U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33945119

Date: AUG. 08, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a business administrator, seeks employment-based second preference (EB-2) immigrant classification as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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 Petitioner is well positioned to advance the proposed endeavor or that it would be beneficial to waive the requirements of a job offer. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To qualify for the underlying EB-2 visa classification, a petitioner must establish they are an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A U.S. 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 the requisite degree of expertise and will substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate 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.

Id.

II. ANALYSIS

As noted, the Director determined that the Petitioner, who claims eligibility for the EB-2 classification as both an advanced degree professional and as an individual of exceptional ability, qualifies for the requested visa classification. However, the Director determined that the record did not establish his eligibility under the second and third prongs of the *Dhanasar* framework, and therefore found him ineligible for a waiver of the job offer requirement.

For the reasons discussed below, we will withdraw the Director's decision and remand the matter to the Director for entry of a new decision.

A. Member of the Professions Holding an Advance Degree or Exceptional Ability

We withdraw the Director's determination that the Petitioner qualifies for the requested visa classification. In the request for evidence (RFE), the Director stated that the Petitioner "is eligible for the requested classification" and provided no further analysis. The Director confirmed the finding in the decision without any additional explanation.

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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 individuals 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 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 is discretionary in nature).

As noted, an advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. In order to demonstrate this, the petition must be accompanied by "[a]n official academic record" for the requisite degrees and any document in a foreign language must be accompanied by a full English language translation. 8 C.F.R. §§ 204.5(k)(3)(i)(A); 103.2(b)(3). Thus, for each degree documented in a foreign language, there should be a corresponding academic record and a translated copy with a certificate of translation.

We observe from our review of the record that the Petitioner did not comply with the evidentiary requirements regarding original documents and translations. Specifically, the Petitioner's did not submit a copy of his original transcripts for his Bachelor of Theology degree[4] or his Technologist degree and did not submit a translated version of his Lato Sensu specialization in business management transcript. Consequently, we are unable to meaningfully determine whether the documents support the claim.

Therefore, we withdraw the Director's determination and will remand the matter to the Director for further consideration. If the Director concludes that the Petitioner is not an advanced degree professional, they should then determine whether the Petitioner qualifies as an individual of exceptional ability.

B. 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. *Matter of Dhanasar*, 26 I&N Dec. at 889.

In the RFE the Director found that the "proposed endeavor has substantial merit and national importance" without any discussion. The decision confirmed that finding without further comment.

In determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead we focus on the "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we further noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Id.* 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.

The Petitioner stated that for his proposed endeavor he intends to act as a business administrator in charge of human resources, "help[ing] organizations function efficiently, and recommend changes to policies or procedures to improve operations." The reach of such an endeavor appears limited to the companies and clients who would employ the Petitioner.

[4] We observe that the Petitioner contends that he completed part of his bachelor's degree at the [redacted] however, he did not include an academic record for these courses in the filing.

The Petitioner provided an expert opinion letter from Dr. [redacted] As a matter of discretion, we may use opinion statements submitted by a petitioner as advisory but 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. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). We are ultimately responsible for making the final determination regarding an individual's eligibility. *Id.* In the letter, Dr. [redacted] asserts that the Petitioner's endeavor is of national importance but rests his assessment on a finding that business field is important and the Petitioner's skills would be beneficial for any company he would work for. In determining national importance, it is not the importance of the field that determines an endeavor's national importance, but rather how the specific endeavor will impact the field on a level commensurate with national importance. *See Dhanasar*, 26 I&N Dec. at 889.

The remaining evidence in the record,[5] namely copies his tax documents from Brazil, various training certificates, recommendation letters, a list of his past work achievements, a job offer letter, and evidence of his membership in different associations seems to point to the Petitioner's past accomplishments and experiences, not the specific endeavor's potential impact in his industry. Generally, this type of evidence is more appropriate for the second prong when determining if the petitioner is well-positioned to advance the proposed endeavor. *Dhanasar*, 26 I&N Dec. at 890.

Here, the reach of the endeavor appears limited to the Petitioner's clients. Because the Director's decision did not identify any of the submitted evidence or provide any analysis, it is unclear why they concluded that the Petitioner met prong one. Therefore, we are withdrawing the Director's determination that the Petitioner met prong one and remand the decision for the Director to analyze the evidence to resolve if the proposed endeavor is one of substantial merit and national importance.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the individual. To determine whether they are well positioned to advance the proposed endeavor, we consider factors including, but not limited to: their 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. *Matter of Dhanasar*, 26 I&N Dec. at 890.

The Director determined that the Petitioner did not establish he met this prong. In his evaluation of the evidence, the Director determined that the Petitioner's educational documents do not "show that the petitioner has made significant contributions which have led to the advancement of his industry or that he has a record of success substantially beyond others in the field." They also determined that he did not provide evidence that he has had "a major impact in his industry on a national or global scale."

[5] In the appeal brief, the Petitioner submitted a new proposed endeavor as a trucking company owner and provided corresponding evidence. 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). Also, a petitioner must meet eligibility requirements for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). The Petitioner's new proposed endeavor, submitted for the first time on appeal, cannot retroactively establish eligibility. On remand, the Director should only consider the proposed endeavor as described in the initial filing.

Further, the Director determined that the evidence failed to show that the Petitioner's "contributions impacted beyond his employers or its clients." These are not relevant considerations for analysis under prong two.

On remand, the Director should analyze the evidence to determine whether the record sufficiently demonstrates the Petitioner is well positioned to advance the proposed endeavor.

C. Whether on Balance a Waiver is Beneficial

As the aforementioned reasons are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the third prong of the *Dhanasar* framework. *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 alternative issues on appeal where an applicant is otherwise ineligible).

On remand, if the Director concludes that the Petitioner does not meet *Dhanasar's* third prong, the decision should address the Petitioner's arguments and evidence, and explain the relative decisional weight given to each balancing factor.

III. CONCLUSION

The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis. The Director should issue a new decision regarding the Petitioner's eligibility for the underlying EB-2 visa classification and for a national interest waiver with an analysis of the evidence to support each conclusion. The Director may request any additional evidence considered pertinent to the new determination and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.