U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31281910

Date: AUG. 01, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an information technology consultant, 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 denied the petition, concluding that the record did not establish that the proposed endeavor is nationally important, that the Petitioner was well-positioned to advance the proposed endeavor, or that it would be beneficial to the United States to waive the requirements of a job offer and labor certification. 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.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation

that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

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,[3] 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.

II. EB-2 CLASSIFICATION

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification. Here, the Director's decision did not make an initial determination regarding the Petitioner's eligibility in this threshold first step.

The Petitioner submitted evidence with the initial petition to establish his qualifications as an individual of exceptional ability. The Petitioner did not submit evidence regarding an advanced degree, nor did he claim to possess one. In the Request for Evidence (RFE), the Director determined that "because the petitioner has not demonstrated that beneficiary holds an advanced degree and thus does not qualify as a member of the professions holding an advanced degree, USCIS does not need to evaluate whether the beneficiary also qualifies as an individual of exceptional ability." This is incorrect. As noted above, an individual can qualify for the EB-2 classification as either an advanced degree professional or an individual of exceptional ability. In the decision, the Director does not make a finding on the EB-2 visa classification claimed by the Petitioner.

On remand, the Director should analyze the record and determine whether the Petitioner has established he is an advanced degree professional or an individual of exceptional ability consistent with the regulations at 8 C.F.R. § 204.5(k).

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[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

[3] *See also 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).

III. NATIONAL INTEREST WAIVER

The Petitioner is an information technology consultant. In the response to the RFE, the Petitioner states that his proposed endeavor is to "offer technological solutions, innovative and adaptable to the needs of clients, guaranteeing an increase in their competitiveness and growth."

The Director determined that the Petitioner did not establish that his proposed endeavor has national importance, that he is well-positioned to advance his proposed endeavor, or that on balance, waiving the job offer requirement would benefit the United States. On appeal, the Petitioner asserts that the Director made several errors in this matter, including errors of fact, law, and policy.

Upon review, we agree with the Petitioner that the Director's decision regarding the national interest waiver contained sufficient errors to warrant a remand. We are remanding the case to the Director for further review and to provide an accurate and sufficient explanation of the grounds of denial so that the Petitioner can more fully understand the Director's concerns.

For example, when discussing national importance, the Director states the Petitioner must "demonstrate an interest of the government or its agency in the beneficiary's particular endeavor." Furthermore, when analyzing eligibility under the second prong of *Dhanasar*, the Director found the Petitioner ineligible because the duties they would perform are not "unique or unusual." The Director cites to no support for these requirements.

Concerning the third prong, the Director did not engage in any analysis of the evidentiary record. A decision must fully explain the reasons for denying a visa petition to allow a petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

III. CONCLUSION

For the above reasons, we will withdraw the Director's decision and remand this matter for further consideration and entry of a new decision. On remand, the Director should review the entire record, including the Petitioner's appeal, and determine whether he has established eligibility for both the underlying classification as an individual of exceptional ability and each of the three prongs of the *Dhanasar* framework. The Director may request any additional evidence considered pertinent to the determination prior to issuing 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.