U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25279098

Date: MAR. 20, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an electrical engineer, 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 concluded that the Petitioner qualified for classification as an individual with an advanced degree, but denied the petition, concluding he did not establish that a waiver of the required job offer, and thus the labor certification, would be in the national interest. On appeal, the Petitioner contends that the Director did not sufficiently consider the submitted evidence demonstrating that he is eligible for a national interest waiver.

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.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

> who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
>
> > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

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, 889 (AAO 2016). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[1], 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.[2]

II. ANALYSIS

The sole issue to analyze is whether the Petitioner established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. For the reasons discussed below, we agree with the Director that the Petitioner did not sufficiently demonstrate the national importance of his proposed endeavor under the first prong of the *Dhanasar* analytical framework.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national 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. *Id.*

Regarding his claim of eligibility under *Dhanasar*'s first prong, the Petitioner initially indicated that his proposed endeavor was to continue using his expertise and knowledge in the field of electrical engineering "in the U.S. manufacturing, industrial, and engineering sectors." The Petitioner pointed to his more than 17 years of experience working as an electrical chief at a factory in Pakistan and stated that he planned to "contribute significantly to U.S. electrical engineering projects, by helping to build and maintain large electrical projects." Later, in response to the Director's notice of intent to deny (NOID), the Petitioner again explained that he intended to advance his career in electrical engineering, in the field of

[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.

manufacturing, but then stated he planned on launching his own business. The Petitioner stated that that his new proposed company would provide engineering and technical services, solar power and wind power consultation, energy consumption assessment and efficiency project plans, electrical engineering outsourcing services, and alternative energy project implementation. The Petitioner projected that the new company would pay approximately $4.29 million in wages during its first five years of operation and that it would establish at least four different regional offices throughout the United States. The Petitioner indicated that the company would be launched through a $200,000 initial investment, including $120,000 from him, and another $80,000 from a business partner.

In denying the petition, the Director concluded that the Petitioner's proposed endeavor was not sufficiently clear, due to the material change in his proposed plans from the time the petition was filed to the NOID response. The Director determined that the material change by the Petitioner to the proposed endeavor made its national importance and potential prospective impact questionable, and therefore, concluded that he did not demonstrate national importance. On appeal, the Petitioner does not discuss the Director's determination that a material change was made to the petition. The Petitioner asserts that he is uniquely qualified to advance his proposed endeavor; specifically, his proposed new electrical engineering company. The Petitioner states that his new business would be established in various historically underutilized business zones throughout the United States, boost the United States economy, and thereby be of national importance.

The Petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, the purpose of a NOID is to elicit information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), 103.2(b)(8), 103.2(b)(12). 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). 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. The information provided by the Petitioner in the response to the Director's NOID did not clarify or provide more specificity to the proposed endeavor as initially described, but rather materially changed its focus. For instance, in support of the petition, the Petitioner indicated he would seek employment as an electrical engineer in the United States engineering market, while in response to the NOID he set forth extensive plans to launch a new business, including at least four branch offices throughout the country. Accordingly, the NOID response presented a new set of facts regarding the proposed endeavor, which is material to eligibility for a national interest waiver. *See Matter of Katigbak*, 14 I&N Dec. 45, 49; *see also Dhanasar*, 26 I&N Dec. at 889-90. The fact that his endeavor falls within a STEM field does not automatically show eligibility for a national interest waiver. Specifically, the STEM endeavor must have both substantial merit and national importance in respect to the first prong of *Dhanasar*. *See generally* 6 USCIS Policy Manual F.5(D)(2), https://www.uscis.gov/policymanual.

In determining whether an individual qualifies for a national interest waiver, we must first rely on the specific proposed endeavor to determine whether it has both substantial merit and national importance under the *Dhanasar* analysis. Because the Petitioner has not provided consistent information regarding his proposed endeavor, we cannot conclude that his proposed endeavor would have national importance. On appeal, the Petitioner does not address this stated basis for denial discussed by the Director, but merely reiterates the same contentions specific to his proposed new electrical engineering

company. Therefore, since the Petitioner has not overcome the Director's stated basis for denial, we must dismiss the appeal.

Because the documentation in the record does not establish the national importance of his proposed endeavor as required by the first prong of the *Dhanasar* precedent decision, the Petitioner has not demonstrated eligibility for a national interest waiver. Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding his eligibility under the second and third prongs. *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 find that he has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.