U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 35489660

Date: JAN. 08, 2025

Appeal of Nebraska Service Center Decision

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

The Petitioner, a senior business intelligence analyst, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, 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 Nebraska Service Center approved the petition, but later issued a service motion to reopen and a request for evidence (RFE). The Director then issued a notice of intent to revoke (NOIR) and denied the petition, concluding the Petitioner did not demonstrate the Beneficiary's 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 withdraw the Director's decision and remand the matter for entry of a new decision.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification of the beneficiary 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.

If a petitioner establishes the beneficiary's 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." *Id*. *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:

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

- 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. NATIONAL INTEREST WAIVER

A. Facts and Procedural History

The Petitioner stated that the Beneficiary's proposed endeavor was to "utilize advanced computing technologies to design and develop data analytics infrastructure to gather and track metrics on the performance of systems for [the Petitioner's] streaming platform." The Petitioner asserted that the innovative solutions developed by the Beneficiary would maintain its status as a leader in the global video game industry, generate significant revenue for the U.S. economy, and have national implications on technology of interest to the U.S. government, namely, the advancement and development of advanced computing capabilities and technologies.

As discussed, the Director approved the petition on May 10, 2024, but later issued a service motion to reopen and RFE on May 31, 2024. Following the issuance of the RFE, the Director issued a NOIR on June 7, 2024. In the NOIR, the Director indicated that the Petitioner did not establish the Beneficiary's eligibility under any of the three prongs of *Dhanasar* and requested additional evidence to demonstrate each prong.

The Director later issued a decision on August 20, 2024 "denying" the petition. In this decision, the Director determined the Petitioner demonstrated that the Beneficiary was a member of the professions holding an advanced degree. 8 C.F.R. § 204.5(k)(2). The Director also stated that "the petitioner has not met prongs 1 or 3…therefore, the petitioner is not eligible for, and does not merit, a national interest waiver as a matter of discretion." However, the Director further concluded that "the evidence submitted is sufficient to establish that the [Beneficiary's] proposed endeavor to work as an Operations Management [*sic*] has substantial merit and national importance." In addition, the Director determined that the Beneficiary was well positioned to advance the proposed endeavor, consistent with the second prong. *Matter of Dhanasar*, 26 I&N Dec. at 890

However, the Director concluded the Petitioner did not establish that, on balance, it would be beneficial to the United States to waive the requirements of the job offer and thus of the labor certification. *Id.* at 890-91. In making this determination, the Director stated the following:

> The evidence submitted does not establish the beneficiary has a degree of influence in their field at a level that would warrant waiver of the job offer requirement, and thus the labor certification. Further, the petitioner has not established their contributions are sufficiently urgent or time-sensitive, or that their knowledge and skills could not be easily articulated on a labor certification. The petitioner has not shown that they have knowledge or skills above that of a successful senior business analyst. Additionally [*sic*], the petitioner has not submitted evidence of significant contributions to the

> business industry, or evidence to establish that they have skills that are atypical of a qualified U.S. software developer

The Director further acknowledged the Petitioner's contention that the Beneficiary's proposed endeavor met the third prong based on his contributions to critical and emerging technology in a STEM (Science, Technology, Engineering, or Mathematics) field. However, the Director determined the Petitioner did not sufficiently demonstrate the Beneficiary met the third prong on this basis, reasoning that "despite public and private investment, the U.S. is not developing an American STEM workforce to fill the jobs of the future." They further noted that the labor certification process existed to address shortages of workers. The Director reasoned that the Beneficiary's proposed endeavor contributed mostly to his immediate employer, not warranting that they forgo the labor certification process. The Director also stated that the Petitioner did not demonstrate how his work would "directly lead to a significant creation of jobs, or that the United States will benefit, on a national scale, from his contributions."

On appeal, the Petitioner points to the USCIS Policy Manual and asserts it provides specific evidentiary considerations related to individuals with advanced degrees working on critical and emerging technologies in a STEM field. The Petitioner contends that the Director improperly ignored these stated factors in the USCIS policy manual, applying a stricter standard. The Petitioner emphasizes that this guidance does not require USCIS to determine that a "beneficiary have a degree of influence in their field" and asserts that this conclusion is in conflict with the Director's determinations with respect to prongs one and two of *Dhanasar*. The Petitioner asserts that the Beneficiary's endeavor related to advanced computing technologies, specifically "data storage architectures and data processing and analysis techniques," represents critical and emerging STEM technology meeting the guidance for eligibility under the third prong balancing test articulated in the USCIS policy manual.

B. Analysis

Upon review, we will remand this matter for the entry of a new decision consistent with the following analysis. As a preliminary matter, the Director did not properly revoke the approval of the petition. Section 205 of the Act states: "The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition."

Regarding revocation of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (quoting *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

Once a director decides to revoke the approval of a petition on any ground other than those specified in 8 C.F.R. § 205.1, the proper course of action is to revoke the approval following issuance of a NOIR and not reopen on service motion and deny. In such cases, the Petitioner must be given the opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval. *See* 8 C.F.R. § 205.2.

Here, following the approval of the petition, the Director issued a service motion reopening the matter and issued a blanket RFE, and later issued a NOIR without addressing the previously issued service motion and RFE. Further, the NOIR did not articulate with specificity the good and sufficient cause for revocation of the approved petition, but instead broadly discussed all grounds of ineligibility without identifying which grounds for revocation applied in this matter. In addition, the Director further "denied" the petition in its latest decision, an apparent error in attempting to revoke the approval.[2] As such, the Director should properly issue a new NOIR specifically identifying the grounds for revocation of the approved petition.

We also note that the Director made conflicting statements in the prior decision as to whether the Petitioner had established eligibility under the first prong of *Dhanasar* related to substantial merit and national importance. In any future proceedings, the Director should clearly articulate its conclusion as to the first prong of *Dhanasar*.

In addition, the third prong requires the petitioner to demonstrate 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. As discussed, the Petitioner asserts the Beneficiary is eligible under the third prong of *Dhanasar* since his proposed endeavor is focused on a critical and emerging technology in a STEM field. The USCIS policy manual outlines specific evidentiary considerations relating to STEM degrees and fields, including with respect to evaluating eligibility under the third prong. When evaluating the third prong and whether the United States may benefit from the person's entry, regardless of whether other U.S. workers are available, the USCIS policy manual instructs us to consider the following combination of facts contained in a record as a strong positive factor:

- The person possesses an advanced STEM degree, particularly a Ph.D.;
- The person will be engaged in work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness; and
- The person is well positioned to advance the proposed STEM endeavor of national importance.

The benefit to the United States is considered especially weighty where the endeavor has the potential to support U.S. national security or enhance U.S. economic competitiveness, or when the petition is supported by letters from interested U.S. government agencies.[3]

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[2] We also observe that the Director made conflicting statements in the decision as to the Beneficiary's stated profession referring to operations management, senior business analysts, and software developers. In any future proceedings, the Director should properly state the Beneficiary's proposed title, senior business intelligence analyst.

[3] *See generally* 6 USCIS Policy Manual F.5(D)(2).

In making their determination with respect to the third prong of *Dhanasar*, the Director focused on the degree of influence the Beneficiary had in his field; the urgency and time-sensitivity of his work; whether his knowledge and skills could be easily articulated on a labor certification; whether his knowledge or skills were above that of a successful senior business intelligence analyst; and whether he had made significant contributions to the business industry, among other considerations. However, the Director's analysis on the third prong did not sufficiently address the guidance specifically provided by the USCIS policy manual with respect to those asserting a beneficiary's eligibility with a proposed endeavor advancing a critical and emerging technology in a STEM field, namely, those factors we have discussed in bullet points above. In any future proceedings, the Director should consider this guidance in their determination on the third prong of *Dhanasar*. *Id.*

In sum, the Director did not properly revoke the approved petition. We will therefore remand the matter to the Director for further action. We express no opinion regarding the ultimate resolution of this case on remand, however to the extent the Director determines the approval of the petition must be revoked, they must specifically set forth good and sufficient cause for doing so.

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