U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32628256

Date: AUG. 16, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a cosmetologist, seeks employment-based second preference (EB-2) immigrant classification as an individual 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 EB-2 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.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for the underlying EB-2 qualification or for a national interest waiver. The Director granted a subsequent motion to reopen and reconsider, but ultimately denied the petition. 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.

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. Section 203(b)(2)(B)(i) of the Act.

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

[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).

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 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.[4]

Id. at 889.

II. EB-2 CLASSIFICATION

The Director determined that the Petitioner did not meet any of the following categories of evidence required to demonstrate exceptional ability:

- Evidence in the form of letter(s) from current or former employer(s) showing that the individual has as least ten years of full-time experience in the occupation for which he or she is being sought. 8 C.F.R. § 204.5(k)(3)(ii)(B);
- A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(ii)(C);
- Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D);
- Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E); or
- Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization. 8 C.F.R. § 204.5(k)(3)(ii)(F)

The Director concluded however that the Petitioner had an official academic record showing that she 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. 8 C.F.R. § 204.5(k)(3)(ii)(A). Therefore, although the Petitioner did not meet at least three of the six criteria, she met at least one. Ultimately, the Director determined that the Petitioner was not an individual of exceptional ability as necessary to qualify for the EB-2 classification. However, the Director determined that based on the

[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 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).
[4] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

Petitioner's diploma from [redacted] in Russia, awarded in June 2011, she had a foreign equivalent degree to a U.S. advanced degree. Thus, the Petition qualified for E21 visa classification.

On appeal, the Petitioner submits a brief and copies of documents already in the record. The Petitioner states that the Director's decisions were "incorrectly based on the application of law or policy, and that these decisions were erroneous considering the evidence available in the case record at the time of judgment." She asserts that she has established her qualification as a member of professions holding an advanced degree as outlined in 8 C.F.R. § 204.5(k)(2), thereby meeting the requirements for E21 visa classification. The Petitioner states that she has established that her proposed endeavor has substantial merit and is of national importance. Because the record does not establish by a preponderance of the evidence that the Petitioner is eligible for or otherwise merits a national interest waiver as a matter of discretion, we will reserve the issue of the Petitioner's eligibility for the EB-2 classification as an individual of exceptional ability.[5]

III. NATIONAL INTEREST WAIVER

The issue to be determined on appeal 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 conclude that the Petitioner has not sufficiently demonstrated the national importance of her proposed endeavor under the first prong of the *Dhanasar* analytical framework. We will not disturb the Director's finding that the proposed endeavor had substantial merit.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual proposes to undertake. In the original submission, the Petitioner provided a description of the proposed endeavor and documentary evidence that demonstrates that the proposed endeavor has substantial merit in an area such as business, entrepreneurialism, science, technology, culture, health, education, the arts, or social sciences. The Petitioner intends to pursue her endeavor as a business owner and cosmetology instructor. The Director concluded that, while the Petitioner's proposed endeavor had substantial merit, she did not demonstrate that her proposed endeavor had national importance.

In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889. The relevant question is not the importance of the 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 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. Further, to evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement, we look to evidence documenting the "potential prospective impact" of her work. In *Dhanasar* we determined that the petitioner's teaching activities did not rise to the level of

[5] *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).

having national importance because they would not impact his field more broadly. *Id.* at 893. Here, the record does not show through supporting documentation how her endeavor sufficiently extends beyond her prospective clients or employees, to impact the field or the U.S. economy more broadly at a level commensurate with national importance.

On appeal, the Petitioner asserts that the submitted evidence establishes the national importance of her endeavor, [redacted] stating the following:

> The business plan outlined the potential to employ U.S. workers, as the positive economic effects for New York and the United States, embedded in numerous tables with precise calculations.

The Petitioner notes that her business plan:

> [M]eticulously outlined the potential benefits to the regional and national economy resulting from her projects, demonstrating a clear understanding of the substantial positive economic effects provided by *Dhanasar*.

The Petitioner's assertions, as well as others in her business plan and elsewhere on the record, largely discuss the anticipated potential of her company based on her experience in operating a consulting business in the beauty industry. However, these assertions are not supported by objective evidence to demonstrate how her company, one of many operating in the industry, would have a prospective national impact on the field or on an economy of any scale. For example, the business plan anticipates hiring 44 individuals, generating $1,522,480 in payroll expenses, $228,372 in payroll taxes, and a net profit of $449,393 by the conclusion of its fifth year of operation. The plan does not, however, provide an objective basis for these projections, nor are the numbers corroborated by probative evidence sufficient to demonstrate that it is likely the company will have a positive national economic impact or a national prospective impact within the field. A petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

On appeal, the Petitioner references letters of recommendation and other material as evidence of her skills and experience. The Petitioner argues that the letters not only affirm her past work but also highlight the tangible benefits her company provides to the beauty industry at large. We note that the letters explicitly acknowledge "the Petitioner's extraordinary skills as a personal care specialist in the beauty sector" and the Petitioner's "masterclass service and professional skills have left a lasting impression." And both writers have expressed a desire to work with the Petitioner in the future. However, this supporting documentation does not show how the endeavor sufficiently extends beyond the Petitioner's prospective clients to impact the field or the U.S. economy more broadly at a level commensurate with national importance. We note that evidence of an individual's abilities and history within a field generally relate not to the national importance of an endeavor, as discussed in the first prong of *Matter of Dhanasar*, but to the second,[6] discussing whether an individual is well positioned to advance an endeavor. As such, the letters of recommendation do not sufficiently demonstrate the

[6] Because the Petitioner has not established eligibility under the first prong of the *Dhanasar* framework, determinations concerning the second and third prongs are unnecessary to the ultimate decision; therefore, they will be reserved in this decision.

national importance of the Petitioner's proposed endeavor. 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. Thus, while highly complementary to the Petitioner, the recommendation letters do not support the Petitioner's contention that her proposed endeavor is of national importance.

The Petitioner has not demonstrated that her proposed endeavor has significant potential to employ U.S. workers or otherwise offer substantial positive economic effects for the nation. Specifically, she has not shown that her business stands to provide substantial economic benefits to New York or to the United States overall. While the business plan and statements explain in general terms that her company would benefit the U.S. economy because it would help create jobs, that reasoning is not based on any objective evidence related to her specific proposed endeavor to operate a beauty industry consultancy. The Petitioner has not provided evidence to show that her proposed endeavor would offer a region or its population substantial economic benefits through employment levels, business activity, or tax revenue. As such, the business plan does not demonstrate that the prospective benefits to the regional or national economy resulting from the Petitioner's endeavor would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890.

On appeal, the Petitioner contends that the Director's focus on the physical location of her office is misplaced. However, the Director correctly observed that the Petitioner's office would not be located in a retail space but in a residential apartment building. The Petitioner states:

> [redacted] specializes in providing classes, workshops, and consulting services tailored to the beauty industry. Such services do not necessitate a traditional retail space, as the focus is on educational and advisory functions rather than retail transactions. Classes will be online and do not require office space, and a temporary rental space will be utilized for face-to-face events."

Furthermore, the Petitioner states:

> [redacted] fully intends to rent a suitable space to accommodate its classes, workshops, and consulting services effectively.

However, heretofore, the Petitioner did not indicate that she would utilize a temporary or suitable rental space to conduct her endeavor. Therefore, this represents a material change in the proposed endeavor. 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).

The Petitioner also argues that the Director disregarded her business plan because it was developed after the initial petition filing and submitted in response to the request for evidence. She argues that "[t]he fact that the business plan was crafted after the petition was filed and the RFE was issued is not indicative of its unreliability," and that is was common practice for businesses, especially startups, to refine and adjust their business plans based on evolving circumstances and feedback received from

regulatory bodies such as USCIS." The Petitioner further asserts that the business plan was meticulously crafted and thoroughly researched; it outlined the potential benefits to the regional and national economy resulting from her projects; there are no rules or regulations mandating that a business plan must be executed prior to filing; it did not contradict the assertions made in the initial petition; and the Petitioner developed a business plan in response to the RFE that "aligns with the autobiographical details initially provided." Nevertheless, we agree with the Director that the business plan held limited evidentiary value as it related to the material change to the petition because a petitioner must establish eligibility at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971); *see* also *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (Standing for the proposition that any inconsistencies in a petitioner's evidence may lead to reevaluation of the remaining evidence offered in support of the visa petition). The Petititioner states that the principles established in *Katigbak* and *Izummi* have been misinterpreted and misapplied to unrelated benefit applications, to wit, the national interest waiver petitions. However, contrary to the Petitioner's assertions on appeal, *Katigbak* and *Izummi,* like 8 C.F.R. § 103.2(b)(1), apply both to evidence pertaining to a particular visa classification and to evidence pertaining to issues the Petitioner describes as "unrelated benefit applications." *Katigbak* specifically noted that a central question is whether an individual qualified for the requested visa at the time the visa petition is filed, based on the set of facts that existed as of that date, because the priority date attaches to the petition filing date. *Matter of Katigbak*, 14 I&N Dec. at 48-49. Section 203(b)(2)(A) of the Act makes second-preference visas available, in relevant part, to qualified individuals "whose services in the sciences, arts, professions, or business are sought by an employer in the United States," thus making the job offer requirement a visa classification eligibility criterion that must be satisfied at the time of filing, not an "unrelated benefit application[s]" as the Petitioner describes it. *See* C.F.R. § 103.2(b)(1); *see* also *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. Section 203(b)(2)(B) of the Act establishes criteria for a discretionary national interest waiver of the job offer requirement. Because the job offer requirement must be satisfied at the time of filing as a part of a requested visa classification, eligibility for the waiver of a requisite job offer must also be satisfied based on the set of facts that existed at the time of filing as part of the requested visa classification; otherwise, a beneficiary in question would not have been eligible for the requested visa classification on the filing date and, thus, as of the priority date. *See id.* The Petitioner must establish that the fact existed at the time of filing the benefit request for it to be within the set of facts that may establish eligibility for the benefit. *See id.*

The record does not establish the national importance of the proposed endeavor as required by the first prong of the *Dhanasar* precedent decision. Therefore, the Petitioner has not demonstrated eligibility for a national interest waiver. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under 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).

III. CONCLUSION

The Petitioner has not demonstrated that the proposed endeavor has national importance. As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, she has not

established that she is eligible for or otherwise merits a national interest waiver as a matter of discretion. The petition will remain denied.

ORDER: The appeal is dismissed.