manager's annual wage is $100,000, which is consistent with the position wage provided in the Form I-140, Immigrant Petition for Alien Worker. Section 3.3 of the business plan states, "The next investment, made by the founding shareholders, will be in the order of US$100,000.00, more than sufficient to develop its activities and operations." However, the Petitioner, a "90% participant in capital," would essentially be forfeiting his annual wage reported in the business plan in order to make the stated investment "to develop its activities and operations." The ratio of the Petitioner's annual wage from the company to his capital reinvestment in that company raises questions regarding the company's financial viability. *See id.* Therefore, even if the business plan could establish eligibility, which again it cannot, it would undermine its own reliability and sufficiency, and that of other evidence in the record. *See id.*

The Petitioner's RFE response also presents information that directly conflicts with the description of the proposed endeavor submitted at the time of filing. The RFE response business plan indicates that the Petitioner worked as a business consultant for [redacted] from "July 2018 – June 2020," ending his employment at that company before the petition filing date. Therefore, the record does not support the Petitioner's assertion at the time of filing that he "will expand [his] roles at [redacted] and [he] will be in charge of managing and setting up the firm's new U.S. location." Additionally, the Petitioner's discussion of his work at [redacted], and its consequences for his clients is inapposite to the instant petition because the RFE response indicates that, before filing the petition, the Petitioner ceased working for [redacted] and providing such consequences to its clients. A petitioner must establish eligibility for a requested benefit at the time of filing the benefit request, and a petitioner must continue to be eligible through adjudication. *See* 8 C.F.R. § 103.2(b)(1). Because the RFE response indicates that the Petitioner ceased working for [redacted] prior to filing the petition, information regarding his

work for that company and the consequences for its clients cannot establish eligibility under the first *Dhanasar* prong. *See id*; *see also Dhanasar*, 26 I&N Dec. at 889-90.

In the decision, the Director noted that, although the Petitioner founded his company before the petition filing date, he "made no mention of this entrepreneurial venture" before the RFE response. As discussed above, the Director further noted that the RFE response "shows that [the Petitioner's] employment with [redacted] ended in June 2020, which make[s] his initially stated intentions to continue working with that company at the time of filing false." The Director noted that the material changes to his planned endeavor—cessation of stated employment and a previously undisclosed plan to found a company and hire workers—cannot establish eligibility and found "sufficient reason to conclude that the prong relating to national importance has not been met." The Director further noted inconsistent or unsupported information submitted in the RFE response.

On appeal, the Petitioner asserts that his proposed endeavor has not changed since the time of filing. Specifically, he asserts that he "intends to work in the United States as a [g]eneral and [o]perational [m]anager while also continuing to expand his business, [redacted] He adds that "wanting to further expand his business does not deviate from this plan" and that he "will be employing the same skills to further the same proposed endeavor while simultaneously adding an extra layer of value by continuing to provide these same benefits to the US economy through his business." The Petitioner further references general information about operations management published by Inc. Magazine, Harvard Business Review, and Entrepreneur Magazine. However, none of the publications reference the Petitioner, nor do they address how his specific endeavor may have national importance. The Petitioner summarizes his prior work experience and asserts that his endeavor has national importance because it "aligns with the national interests of the U.S. in improving marketing in the business sector."

In determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. *Dhanasar* provided examples of endeavors that may have national importance, as required by the first prong, having "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" and endeavors that have broader implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

The record does not support the Petitioner's characterization on appeal that the proposed endeavor remained unchanged since the time of filing through adjudication. As discussed above, the Petitioner submitted a statement in support of the petition that specifically asserted, "Should the present petition be approved, I will expand my roles at [redacted] and I will be in charge of managing and setting up the firm's new U.S. location." However, the RFE response indicated that the Petitioner's employment at [redacted] ceased before the petition filing date. Therefore, the record does not support the conclusion that the specific employment plans that the Petitioner provided at the time of filing were factually possible as of the petition filing date. The revelation, provided in response to the RFE, that the Petitioner's plans to expand his roles at [redacted] Inc., and manage and set up a new U.S. location for that company were not factually possible presents a new set of facts material to the first *Dhanasar* prong, because managing and setting up a new office

relate to whether a proposed endeavor may have national importance. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176; *Dhanasar*, 26 I&N Dec. at 889-90. Similarly, the Petitioner's cessation of work at [redacted], presents a new set of facts regarding the consequences of his consulting work for his clients at that company because the record does not establish that those clients would follow him to his own company. *See id.*

We acknowledge that the initial description of the proposed endeavor also indicated, "Apart from my roles at [redacted], I will also offer my skills on a consultancy basis, in which capacity I will support U.S. businesses seeking to expand their clientele and business into diverse economic regions, such Latin [sic] America, as well as foreign companies and/or investors wishing to introduce their products, services, wealth, and business to the U.S. market." The Petitioner also asserted that, as a consultant, he will "offer external management services to small and medium-sized companies in the U.S. which require the services and management of an operations executive, but are unable to employ someone in that role on a full-time basis due to their internal structure or the current financial condition of their business." However, the Petitioner did not initially indicate that he planned to found a new business or hire workers for such a new business; instead, he appeared to plan to work as a freelance consultant. A plan to work as a freelance consultant is materially different from founding a new consulting company and hiring workers because of the potential broader implications of the latter. Whether the Petitioner would utilize the same set of business consulting and managerial skills at either [redacted] does not fully address the consequences of founding a new business and hiring employees for that business under the Petitioner's sole direction, rather than working under the direction of [redacted] ownership and management structure. The Petitioner stated for the first time in response to the RFE that he planned to found his own company and hire workers, again presenting a new set of facts material to the first *Dhanasar* prong not addressed at the time of filing the petition. *See id.* For the reasons discussed above, the record supports the Director's conclusion that the Petitioner materially changed the proposed endeavor and that the information regarding [redacted] cannot establish eligibility. *See id.*

The Petitioner's reference on appeal to his prior work experience as a factor in the proposed endeavor's national importance is misplaced. A petitioner's work experience relates to the second *Dhanasar* prong—whether an individual is well positioned to advance a proposed endeavor—but it does not relate to the first *Dhanasar* prong—whether the specific endeavor an individual proposes to undertake will have broader implications or other substantial positive economic effects. *Dhanasar*, 26 I&N Dec. at 888-91. In turn, the Petitioner's reference on appeal to "the national interests of the U.S. in improving marketing in the business sector" is misplaced. Again, in determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See id.* at 889. General assertions regarding an industry that do not address how a specific endeavor will have broader implications or other substantial positive economic effects do not establish how a proposed endeavor may have national importance. *See id.*

The record does not establish that the proposed endeavor will have national importance. For the reasons discussed above, the Petitioner's RFE response presented a new set of material facts—and established that significant aspects of his initial proposed endeavor were not factually possible—that

cannot establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. Instead, the Petitioner's initial proposed endeavor description asserted that he will "continue using my skills, expertise, and knowledge to work as a [g]eneral [o]perations [m]anager for U.S. institutions, as well as for foreign entities looking to expand their wealth and business portfolio in the United States." The proposed endeavor appears to benefit the Petitioner's potential employer(s) and the clients, customers, etc., of the Petitioner's potential employer(s); however, the record does not establish how the Petitioner's work as a general operations manager will have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" or broader implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

In summation, the Petitioner has not established that the proposed endeavor has national importance, as required by the first *Dhanasar* prong; therefore, he is not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or 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).

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.