U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33358439

Date: AUG. 27, 2024

Appeal of Texas Service Center Decision

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

The Petitioner seeks employment-based second preference (EB-2) immigrant classification as 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 the record did not establish the Petitioner was an individual of exceptional ability and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. 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 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.

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

[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.

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

A. Exceptional Ability

The Director concluded the Petitioner met three of the six evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), and (C), but that, upon review of the evidence its totality, had not established that he is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. While we agree with the Director's ultimate conclusion, for the reasons discussed below, we disagree the Petitioner meets the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B) and (C). On appeal, the Petitioner maintains he qualifies for EB-2 classification as an individual of exceptional ability.

Evidence in the form of letter(s)from current or former employer(s) showing that the individual has at 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).

Upon review, we disagree with the Director's conclusion that the Petitioner met this criterion, and hereby withdraw it. Two of the letters, which are not on letterhead, are from a contract coordinator and a planning technician and a third letter, although it is on letterhead, was written by an administrative assistant. The Petitioner has not established that these letters are from "current or former employer(s)," as opposed to colleagues for example, as required by the plain language of the regulation. As a result, the Petitioner has only established work experience from July 1, 2013 until October 9, 2015 and from December 21, 2015 until April 8, 2017. Without additional letters from his "current or former employer(s)," as required, we cannot conclude he has established he has at least ten years of full-time experience and meets this criterion.

[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).

A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(ii)(C).

We also disagree with the Director's determination that the Petitioner met this criterion, and hereby withdraw it. In support, the Petitioner provided a copy of his "Individual Registration and Good Standing Certificate" from the Regional Council of Industrial Technicians, indicating he is "registered in this Council" and "is not in debt." Beyond a printout of the "Our story" section from their website, the Petitioner has not provided sufficient evidence to establish that this qualifies as a certification for a particular occupation.[4] Therefore, he has not established that he meets this criterion.

The Petitioner has had a successful career in Brazil. But the record does not establish that he meets at least three of the evidentiary criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(A) through (F). Since the Petitioner did not satisfy the initial evidence requirements, we need not conduct a final merits analysis to determine whether the evidence in its totality shows that he is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).

Because the Petitioner has not established eligibility for the underlying EB-2 classification, the petition is not approvable on this basis alone.

B. National Interest Waiver

The Petitioner's proposed endeavor is to establish a company in [redacted] Louisiana that specializes "in construction and industrial assembly of metallic structures and mechanical maintenance services." The Petitioner stated that he intends "to contribute to the strengthening of the American economy and generate more direct and indirect jobs for American workers."

The Director determined that the Petitioner's proposed endeavor was of substantial merit, and we agree. However, the Director concluded the Petitioner did not establish that his proposed endeavor has national importance.

On appeal, the Petitioner contends the Director did not give due regard to the evidence submitted, specifically his resume, business plan, documentation of his work in the field, letters of recommendation, and industry reports and articles. He asserts he has demonstrated the national importance of his proposed endeavor consistent with the first prong of the *Dhanasar* framework.

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. *Id.* at 889. We look for broader implications. An endeavor that has significant potential to employ

[4] Profession is defined as one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. 8 C.F.R. § 204.5(k)(2). As the record does not establish that an industrial/mechanical technician meets the definition of a profession, the Petitioner must establish that this is a certification for a particular occupation.

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 889-890.

Here, the Petitioner has not shown that the specific endeavor he proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for the United States. Specifically, the Petitioner has not demonstrated that his company's future staffing levels and business activity stand to provide substantial economic benefits in Louisiana or the United States. While the Petitioner claims his company plans to hire 57 employees, generate direct and indirect jobs, and has the potential to employ U.S. workers and will bring substantial positive economic effects, particularly in economically depressed areas, he has not provided a basis for these projections or presented evidence indicating that the benefits to the regional or national economy resulting from his undertaking would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id*. at 890. In addition, although the Petitioner asserts that his endeavor stands to create substantial benefits to the U.S. economy, he has not offered sufficient evidence that the area where his company plans to operate in Louisiana will be an area that is economically depressed, that he would employ a significant population of workers in that area, or that his endeavor would offer the region or its population a substantial economic benefit through employment levels, tax revenue, or business activity. While any basic economic activity has the potential to positively impact the economy, the Petitioner has not demonstrated how the economic activity of his proposed endeavor would rise to the level of national importance.

The Petitioner highlights the shortage of refinery operators and industrial maintenance professionals. However, the national shortage of refinery operators and industrial maintenance professionals is not, in and of itself, sufficient to establish the national importance of the Petitioner's endeavor. Further, the Department of Labor directly addresses U.S. worker shortages through the labor certification process.

While the Petitioner's statements reflect his intention to own and operate a construction and mechanical maintenance services company, the Petitioner has not offered sufficient information and evidence to demonstrate that the prospective impact of his proposed endeavor rises to the level of national importance. In *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id*. at 893. Here, we similarly conclude the record does not show that the Petitioner's proposed endeavor stands to sufficiently extend beyond his clients to impact the industry more broadly at a level commensurate with national importance. Nor has he documented that the particular work he proposes to undertake offers original innovations that contribute to advancements in construction and mechanical maintenance services or otherwise has broader implications for his field. For all these reasons, the Petitioner's proposed endeavor does not meet the first prong of the *Dhanasar* framework.

Because the Petitioner has not established eligibility under the first prong of the *Dhanasar* test, we need not address his eligibility under the remaining prongs, and we hereby reserve them.[5] The burden of proof is on the Petitioner to establish that he meets each eligibility requirement of the benefit sought

[5] *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 alternate issues on appeal where an applicant is otherwise ineligible).

by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 375-376. The Petitioner has not done so here and, therefore, we conclude that he has not established eligibility for a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.