U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29836252

Date: FEB. 15, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a project director, seeks classification as a member of the professions holding an advanced degree or 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. *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v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish 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 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. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Whilst neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner

classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen is well positioned to advance the proposed endeavor, and (3) that on balance it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the noncitizen 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.

The second prong shifts the focus from the proposed endeavor to the noncitizen. To determine whether the noncitizen 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, progress towards achieving the proposed endeavor, and the interest of potential customers, users, investors, or other relevant entities or individuals are also key considerations.

The third prong requires the petitioner to demonstrate that, on balance of applicable factors, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. USCIS may evaluate factors such as whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen to secure a job offer or for the petition to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the noncitizen's contributions; and whether the national interest in the noncitizen's contributions is sufficiently urgent to warrant forgoing the labor certification process. Each of the factors considered must, taken together, indicate that on balance it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

II. ANALYSIS

A. The Petitioner's Proposed Endeavor

The Petitioner's form I-140 indicated that they proposed to endeavor to work as a project director launching "[geographical information system] GIS [and] digital initiatives for renewable energy business expansion by leading managers of highly efficient teams to handle fast growing business units." But the description of the proposed endeavor in the Petitioner's letter accompanying their petition was markedly different. The letter described the endeavor as "Business Management for Economic Development…dedicated to growing the United States Economy by guiding both leading organizations…as well as mentoring small to medium, minority owned operations…" In essence, the Petitioner's endeavor as proposed in their initial petition contemplated guiding or mentoring entrepreneurs from minority or underrepresented backgrounds who owned small and medium enterprises (SME) to increase diversity, equity and inclusion in the ownership and operation of successful businesses.

In response to the Director's request for evidence (RFE), the Petitioner highlighted their "technical background" as a "business executive and geospatial intelligence expert with 12 years of experience

in the business and energy industries." The Petitioner listed identifying new markets and opportunities, improving efficiency and profitability, reducing risk, and building relationships with customers and suppliers through consulting services. So from the time they filed their initial filing petition to when they responded to the RFE, the Petitioner's manner for carrying out their proposed endeavor transformed from serving as a project director to functioning as a consultant.

Both in their initial petition and response to the RFE, the Petitioner did not readily identify how they intended to prosecute their proposed endeavor. For example, they did not identify a project, entrepreneurial endeavor, or employment opportunity that would host the proposed endeavor. On appeal, the Petitioner stated they were "currently pursu[ing]" their endeavor as part of their current employment with [redacted]. The Petitioner stated they "identif[y] and implemen[t] renewable investment opportunities for [redacted] closely linked to US national interests in the developing green and sustainable domestic energy production and energy conservation."

The Petitioner's proposed endeavor has thus developed in a scattershot manner in the proceedings below. The Petitioner's expression of their proposed endeavor has morphed in response to the Director's RFE and on appeal. Essentially, the Petitioner has expressed their endeavor in three disparate ways, as we have outlined above; (i) as a project director initially with their petition, (ii) as a business manager for economic development by elevating the profile and therefore profitability of entrepreneurs coming from minority and underrepresented backgrounds owning and operating SMEs, and (iii) as a geospatial intelligence and business executive consultant utilizing GIS to enhance the profitability of large companies and SMEs in the energy industry. The Petitioner also couched their endeavor in terms of relating to "leading organizations going through business expansion" and cites their "key achievements include (sic) creating a startup company (Human capital development company platform) and a consulting company [redacted] a consulting company for SMEs and startups…" targeting their services to "clients contracting" them for services. The Petitioner intends to target large as well as small and medium sized enterprises, especially those owned and operated by minorities or traditionally underrepresented communities. The three ways the Petitioner exhibited their proposed endeavor had meaningful differences. The record reflects the Petitioner would be engaged in renewable energy business expansion and people management as a project director. But the Petitioner's letter accompanying their petition focused on mentorship and development of individuals from underrepresented or minority backgrounds to, essentially, advise them on owning and operating profitable businesses. The use of GIS and the renewable energy sector of the economy were not mentioned or contemplated in the Petitioner's letter. Then, in response to the RFE, the Petitioner combined the two separate expressions of their endeavor but expanded their role from directing individual projects to source renewable energy to consulting and "leading organizations going through business expansion." So it is unclear what endeavor the Petitioner proposes to undertake in the United States; project management, guidance and mentoring, or overall business development. We consequently conclude the Petitioner's proposed endeavor is ill-defined and we are unable to evaluate it for eligibility under any of the three prongs contained in the *Dhanasar* analytical framework. So the Petitioner has not demonstrated their eligibility for a discretionary waiver of the required job offer, and thus of a labor certification, in the national interest.

B. Substantial Merit and National Importance

1. Substantial Merit

It is not possible to determine the substantial merit of an endeavor when a Petitioner cannot consistently articulate its nature. As we discussed above, the Petitioner adjusted their proposed endeavor at the procedural stages below. For example, the Petitioner did not state that they intended a consulting component to their proposed endeavor in their initial petition. But, in the RFE response they introduced a consulting component. And, whilst their initial submission heavily emphasized their mentorship and guidance of minority and underrepresented entrepreneurs to form and operate SMEs, the response to their RFE introduced their "technical background" to substantiate their use of GIS in their endeavor. The addition of these new components to their proposed endeavor did not enhance or clarify their intentions. It introduced ambiguity and uncertainty. The proposed endeavor changed at RFE response into a wholly different one centered around consulting for the economic benefit of companies and not to enhance diversity and representation in ownership of SMEs. A petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner may not make material changes to a petition 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's use of GIS was not to mentor and guide minority and underrepresented entrepreneurs but to identify new markets and opportunities, improve efficiency and profitability, reduce risk, and build relationships with customers and suppliers. And it was unclear in the RFE response how the proposed endeavor sought to accomplish these goals, either through continuing employment, setting up their own entrepreneurial endeavor, or making themselves available for employment with other entities. The Petitioner's RFE response constituted a materially different endeavor transformed from a project director to a business executive utilizing GIS rendered their proposed endeavor ill-defined and amorphous. The Petitioner's reversal introduced ambiguity into their proposed endeavor which prevented analysis into its substantial merit. So we disagree with the Director's conclusion that the Petitioner's proposed endeavor was substantially meritorious and withdraw it.

2. National Importance

We agree with the Director that the Petitioner has not demonstrated the national importance of their proposed endeavor. Although the evidentiary standard in immigration proceedings is the lowest preponderance of the evidence standard, the burden is on the Petitioner alone to provide material, relevant, and probative evidence to meet that standard. Section 291 of the Act, 8 U.S.C. § 1361. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *see also* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). First, a petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres to the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits. The Petitioner submitted their professional plan, educational documents and certificates, curriculum vitae, two expert opinion letters, reports authored by the Petitioner, and letters of recommendation to bolster their assertions of the national importance of their proposed endeavor.[1]

[1] While we may not discuss every document submitted, we have reviewed and considered each one.

As we described above, the Petitioner has not consistently presented their proposed endeavor in a manner reliable enough to evaluate its national importance. This fact by itself would require us to conclude the Petitioner had not demonstrated the national importance of a proposed endeavor with material, relevant, and probative evidence in the record. But even if we were to set aside the shifting manner in which the Petitioner communicated the proposed endeavor, we would still conclude that it did not rise to a level of national importance under the first prong of the *Dhanasar* analytical framework because none of the three variations of the proposed endeavor the Petitioner described rises to a level of national importance as required in the first prong of the *Dhanasar* analytical framework. In determining national importance under *Dhanasar*, the relevant question is not the importance of the field, 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 a 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. What is critical in determining the national importance of a proposed endeavor under the first prong of *Dhanasar* is whether the proposed endeavor has a potential prospective impact with broader implications which rise to the level of national importance. So it is not what duties or what occupation the noncitizen will fill or perform but their actual plan with their occupation and duties that is examined.

The infirmity in the Petitioner's tripartite description of their endeavor is patent upon examination into the evidence and argument they introduced into the record. The Petitioner's evidence and argument do not help them carry their burden of production and persuasion because it does not relate to the proposed endeavor's national importance under the first prong of the *Dhanasar* framework. On appeal, the Petitioner states that their endeavor has national importance because of the Petitioner's past record, that they are currently engaged in their proposed endeavor, and that the United States has "current national priorities for offshore drilling." When evaluating the national importance of a proposed endeavor under the first prong of *Dhanasar*, we are concerned with its potential prospective or future impact. The Petitioner's demonstration of prior similar work does not have an influence on the proposed endeavor's potential prospective impact based on its national importance. In each of the endeavors the Petitioner presented for our evaluation over the course of the proceedings below, the Petitioner emphasized their *execution* of the respective proposed endeavor. For example, the Petitioner stated that their past work experience with [redacted] and achievements whilst in their employ render their work in their proposed endeavor likely to achieve results that will benefit the United States national interest. On appeal, the Petitioner attempts to convince us that their past success with energy exploration, project organization, and mentorship elevates any endeavor they propose to undertake in the United States with similar characteristics to a level of national importance. They also highlight their self-professed "strong operational background and leadership" as evidence that the consulting role in their proposed endeavor is nationally important to "support SMEs as they develop economically viable products." But the Petitioner's claims are not persuasive because the Petitioner's contention spotlights a fundamental misunderstanding of the *Dhanasar* framework's first prong. The first prong focuses on the proposed endeavor; not on the Petitioner's execution of that proposed endeavor. The *Dhanasar* framework is consequently unconcerned with the success of the proposed endeavor or the Petitioner's track record in their field of endeavor previously. The Petitioner's

contentions about their successful past performance in the field of endeavor they propose, as well as evidence and information of their achievements and recognition, would better serve a demonstration of eligibility under the *Dhanasar* framework's second prong. So the Petitioner's assertions about their successful career-to-date, as well as evidence and information of their achievements and recognition such that they are, are irrelevant to an examination of their eligibility under the first prong of the *Dhanasar* analytical framework.

In the same vein, the letters of recommendation the Petitioner submitted do not illustrate the prospective positive impact of the triumvirate components of the Petitioner's proposed endeavor because they focus on the Petitioner's past achievements and not on the proposed endeavor's broader benefits or initiatives implicating matters of national importance.

USCIS may, in its discretion, use as advisory opinion statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *See Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, the submission of letters or opinion statements from experts supporting the petition is not presumptive evidence of eligibility. *Id.* The Petitioner submitted two expert opinion statements. One was authored by [redacted], associate professor, electrical and computer engineering, [redacted] The other was authored by [redacted] professor at the [redacted] But these opinion statement do not illustrate how the Petitioner's proposed endeavor rises to a level impacting national importance either. Both opinions heavily discuss and root their conclusions in the Petitioner's ability and achievement in their field. As we have stated previously the first prong focuses on the proposed endeavor. So, a petitioner's ability and achievement are not a relevant consideration to evaluate the national importance of the proposed endeavor.

Moreover, both authors highlight the importance of the renewable energy industry and field to substantiate their conclusion that the Petitioner's proposed endeavor has national importance. But in evaluating national importance we are not concerned with the importance of the field; we are evaluating the specific proposed endeavor. Simply proposing an endeavor adjacent to an area of substantial merit or special concern to the United States does not render such an endeavor nationally important as a default. Neither author strays from their descriptions of the importance of the renewable energy field to evaluate the Petitioner's specific endeavor and how it can have a prospective positive impact from the broader implications of its specific contributions to the renewable energy field. Nor does either author sufficiently describe positive economic impacts from the Petitioner's proposed endeavor. Or in other words, neither author convincingly demonstrates the national impact of the Petitioner's endeavor through its broader implications so that a meaningful evaluation of the proposed endeavor's potential prospective impact can be made to determine if it rises to a level of national importance. And both authors discuss the impact of encouraging business development, finding new business opportunities, and providing advising services. But neither author adequately describes how the Petitioner's business development initiatives, new business opportunities sourcing, and advisory services has broader implications beyond those entities engaging the Petitioner for their services which could be examined to determine if they rise to a level of national importance.

The Petitioner's endeavor also intended to counsel and guide individuals from underrepresented and minority backgrounds owning and operating businesses in large, small, and medium enterprises. The Petitioner spotlighted [redacted] a "creation" of theirs in the form of an "online platform [for]

cultivating vital partnerships" which heavily utilized the Petitioner's "technical expertise with strategic foresight." The Petitioner asserted that the positive downstream economic effects of their guidance and mentorship to entrepreneurs from minority and underrepresented backgrounds owning and operating large, medium, and small enterprises would ascend to a level of national importance. But the benefit of guidance and mentorship is akin to the benefit of someone's teaching. The benefit is generally only directly beneficial to the students being taught and not the wider population. In *Dhanasar* we discussed how teaching would not impact the field of education broadly in a manner which rises to national importance. *Dhanasar* at 893. By extension activities which only benefit a small subset of individuals, like the mentorship and guidance component of the Petitioner's proposed endeavor, would not rise to a level of national importance.

And the Petitioner's intention for their endeavor to support "current national priorities for offshore drilling" and renewable energy is not by itself sufficient to elevate their endeavor to a level of national importance. Not every endeavor that purports to address renewable energy challenges and offshore drilling adjacent to U.S government initiatives is nationally important. We said in *Dhanasar* that we focus on "the specific endeavor that the foreign national proposed to undertake" and "look for broader implications" to determine the proposed endeavor's national importance. *See Dhanasar*, 26 I&N Dec. at 889. The evidence and assertions in the record do not adequately describe how the Petitioner's endeavor would broadly implicate matters in the energy sector to a level commensurate with national importance. For example, the Petitioner's appeal emphasizes government priorities with offshore drilling and the volatility in the availability of oil and gas leases offshore for exploration. And the Petitioner describes work that they did with their current employer utilizing GIS that advantaged that employer because they were "responsible for identifying and implementing renewable investments" for them. But the Petitioner's evidence does not sufficiently describe how the Petitioner's proposed endeavor would address the volatility in the availability of oil and gas leases to a level broadly implicating matters of national importance. Or in other words, it is not evident how the Petitioner's identification and implementation of renewable investments would broadly implicate the availability and cost of leases for exploration on federally managed lands in a manner that is nationally important. And it is not sufficiently apparent from the record how the benefits of the Petitioner's utilization of expertise in GIS in the renewable energy sector or oil and gas exploration permeate beyond their immediate employer to broadly implicate issues at a level commensurate with matter of national importance.

As we discussed previously, the Petitioner's proposed endeavor has shifted and adjusted throughout the proceedings below. This impedes our ability to evaluate its national importance. But, even if we chose to evaluate the three variations of the Petitioner's endeavor individually, the record does not contain relevant, probative, or material evidence establishing the Petitioner's proposed endeavor has potential positive impact either through its broader implications to its field or its positive economic effects. So we conclude that the Petitioner has not established that their proposed endeavor is of national importance.

C. Well-Positioned To Advance The Proposed Endeavor

We disagree with the Director and hereby withdraw the Director's conclusion that the record established the Petitioner was well-positioned to advance the proposed endeavor under the second

prong of the *Dhanasar* framework. In evaluating whether a petitioner is well positioned to advance their proposed endeavor, we review the following and any other relevant factors:

- A petitioner's education, skill, knowledge, and record of success in related or similar efforts;
- A petitioner's model or plan for future activities related to the proposed endeavor that the individual developed, or played a significant role in developing;
- Any progress towards achieving the proposed endeavor; and
- The interest or support garnered by the individual from potential customers, users, investor, or other relevant entities or persons.

It is not clear how an individualized consideration of the multifactorial analysis under *Dhanasar's* second prong would demonstrate how well positioned the Petitioner is to advance their proposed endeavor because the proposed endeavor has been inconsistently expressed. The trio of different expressions of the Petitioner's endeavor developed over the course of the proceedings below has generated a lack of clarity about what the proposed endeavor is. So we determined that we could not evaluate whether the endeavor's potential prospective impact rose to a level of national importance either through its broader implications on its field or its positive economic effects. The record contains evidence of the petitioner's education, certification, performance of activities like those variously described as their endeavor different stages in the proceeding below. But it is not possible to evaluate whether the evidence is relevant, probative, or material to the Petitioner's positioning to advance their proposed endeavor when the specific endeavor they seek to advance to advance is not readily apparent due to the numerous presentations of that endeavor over the course of these proceedings. And the letters of support, whilst speaking of the Petitioner very favorably, are not sufficient to demonstrate interest or support in the Petitioner's proposed endeavor. Or in other words, even though some of the authors of the letters the Petitioner submitted had worked with the Petitioner or gained a benefit from their performance of one the three disparate aspects the Petitioner expressed as their proposed endeavor, they did not evidence a persisting interest or support in the Petitioner's proposed endeavor.

And it remains unclear how the Petitioner would prosecute their proposed endeavor. As we stated previously, the Petitioner did not readily identify both in their initial petition and response to the RFE how they intended to execute their proposed endeavor. For example, they did not identify a project, entrepreneurial endeavor, or employment opportunity that would host the proposed endeavor. On appeal, the Petitioner stated they were "currently pursu[ing]" their endeavor as part of their current employment with [redacted] But it is not clear from the record if this "current" pursuit is the conduit they propose for the continuation of their endeavor such that it is. So we are not able to evaluate whether the Petitioner is making progress towards achieving their endeavor if we cannot fully comprehend based on the Petitioner's contentions and the evidence in the record how they would accomplish the activities of their proposed endeavor.

As stated above, a petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. at 1142 n.3 (BIA 1998); *see also* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). So the evidence in the record does not sufficiently describe how well situated the Petitioner would be to advance their petition's proposed endeavor.

D. Balancing Factors to Determine Benefit to the United States of Granting Waiver of the Job Offer Requirement so that the Petitioner can Undertake the Proposed Endeavor.

If the Director had found that the Petitioner met the eligibility requirements contained in the first and second prongs of the *Dhanasar* framework they would have moved to evaluating whether, on balance, the Petitioner had demonstrated that it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The Director could have considered the impracticality of a labor certification, the benefit to the U.S. of a petitioner's contributions, the urgency of a petitioner's contributions to the national interest, the capacity for job creation, and any adverse effects on U.S. workers when conducting the balancing of the national interests of waiving the requirements of a job offer and therefore a labor certification.

The record here does not demonstrate the Petitioner's eligibility under the first two prongs of the *Dhanasar* framework. But even if the first two prongs had been met, the petition could not have been approved because the record does not satisfy the third prong. The record does not contain sufficient evidence of factors like the impracticality of a labor certification, the benefit to the U.S. of a petitioner's contributions, the urgency of a petitioner's contributions to the national interest, the capacity for job creation, and any adverse effects on U.S. workers. So it is not evident in the record, on balance, that the requirement of a job offer and thus a labor certification, should be waived for the Petitioner.

III. CONCLUSION

In visa petition proceedings, it is always the Petitioner's burden to provide competent and credible evidence to establish eligibility for the benefit they seek. The Petitioner has not met their burden for the reasons set forth above.

ORDER: The appeal is dismissed.