U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29534555

Date: JAN. 17, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an instructional coordinator for schools and businesses, seeks classification under the employment-based, second-preference (EB-2) immigrant visa category and a waiver of the category's job offer requirement. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(B)(i), 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) has discretion to excuse a job offer in this category - and thus a related requirement for certification from the U.S. Department of Labor (DOL) - if a petitioner demonstrates that waiving these U.S.-worker protections would be "in the national interest." *Id.*

The Acting Director of the Texas Service Center denied the petition. While finding the Petitioner qualified for the requested EB-2 category, the Director concluded that she did not demonstrate a waiver's merits. On appeal, the Petitioner contends that the Director erred in finding insufficient evidence of her positioning to advance her proposed work and that, on balance, a waiver would benefit the United States.

The Petitioner must demonstrate eligibility for the requested benefit by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that, in finding insufficient evidence of her positioning to advance her proposed endeavor, the Director omitted relevant factors and overlooked evidence. We also conclude that the Director did not explain his specific reasons for finding that the Petitioner did not demonstrate a waiver's benefit to the United States. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility for national interest waivers, petitioners must first demonstrate their qualifications for the requested EB-2 immigrant visa category, either as members of the professions holding "advanced degrees" or noncitizens of "exceptional ability" in the sciences, arts, or business. *See* section 203(b)(2)(A) of the Act. To protect the jobs of U.S. workers, this category generally requires prospective employers to offer jobs to noncitizens and obtain DOL certifications to permanently employ them in the country. *See* section 212(a)(5)(D) of the Act, 8 U.S.C.

§ 1182(a)(5)(D). To avoid the job offer/labor certification requirements, petitioners must demonstrate that waivers of the U.S.-worker protections would be in the national interest. Section 203(b)(2)(B)(i) of the Act.

Neither the Act nor regulations define the term "national interest." Thus, to adjudicate these waiver requests, we have established a framework. *See Matter of Dhanasar,* 26 I&N Dec. 884, 889-91 (AAO 2016). If otherwise qualified as advanced degree professionals or noncitizens of exceptional ability, petitioners may merit national interest waivers of the job-offer/labor certification requirements if they establish that:

- Their proposed U.S. work has "substantial merit" and "national importance;"
- They are "well positioned" to advance their intended endeavors; and
- On balance, waivers of the job offer/labor certification requirements would benefit the United States.

Id.

II. ANALYSIS

A. The Proposed Endeavor

The record shows that the Petitioner earned a bachelor's degree in social communication in Brazil in 2006. She then remained working in Brazil, her home country. Her work included more than six years as an instructional coordinator, developing educational courses for schools and businesses. In 2015, she came to the United States to further her studies. She earned a bachelor's degree in business leadership in 2020 and then pursued a master's degree in education, specializing in instructional technology. She also gained U.S. experience in internships related to her studies and jobs on her school's campus.

At the time of the petition's filing in November 2022, the Petitioner stated her intent to remain in the United States to establish a "consulting, advisory, and training company in content development and educational technology." She stated that the firm would help medium- and large-sized schools and businesses develop online, "distance learning" courses. Her business plan projects that, within five years of operation, her company would generate annual revenues of $743,424 and employ eight people. On appeal, she submits evidence that, in July 2023, a U.S. hospital offered her a job in its "center for learning excellence" as an instructional designer.

A petitioner must demonstrate eligibility "at the time of filing the benefit request." 8 C.F.R. § 103.2(b)(1); *see also Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) ("[A] petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements.") As the Petitioner filed her petition in 2022, her proposed endeavor cannot comprise or include the work the hospital offered to her in 2023. We therefore consider her proposed endeavor to include only her initial plan to establish a consulting and training company.

The Director found the Petitioner eligible for the requested EB-2 category as an advanced degree professional. The Director also concluded that she meets *Dhanasar*'s first prong, finding that her proposed endeavor has both substantial merit and national importance. The Petitioner challenges the Director's findings of insufficient evidence of her positioning to advance her proposed venture under *Dhanasar*'s second prong and a waiver's benefits to the United States under the third prong.

B. Positioning to Advance the Endeavor

To determine whether a petitioner is well positioned to advance their proposed endeavor, we must focus on the noncitizen. *Matter of Dhanasar*, 26 I&N Dec. at 890. We must consider multiple factors, including:

- their education, skills, knowledge, and record of success in related or similar efforts;
- the existence of a model or plan for future activities;
- any progress towards achieving their proposed endeavor; and
- interest in the endeavor by potential customers, users, investors, or other relevant entities or individuals.

Id. A petitioner need not demonstrate that their endeavor would more likely than not succeed. But they must establish that they are well-positioned to further it. *Id.*

The Director acknowledged the Petitioner's skills and experience in the education technology field. But the Director found insufficient evidence of her success in endeavors related or similar to her proposed U.S. venture to establish an education technology company. The Director also found that the Petitioner did not demonstrate interest in her endeavor from other parties, such as potential customers or investors.

The Director did not consider all relevant factors. While discussing interest in the Petitioner's proposed endeavor and her education, skills, knowledge and record of success, the Director did not consider the existence of a model or plan for future activities or progress towards achieving the proposed venture.

Also, the Director overlooked the following evidence, most of which the Petitioner submitted in response to the Director's request for additional evidence:

- Copies of bank statements and a letter from a Brazilian "angel investor" who would purportedly invest about $50,000 in the proposed endeavor;
- Evidence that the Petitioner owns a home in Brazil that she claims she could sell for money to invest in her venture;
- Letters from potential customers, including a church and a real estate company;
- A letter from a potential U.S. investor; and
- Evidence that the Petitioner co-founded a nonprofit organization in Brazil, possibly indicating a record of success in a similar venture.

As the Director insufficiently considered the Petitioner's positioning to advance her proposed endeavor, we will withdraw the Director's finding. To avoid considering factors and evidence in the

first instance under this prong, we will next review the Director's decision under *Dhanasar*'s third prong.

C. A Waiver's Benefits to the United States

Dhanasar's third prong requires a petitioner to demonstrate that, on balance, a waiver of the job offer and labor certification requirements would benefit the United States. *Matter of Dhanasar*, 26 I&N Dec. at 890. When considering a waiver's benefits to the United States, USCIS must weigh competing interests. *Id.* On one hand, Congress sought to further the national interest by requiring job offers and labor certifications to protect domestic workers. *Id.* On the other hand, by creating the national interest waiver, Congress recognized that other factors could outweigh benefits inherent in the labor certification process. *Id.*

In performing this balancing analysis, USCIS must evaluate factors such as whether:

- in light of the nature of a noncitizen's qualifications or proposed endeavor, securement of a job offer or labor certification would be impractical;
- even assuming that other qualified U.S. workers are available, the United States would still benefit from a noncitizen's contributions; and
- the national interest in a noncitizen's contributions is sufficiently urgent to warrant forgoing the labor certification process.

Matter of Dhanasar, 26 I&N Dec. at 890-91.

The Director concluded that "the petitioner has not submitted documentary evidence that demonstrates 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 Director's decision lists the potential factors to be considered. But the decision does not apply any factors to the Petitioner's case or explain why her evidence did not demonstrate a waiver's benefits. *See* 8 C.F.R. § 103.3(a)(1)(i) (requiring USCIS to "explain in writing the specific reasons for denial").

The Director's lack of analysis prevents us from adequately reviewing the decision under *Dhanasar*'s third prong. We will therefore withdraw the Director's decision on this prong and remand the matter.

On remand, the Director should rewrite the decision under *Dhanasar*'s third prong, applying relevant factors to the Petitioner's case and explaining why her evidence did not demonstrate the benefits of a waiver. The Director should also rewrite the decision under *Dhanasar*'s second prong, considering all relevant factors and evidence of the Petitioner's positioning to advance her endeavor.

D. National Importance

Contrary to the Director's finding, the Petitioner also has not demonstrated that her proposed undertaking has national importance.

In determining whether a proposed endeavor has national importance, USCIS must focus on the particular venture, specifically on its "potential prospective impact." *Matter of Dhanasar*, 26 I&N

Dec. at 889. "An undertaking may have national importance, for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances." *Id.* A nationally important venture may even focus on only one geographic area of the United States. *Id.* at 889-90. "An 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.*

Before the Director, the Petitioner contended that her proposed U.S. company would have national implications because education technology enhances student learning. She asserted the importance of her endeavor, stating that U.S. school districts and businesses need to "leverage" education technology "to realize its full potential for growth." The Petitioner also argued that her proposed business would create U.S. jobs and tax revenues and that USCIS recognizes the importance of progress in science, technology, engineering, and mathematics (STEM) fields. *See generally* 6 *USCIS Policy Manual* F.(5)(D)(2), www.uscis.gov/policy-manual. Further, the Petitioner submitted an expert opinion letter from a U.S. associate superintendent of schools, stating that education has national and global importance.

We recognize that the Petitioner's proposal to start an education technology firm has substantial merit. As previously indicated, however, when considering national importance, USCIS must focus on the *particular* endeavor. *Matter of Dhanasar*, 26 I&N Dec. at 889 ("The first prong, substantial merit and national importance, focuses on the *specific* endeavor that the foreign national proposes to undertake.") (emphasis added). Thus, while the education technology field, as a whole, has potential to enhance students' learning and generate jobs and substantial economic benefits across the country, the Petitioner has not demonstrated that her *particular* endeavor has national implications. She has not explained how her proposed company, at its projected size and scope, could generate enough jobs and economic benefits to have a national impact. Nor does the record establish that her particular proposal would benefit an economically depressed area. Also, the Petitioner has not demonstrated how her specific proposal would introduce advancements to the U.S. education technology field.

In *Dhanasar*, we found that a proposal to teach U.S. university students courses in STEM fields had substantial merit. *Matter of Dhanasar*, 26 I&N Dec. at 893. But we held that the venture lacked national importance because the proposal would not "more broadly" impact U.S. STEM education. *Id.* Similarly, the Petitioner has not demonstrated that her meritorious proposal to provide education technology to U.S. schools and businesses would have "broad" implications for the field or the national economy.

The Director did not notify the Petitioner of this evidentiary deficiency. Thus, on remand, the Director should inform her of the insufficient evidence and provide her a reasonable opportunity to respond.

If supported by the record, the Director may notify the Petitioner of any other potential denial grounds. But the Director must provide her a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

In finding insufficient evidence that the Petitioner is well positioned to advance her proposed endeavor, the Director omitted relevant factors and overlooked evidence. In finding that the Petitioner did not demonstrate a waiver's benefits to the United States, the Director did not specify reasons for the conclusion. The record also does not establish the claimed national importance of the Petitioner's proposed venture.

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