U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31318347

Date: AUG. 06, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an educator entrepreneur, seeks second preference immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding the Petitioner did not establish eligibility for a national interest waiver. 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.

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.

Id.

[1] *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v. Garland,* 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

The Petitioner, an engineer, intends to work as an entrepreneur in the field of education. Her business plan submitted for the first time in response to the Director's request for evidence (RFE) states, "Our Non-Profit will provide learning and promote science in [redacted] with students of Hispanic descent and /or low income, from preschool to high school through workshops, courses, mass events, support in national and international competitions, summer camps, master classes, visits to museums, conducting experiments and volunteering." The Director noted that the Petitioner had a bachelor's degree majoring in renewable energy engineering from [redacted] in February 2015, and subsequently gained at least 5 years of progressive post-baccalaureate experience in the specialty. Thus, the Director determined that the Petitioner qualified as a member of a profession holding an advanced degree. The Director further determined that the Petitioner submitted sufficient evidence to establish that her proposed endeavor had substantial merit and was of national importance. However, the Director concluded that the Petitioner had not submitted sufficient evidence to demonstrate that she was well positioned to advance the proposed endeavor. Additionally, the Director deduced that the Petitioner had not submitted sufficient documentary evidence that demonstrated that, on balance, it would be beneficial to the U.S. to waive the requirements of a job offer, and thus of a labor certification.

A. Substantial Merit and National Importance

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 Director did not provide an analysis of the evidence used to determine that the Petitioner's proposed endeavor had substantial merit and national importance. Rather, in the RFE, the Director stated that the Petitioner's proposed endeavor had both substantial merit and national importance and requested that the Petitioner submit evidence that she met the remaining prongs of the *Dhanasar* framework. Although the Director concluded the Petitioner established the substantial merit and national importance of her proposed endeavor, we will not disturb this finding at this time because we will make a definitive finding on the second prong below. Consequently, we will reserve this issue. *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision).

B. Well Positioned to Advance the Proposed Endeavor

Turning to the second prong, the Petitioner, on appeal, has not established that she is well positioned to advance the proposed endeavor.

The second prong shifts the focus from the proposed endeavor to the individual. To determine whether the Petitioner 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. *Id.* at 890.

In discussing the Petitioner's qualifications under the second prong, the Director stated that the Petitioner established she had the education, skills, and knowledge to advance the endeavor. However, the Director determined the evidence was not sufficient to establish the Petitioner had a record of success, a model or plan for future activities, made progress towards achieving the endeavor, and had sufficient interest from relevant entities or individuals in having her advance the endeavor in the U.S.

The Director highlighted four initial letters of recommendation. The letters were submitted by colleagues of the Petitioner namely, [redacted] The Director observed that although the letters were complimentary, and praised her experience, knowledge, and skills in the field, the letters did not detail achievements or significant contributions the Petitioner made to the field. In addition, the letters did not detail how the Petitioner was well positioned to advance the endeavor. In response to the RFE, the Petitioner submitted two additional letters. The letter from Dr. [redacted] spoke to the Petitioner's experience in the field and highlighted her contributions to the study plans and promotion of science in high schools and universities, and her innovative ideas. However, the letter did not provide details regarding what exactly were the Petitioner's contributions. In addition, although the letter briefly discussed that the Petitioner served as an advisor to students for different events and contests, and was a speaker, it did not detail the achievements the Petitioner made in the field and how she was well positioned to advance the endeavor. Regarding the letter from [redacted] it discussed how the Petitioner created activities and advised students who had the facility to develop extraordinary abilities in STEM areas. The letter stated, "She contributed in (sic) the modifications of the Physics and Mathematics programs in the state work tables to which she was called in recognition of her career in the [redacted] The Director reasoned that these letters demonstrated the Petitioner was successful in performing her job duties for her employer, but they did not detail achievements in the field and how she was well positioned to advance the endeavor in the U.S. The Director further noted that none of the letters were submitted by independent experts in the U.S. Consequently, while the opinions of those in the field with whom the Petitioner was acquainted were not without weight, they could not form the cornerstone of a successful national interest waiver claim. Ultimately, the Director concluded the record did not contain independent objective documentary evidence to establish that the Petitioner made any "original contributions that garnered her any recognition or influence in the field" which would suggest she could advance the endeavor.

The Director reviewed several certificates of participation, course completions, advising, assistance, and attendance, and determined that these certificates demonstrated the Petitioner had the education, knowledge, and skills to advance the endeavor, but were not sufficient to establish the Petitioner had a record of success in the field. The Director determined that the business plan provided information regarding strategy, SWOT analysis, market and competitor analysis, marketing strategy, operational plan, financial projections, and an organization chart. However, despite these factors, it was not sufficiently detailed. For example, it did not include calculations demonstrating the potential income, expenses, cash flow, and a balance sheet of the business. And although the business plan stated, "[t]he first expense would be the constitution as a nonprofit, which was quoted around $900 in California," the Petitioner did not submit documentary evidence demonstrating a US bank or other banking institution was providing financial support for the endeavor. In addition, the business plan stated, "[i]n the same way, support will be requested from other organizations to link with donors who are

interested in contributing." However, as the Director observed, the Petitioner did not submit documentary evidence demonstrating other organizations or donors were providing financial support for her endeavor.

The Director considered the letter from [redacted] of the [redacted] indicating their interest in exploring the Petitioner's program. But the letter did not detail interest in investing in the Petitioner's endeavor and documentation demonstrating they had the finances to invest. A petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. In addition, the Director noted that the intent letter was submitted in response to the RFE and not with the initial filing of the petition. The Director observed that the Petitioner had not submitted evidence of grants, contracts, agreements, or licenses obtained in pursuit of her endeavor. Nor did she submit letters from government entities demonstrating interest in the endeavor, or evidence that she had received investments from U.S. investors. While the petitioner submitted one letter of interest from [redacted] no agreements or contracts were submitted between the Petitioner and [redacted] In addition, the letter was dated April 12, 2023, which was after the initial filing of the petition and after the issuance of the RFE. We cannot consider facts that come into being only subsequent to the filing of a petition. *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008). Therefore, the Director concluded the evidence was not sufficient to establish the Petitioner had a model or plan for future activities, and consequently she did not establish she was well positioned to advance the proposed endeavor.

Overall, the Director identified the evidence and explained the specific reasons why the evidence did not establish the Petitioner's eligibility under the *Dhanasar* analytical framework. The Director correctly concluded, the Petitioner did not adequately demonstrate with material, relevant, or probative evidence that she is well positioned to advance her proposed endeavor.

On appeal, the Petitioner argues that in the initial petition she established that she had a record of success, 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, and she lists the evidence that supports her contention. The Petitioner argues that equal weight should be placed on the testimony of the experts who have personally experienced the Petitioner's work and recognized her record of success in the field, and the Director's characterization that the letters were not submitted by experts within the field is plainly untrue and unsubstantiated by the evidence on record. As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we will reject an opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. We are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.* Here, the expert opinion letters are of little probative value as they did not detail how the Petitioner is well positioned to advance the endeavor, although the letters were broadly complimentary and praised the Petitioner's experience, knowledge and skills.

The Petitioner argues that she is not required to make original contributions to the field of endeavor, nor is it imperative for her work to be revolutionary in the field. She states that the Director's

requirement that the Petitioner demonstrate that she made "original contributions to the field of endeavor that garnered any recognition or influence in the field" is inappropriate for the classification sought, and that such a requirement is the qualifying criterion for those who seek classification as an Alien of Extraordinary Ability under the E11 classification, a higher standard than a petitioner seeking E21 classification. She notes that the RFE made no mention of a requirement to demonstrate original contributions to the field of endeavor, and this requirement was first raised in the decision. The Petitioner argues that her experience within the field is representative of the record of success far beyond what is expected of one within the field and denotes her as an expert. On appeal, the Petitioner asserts that USCIS may not "unilaterally impose a novel or otherwise undefined and arbitrary requirement that is not present in the controlling precedent or relevant regulations in order to serve as a bar for approval of a petition." To support her contention, the Petitioner cites *Love Korean Church v. Chertoff*, 549 F.3d 749 (9th Cir. 2008), a case in which the Ninth Circuit determined that the AAO's interpretation of an eligibility requirement was inconsistent with governing regulation. The Petitioner further argues that where USCIS imposes such a novel and undefined standard or requirement and said requirement is not clearly defined and shrouded in ambiguity, the decision itself must be regarded as arbitrary and an abuse of discretion on the part of the adjudicating officer. *Id*

We do agree that the Director erroneously stated that the Petitioner did not make "any original contributions that have garnered her any recognition or influence in the field." (*see generally*, 6 *USCIS Policy Manual* F.2(B)(1), https://www.uscis.gov/policymanual). Consequently, although it would appear that the Director was also analyzing the Petitioner's eligibility for extraordinary ability classification,[2] the fact remains, the Director correctly references the criteria that establishes eligibility as an individual with exceptional ability set forth under 8 C.F.R. § 204.5(k) and discussed the national interest waiver. The Petitioner does not identify any instance in the Director's decision that the criteria demonstrating ability set forth at 8 C.F.R. § 204.5(h)(3) was applied to the Petitioner, other than the anomalous reference. Therefore, we determine this to be harmless error because the incorrect mention of extraordinary ability was not an incorrect application of law or policy.

The Petitioner argues that she does not need to submit documentary evidence demonstrating that a U.S. bank or other banking institution is providing financial support for the endeavor or demonstrate feasible financial support. She notes that her personal statement outlining her personal and professional goals in line with the endeavor as well as her professional business plan addressed the Director's concerns in the RFE about her plan to carry out her endeavor. However, as an educator entrepreneur, the Petitioner is encouraged to provide evidence such as a future intent to invest in the entity by an outside investor to provide independent validation and support a finding of the Petitioner being well positioned to advance the endeavor. It was the Petitioner who claimed that she "intended to get support from banks, initially from US Bank," thus precipitating this line of inquiry. Simply going on record without supporting substantive evidence to support assertions, is not sufficient in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (BIA 1972).

Regarding progress, the Petitioner argues that she is not required to show progress within the U.S., and that any progress a petitioner makes towards achieving their proposed endeavor is relevant and probative evidence for determining they are well positioned to advance the proposed endeavor. She

[2] The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8. C.F.R. § 204.5(h)(2). See also Section 203(b)(1)(A) of the Act, 8 U.S.C. §1153(b)(1)(A).

asserts that in the initial filing and the RFE, she "provided ample evidence demonstrating the regular and actionable progress she has made towards advancing her proposed endeavor." She states that the Director made an incorrect assessment of the evidence and applied a higher standard in claiming that this factor was not met because the Petitioner did not submit evidence of grants, contracts, or agreements of licenses obtained in pursuit of her endeavor. However, we disagree that the Director applied a higher standard and note that to demonstrate that a petitioner is well positioned to advance a proposed endeavor, the aforementioned factors are just some of the ways a petitioner may substantiate their claim. Further, we note that the Director did not place a geographical limitation on the Petitioner as she sought to establish the proposed endeavor.

Regarding the interest of potential customers, users, investors, or other relevant entities, the Petitioner claims that ample evidence was submitted to satisfy this requirement, and each of the recommendation letters stipulates a degree of interest in the proposed endeavor, and because the letters were written by recognized experts, they represent the interest of relevant entities. The Petitioner points to the [redacted] letter as evidence that a relevant entity and customer in the U.S. is interested in her endeavor. However, the Director already considered this letter and determined that it did not detail interest in investing in the Petitioner's endeavor nor was there documentation demonstrating [redacted] had finances to invest. *Dhanasar's* second prong does not merely require evidence that there is a general industry demand for the products or services a petitioner intends to offer in the U.S. Rather, it indicates that a petitioner may submit evidence of "the interest of potential customers, users, investors, or other relevant entities or individuals" in their specific endeavor. *Matter of Dhanasar*, 26 I&N Dec. at 890. In addition, the letter was submitted after she filed her petition. A petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1).

The Petitioner asserts the Director abused their discretion in failing to address all evidence, citing *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994) in support. The court in *Buletini*, however, did not reject the concept of examining the quality of the evidence presented to determine whether it establishes a petitioner's eligibility, nor does the *Buletini* decision suggest that USCIS abuses its discretion if it does not provide individualized analysis for each piece of evidence. And the Petitioner also cites *Chursov v. Miller*, 1:18-CV-02886-PKS (S.D. NY 2019) that a "partial analysis shall lead to an unreasonable and, thus, arbitrary decision." But the Petitioner has not demonstrated the specific way the Director's analysis was incomplete other than a generalized assignment of error. When USCIS provides a reasoned consideration to the petition, and has made adequate findings, it will not be required to specifically address each claim the Petitioner makes, nor is it necessary for it to address every piece of evidence the Petitioner presents. *Guaman-Loja v. Holder*, 707 F.3d 119, 123 (1st Cir. 2013) (citing *Martinez v. INS*, 970 F.2d 973, 976 (1st Cir. 1992); *see also Kazemzadeh v. U.S. Atty. Gen.*, 577 F.3d 1341, 1351 (11th Cir. 2009); *Casalena v. U.S. INS*, 984 F.2d 105, 107 (4th Cir. 1993). We conclude the record reflects the Director's consideration of all evidence in the totality.

Because the Petitioner did not establish that she was well positioned to advance the proposed endeavor under the second prong of the *Dhanasar* precedent decision, she has not demonstrated eligibility for a national interest waiver, as a matter of discretion. Further analysis of her eligibility under the first and third prongs outlined in *Dhanasar*, therefore, would serve no meaningful purpose. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C*, 26 I&N

Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternate issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.