U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30336141

Date: APR. 23, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an aspiring entrepreneur in the franchise brokerage space, 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 employment based second preference (EB-2) permanent 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 Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).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 the record did not establish that the Petitioner qualified for classification as an employment based second preference permanent immigrant and a discretionary waiver of the job offer requirement, and thus a labor certification was not merited upon the application of the analytical framework we first explicated in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). The matter is now before us on appeal pursuant to 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 immigrant 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.

The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." To demonstrate

exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
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> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; or
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> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

And 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 three-prong analytical framework for adjudicating national interest waiver petitions in *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

A. EB-2 Classification

To qualify for a national interest waiver, the Petitioner must first demonstrate that they qualify for the EB-2 classification under section 203(b)(2)(A) of the Act, either as an advanced degree profession or an individual of exceptional ability. The Director concluded the record did not support the Petitioner's claim to eligibility for EB-2 classification as an individual of exceptional ability because they "did not meet at least three of the six criteria." But the Director did not specify which, if any, of the criteria the Petitioner met. Nor did they explain with specificity which of the criteria the Petitioner did not meet.

As discussed below, the Petitioner has not presented adequate reasons or evidence on appeal to overcome the Director's determination that the Petitioner is ineligible for a national interest waiver as a matter of discretion. Therefore, we need not remand the matter to the Director to clarify the basis of their conclusion that the Petitioner is ineligible for EB-2 classification as an individual of exceptional ability. Since the identified basis for denial discussed below is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the issue of the Petitioner's EB-2 eligibility. *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).

B. National Interest Waiver

The Petitioner, a native and citizen of the United Kingdom as well as South Africa, stated in the Form I-140, Immigrant Petition for Alien Workers, that their anticipated job title was "CEO." The Petitioner proposed to establish, develop, and operate a franchise brokerage and consulting business targeting international investors investing in and launching franchise businesses in the United States. The record contains a business plan for [redacted] eight supportive statements purporting to evidence the Petitioner's past, current, and prospective employment in their field of endeavor, letters and memoranda of intent to engage with the Petitioner's prospective franchise consultants business,

tax documents, business registration, and corporate governance materials related to the current franchise they operate, certificates of completion and achievement for continuing professional development seminars or courses offered by the Petitioner's previous and current employer or franchisor, documentation corresponding to the business registration, general business location on a state level, and good standing of the current franchise they operate, franchisor recognition for high production with scoring and weighing criteria, news clipping related to the Petitioner's professional and immigration journey, report entitled Advancing Equity Through The American Rescue Plan, printout from legacy International Trade Administration website on the topic of foreign direct investment, copy of White House National Security Strategy press release and Interim National Security Strategic Guidance, 2022 National Entrepreneurship Month proclamation, the Petitioner's personal statement letter, article about franchising challenges, promotional material related to Meineke Car Care Centers and Central Bark franchise opportunities, Center on Budget and Policy Priorities Federal Payroll Taxes informational literature, U.S. Department of Labor Bureau of Labor Statistics News Release titled The Employment Situation, online article describing the effect of the unemployment rate, online article from Tax Policy Center regarding the revenue generated from the federal payroll tax, online articles describing job shortages, online article describing effect of franchises on job and economic growth, Economic Innovation Group Distressed Communities Index printout related to North Carolina, financial deposit information for business account, salary survey documentation, corporate by-laws for Pineville North Carolina Chamber of Commerce and dues invoices related to the current franchise they operate, Better Business Bureau registration documentation related to the current franchise they operate, copy of National AAMCO Dealers Association bylaws, copy of 2023 Franchise Economic Outlook, online article detailing franchising industry facts, press release from International Franchise Association on joint employer ruling, industry report on Franchise Resale Brokers and Consultants, Economic Policy Institute report on updated employment multipliers for the U.S. economy, revised economic distress rankings, U.S. Department of Labor Bureau of Labor Statistic spotlight on statistics related to the impact of the coronavirus pandemic on business and employees by industry, McKinsey and Company articles on small business vulnerability to COVID-19, University of New Hampshire monthly update to COVID-19 economic crisis from October 2021, and printout from IFA Foundation listing quick facts related to franchise businesses and economic forecast trending to U.S. recovery.[1]

The Petitioner stated that their proposed endeavor would help international investors "connect with the appropriate vetted and matched franchisor, guide them in the nuances of opening a business in the United States, and ensure the business system is functioning correctly." The Petitioner anticipated a three-phase program consisting of introducing investors to franchising opportunities, advising for the launch of the franchise, and an extended business mentorship and assistance phase post launch to assist with setting "foundational grounds" and "fully understand[ing] which KPIs to measure until [new franchise owners] can effectively navigate [business operations] on their own." The Petitioner intended an initial budget of $50,000 and had earmarked $23,000 for initial expenses. The Petitioner asserted their proposed endeavor would exert potential prospective impact on employment creation, "societal benefit," increased foreign investment, and benefits to economically depressed areas.

[1] Whilst we may not discuss every document submitted, we have reviewed and considered each one.

The Director denied the petition.[2] The Director concluded that the well-positioned[3] Petitioner's proposed endeavor, whilst substantially meritorious, did not demonstrate with material, relevant, and probative evidence in the record its potential prospective impact rising to a level of national importance. The Director also concluded on balance of relevant factors that the waiver of the required job offer, and thus the labor certification, would not be beneficial to the United States.

In determining national importance under *Dhanasar*, the relevant question is not the importance of the field, industry, or profession in which the individual will work; instead, we focus on "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we noted that "[a]n undertaking may have a national importance for example, because it has national or even global implications within a particular field." *Id.* We further noted that "we look for [the] broader implications" of the proposed endeavor. The broader implications of the proposed endeavor can inform us of the proposed endeavor's national importance. We do not view broader implications through a geographical lens. Broader implications can reach beyond a particular proposed endeavor's geographical locus and focus. The relevant inquiry is whether the broader implications apply beyond just narrowly conferring the proposed endeavor's benefit. And 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. We further 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.

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[2] The Director's decision correctly identifies the entrepreneurial nature of the Petitioner's proposed endeavor, but mistakenly refers to the field of endeavor as "automotive repair" instead of franchise brokerage. Nevertheless, the Director's analysis correctly evaluated the entrepreneurial nature of the Petitioner's proposed endeavor and noted pertinent facts pertaining to the proposed endeavor's potential prospective impact like the amount of job creation. And the Director also correctly questioned the exact location of the Petitioner's proposed endeavor when the Petitioner did not provide specificity other than a county and the evidence in the record data at a state rather than county or local level. We consequently conclude that, whilst regrettable, the Director's mistake was harmless. We will proceed with our de novo review of the record. See *Matter of Christo's, Inc.*, 26 I&N Dec. at 537 n.2.

[3] We view the Director's conclusions respecting how well the Petitioner is positioned to advance their proposed endeavor with some doubt. The Petitioner is currently an automotive repair franchise operator. But, the Petitioner's proposed endeavor, as they point out, is not in the realm of automative repair but in franchise brokerage. The great portion of documentation the Petitioner submitted into the record to support how well positioned they were to advance their franchise brokerage company demonstrated their accomplishments and achievements in operating an automotive repair shop. For example, they presented evidence demonstrating praise for their automative repair operations, profitability, and customer regard. And they introduced certificates reflecting plaudits for their automotive repair business operations. Moreover, their foreign work experience before their activities in the United States also related in some way or form to the automotive repair or automobile aftermarket services industry. Though we recognize the Petitioner has entered a franchisee arrangement at least once in the past, it is not sufficiently apparent in the record how the Petitioner's niche qualifications, operations, and kudos as demonstrated in the record in the automotive repair or automobile aftermarket services industry would render them well positioned to operate a franchise brokerage service. On the same token, it is not adequately evident with material, relevant, and probative evidence in the record how the Petitioner's experience as an automotive repair franchisee renders them well positioned to operate a franchise brokerage company for a variety of different franchises in different industries. But since the resolution of the Petitioner's eligibility under the first prong of *Dhanasar* is dispositive of this appeal, we need not consider or discuss their eligibility under the second and third *Dhanasar* prongs or their categorical eligibility for classification under the EB-2 category and will reserve these issues. *See Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

The infirmity of the Petitioner's proposed endeavor becomes readily apparent upon an examination of the evidence and assertions the Petitioner introduced into the record. The Petitioner's evidence and assertions do not adequately support the aspirational proposals advanced by the Petitioner relating to the national importance of the proposed endeavor under the first prong of the *Dhanasar* framework.

Although the evidentiary standard in immigration proceedings is the lowest preponderance of the evidence standard, the burden is on the Petitioner alone to provide material, relevant, and probative evidence to meet that standard. Section 291 of the Act, 8 U.S.C. § 1361. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *see also* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). First, a petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits.

We acknowledge the Petitioner submitted several materials in support of the national importance of their proposed endeavor to relieve their burden of production. But, like the Director, we do not find the evidence material, relevant or probative such that it persuasively demonstrates the Petitioner's proposed endeavor's prospective potential impact. For example, the Petitioner submitted several government generated reports including but not limited to a copy of the White House Interim National Security Strategic Guidance, Advancing Equity Through the American Rescue Plan, and U.S. Department of Labor Bureau of Labor Statistics fact sheets.[4] The Petitioner posited that their proposed endeavor rose to a level of national importance because it anticipated job creation and supported the policy initiatives mentioned in these reports and others like them whilst also broadly enhancing societal welfare. But it is not sufficiently clear how the specific endeavor the Petitioner proposed supports the initiatives or ideals expressed in the reports in a manner rising to a level of national importance. For example, the Petitioner asserts that their proposed endeavor will support the employment of six individuals within five years of inception five years of inception. But it is not apparent from the government generated reports the Petitioner submitted how the employment of six individuals at one business over the course of five years would influence "an expected deficit of 6 million workers" at a nationally important level. And whilst the Petitioner mentions the potential for 1,398 jobs to be created within five years of the inception of their endeavor by and through the franchises it expects to broker into existence, the record does not contain relevant, material, or probative evidence to demonstrate how the addition of 1,398 "indirect" jobs would address unrealized economic output or employment deficits at a level commensurate with matters of national importance. We further note that the record does not contain sufficient evidence to reliably support the magnitude of the "indirect" job creation. For example, the job creation, indirect or direct, as stated in the business plan is not supported by the letters and memoranda of intent the Petitioner's proposed endeavor which

[4] The Petitioner submitted numerous other articles, web pages, and reports from non-profit research organizations and executive level agencies related to the benefits of franchises, small businesses, job creation, tax generation, and foreign direct investment in the United States. This evidence supported the overall merit of the Petitioner's proposed field of endeavor. So, the Director correctly concluded the Petitioner's proposed endeavor had substantial merit. But the same evidence does not adequately describe how the specific endeavor proposed by the Petitioner would elevate the benefits of franchises, small businesses, job creation, tax generation, and foreign direct investment in a manner commensurate with matters of national importance.

contain a nascent intention to utilize franchise brokerage services without any specificity of the letter writer's aspirational franchise's forecasts or objectives.

Similarly, the Petitioner's business plan forecasted an almost four-fold increase in total payroll within five years of inception for their proposed endeavor amounting to over $350,000 in income taxes. The Petitioner also contends that the indirect job creation from the notional franchises they intend to broker into existence would amount to $209,000,000 in "taxes" from over $1,900,000,000 in total payroll. But the record does not sufficiently establish whether the aspirational payroll and income tax figures mentioned by the Petitioner impact government income and benefit the U.S. economy at a level commensurate with matters of national importance. Moreover, as with its employment creation aspirations, the Petitioner's aspirations for tax generation from the activities of their proposed endeavor are not adequately supported in the record with material, relevant, and probative evidence. For example, the letter and memoranda of intent do not sufficiently describe the amount of payroll expenditure and tax generation from the intention they harbor for germinating prospective franchises.

The Petitioner also asserts that the job creation and payroll taxes stemming from its proposed endeavor is likely to have positive economic effects. Specifically, the Petitioner highlights that their endeavor will be headquartered in North Carolina, specifically [redacted] But the evidence in the record does not provide any facts or figures related to whether North Carolina as a whole or [redacted] in specific is an economically depressed area. Moreover, as stated previously, the Petitioner's business plan and statement aspire to grow their employee census to six employees within five years of the start of their proposed endeavor's business operations. The record does not support the significance of the proposed endeavor's potential to employ six workers with material, relevant, or probative evidence. Moreover, there is no indication or discussion as to the location of the 1,398 "indirect" jobs stemming from the Petitioner's proposed endeavor. So, we cannot evaluate the significance of the unrealized potential jobs that could be created from the Petitioner's endeavor.

And whilst the Petitioner's proposes to target international or foreign investors who intend to make direct investments into franchises in the United States, the record does not express through sufficient material, relevant, or probative evidence the magnitude of the foreign direct investment the Petitioner anticipates the proposed endeavor would generate and whether it rises to level implicating national importance.

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, as discussed previously, 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 Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7. So, we will dismiss the Petitioner's appeal.

ORDER: The appeal is dismissed.