U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29547030

Date: JAN. 23, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an energy systems engineer, 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. 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 that the record did not establish that a waiver of the job offer requirement would be in the national interest. The Director further concluded that the petition was incomplete because it did not include a required form. 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.[1] 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 (AAO 2016) provides the framework for adjudicating national interest petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion[2], grant a national interest waiver if the petitioner demonstrates that:

[1] The Director concluded that the Petitioner qualifies as an EB-2 advanced degree professional by holding a foreign degree which is equivalent to a U.S. advanced degree, which the record supports. 8 C.F.R. § 204.5(k)(2) and (k)(3)(i).

[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.

- 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.

All petitions requesting a national interest waiver of the job offer requirement must be accompanied by two fully-executed copies of U.S. Department of Labor (DOL) Form ETA 750B, Statement of Qualifications of Alien. 8 C.F.R. § 204.5(k)(4)(ii).[3]

II. ANALYSIS

The Petitioner seeks to work in the field of energy systems engineering in the United States, stating that he specializes in "solar-thermal systems, phase change materials, heat pumps, nanofluids, zero-energy buildings, energy efficiency in buildings, energy-exergy analysis, and computational fluid dynamics." On appeal, he asserts that the Director applied the law erroneously, disregarded the facts presented in the petition, and disregarded the public policy objectives of the national interest waiver. For the reasons below, the Petitioner has not overcome the Director's denial and established his eligibility for a national interest waiver of the job offer requirement.

A. Required Forms

The first issue on appeal is the Petitioner's incomplete benefit request. The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires petitioners requesting a national interest waiver to provide duplicate signed copies of DOL Form ETA 750B as part of their initial evidence. Alternatively, USCIS will also accept signed duplicate copies of DOL Form ETA 9089, Parts J, K, and L.[4] All benefit requests must include all the initial evidence required by applicable regulations and other USCIS instructions, and the absence of such evidence is grounds for denying that benefit request. 8 C.F.R. § 103.2(b)(1), (b)(8)(ii).[5]

The Petitioner has not submitted either of the above DOL forms, despite being informed of the requirement by both the Director's request for evidence (RFE) and the denial notice. Furthermore, he has not addressed this issue on appeal, and so we consider it waived. *See, e.g.*, *Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012)). The Petitioner's benefit request is incomplete and cannot be approved. 8 C.F.R. § 204.5(k)(4)(ii).

B. First *Dhanasar* Prong

Although the lack of required initial evidence is dispositive in this case, we will also address the Petitioner's qualifications under the first *Dhanasar* prong, substantial merit and national importance. When adjudicating this prong, we consider the specific endeavor the Petitioner proposes to undertake.

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[3] Alternatively, petitioners may submit two full-executed copies of DOL Form ETA 9089, Application for Permanent Employment Certification, Sections J, K, and L. *See generally* 6 *USCIS Policy Manual* F.5(D), https://www.uscis.gov/policy-manual.

[4] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.5(D).

[5] We further note that if, as here, a petitioner does not submit requested evidence in response to an RFE, and that evidence is dispositive of the benefit request, their petition shall be denied on that basis. 8 C.F.R. § 103.2(b)(14).

Matter of Dhanasar, 26 I&N Dec. at 889. The endeavor's merit may be demonstrated in a range of areas, including business, entrepreneurialism, science, technology, culture, health, and education. *Id.* When considering an endeavor's national importance, however, the relevant question is not the importance of the industry or profession where the Petitioner will work, but the specific impact of that proposed endeavor. *Id.* at 889-90. An endeavor may have national importance if, for example, it has national implications within a particular field or has significant potential to have a substantial positive economic effect, especially within an economically depressed area. *Id.*

In his initial submission, the Petitioner provided his educational and research credentials, recommendation letters from his professors and supervisors, and an attorney letter stating that he "has not received any [job] offers yet even though he has been contacted by certain entities in the field," but that he "will be part of a major project and/or national organization once he receives employment authorization"[6] and that this will "benefit the United States scientifically and/or financially in the future." He did not complete Part 6 of his Form I-140, Immigrant Petition for Alien Workers, which requests information about the proposed employment, or provide any other information about his proposed endeavor.

As noted in the Director's RFE, the Petitioner's initial filing did not describe a cognizable endeavor that could be analyzed under the *Dhanasar* framework. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.5(D)(1) ("The term 'endeavor' is more specific than the general occupation; a petitioner should offer details not only as to what the occupation normally involves, but what types of work the person proposes to undertake specifically within that occupation.").[7] The RFE therefore requested a detailed description of the endeavor, its merits, and its national importance.

In his response to the RFE, the Petitioner stated: "Recently, I contacted national laboratories where I applied for a job and was informed that the evaluation process takes time . . . On the other hand, I have prepared a business plan and I will get the innovative and high-performance energy systems manufactured and present them to the US market." To support these statements, the Petitioner provided a list of post-doctoral research positions he had applied for, a patent application, a business plan, and a business funding pledge letter. We agree with the Director's conclusion that these materials do not establish the Petitioner's qualifications for the first *Dhanasar* prong.

First, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1). Therefore, petitioners may not make material changes to a petition that has already been filed in an effort to make a deficient benefit request conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) (citing *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971)). Here, the Petitioner's initial filing only mentioned that he had been contacted by unspecified parties regarding potential employment, and said nothing about starting a business that manufactures and sells "high-performance energy systems." The patent application, which is for a folding portable solar-powered air heater mentioned as a product in the Petitioner's business plan, is dated May 2023, as is the funding pledge letter. The record therefore indicates that the proposed endeavor of starting an energy system

[6] The Petitioner is currently in the United States after being admitted as a B-2 nonimmigrant visitor for pleasure, a visa classification that does not permit employment. 8 C.F.R. § 214.1(e).

[7] We further note that the only initial documentation that addressed the proposed endeavor was the attorney letter. Counsel's unsubstantiated assertions do not constitute evidence. *See, e.g.*, *Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

manufacturing and sales company was a change made after the petition was filed in March 2023.[8] Working for an existing organization and starting a new business are endeavors which differ in ways that are central to assessing their potential scientific, economic, or other impact and determining their national importance. As such, the changes the Petitioner made to his proposed endeavor in response to the Director's RFE are material to his eligibility under the first *Dhanasar* prong, and therefore cannot establish that eligibility.[9] *Id.*

Furthermore, even if we were to accept the Petitioner's revised claims, which we do not, the evidence provided still does not establish a cognizable endeavor. The purpose of the national interest waiver is not to facilitate a petitioner's U.S. job search. While no job offer is required, anyone seeking such a waiver must identify the "specific endeavor" that they propose to undertake. *Matter of Dhanasar*, 26 I&N Dec. at 889. Here, the Petitioner has not specified whether he will work as a researcher or start an energy systems business, or how he will divide his time between these activities if he intends to do both. Without this information, it is not possible to determine whether the proposed endeavor has substantial merit or whether it has the kinds of "broader implications" we look for when assessing national importance. *Id.*

On appeal, the Petitioner submits an attorney letter stating that "[u]nder *Dhanasar*, the evidence that the endeavor has the potential to create significant merit may be established without immediate or quantifiable impact . . . [and] even furtherance of human knowledge qualifies for substantial merit and national importance even if such [an] endeavor does not economically benefit the United States." The letter further states that "the proposed endeavor in this case definitely has the potential of being beneficial to the United States, to the environment and to humankind in general."

The burden of proof in these proceedings lies with the Petitioner, who must provide probative, relevant, and credible documentation showing that the facts he seeks to prove are "probably" true. *Matter of Chawathe*, 26 I&N Dec. at 376 (discussing the requirements of the "preponderance of the evidence" standard). Here, the Petitioner has not provided sufficient information about his endeavor to establish that it will "probably" further human knowledge or otherwise substantially benefit the welfare, economy, or cultural or educational interests of the United States in the future. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.5(D). As noted above, counsel's unsubstantiated assertions do not constitute evidence. *See Matter of S-M-*, 22 I&N Dec. at 51 (BIA 1998). The recommendation letters and the general information provided about the importance of the Petitioner's scientific field do not relate specifically to his proposed endeavor, and are insufficiently probative to demonstrate that endeavor's merits, what impact it is likely to have, or how that impact will rise to the level of national importance.

Finally, we acknowledge the Petitioner's 2022 doctoral degree in his field, as well as his work and publication history as a research assistant while earning this degree. However, these credentials relate to the second *Dhanasar* prong, which concerns the Petitioner's ability to advance his proposed

[8] These documents also date from after the Director's April 2023 RFE.

[9] We further note that an entrepreneurial endeavor requires different forms of preparation and experience than a non-entrepreneurial one, which impacts the assessment of the second *Dhanasar* prong. This change in the endeavor is also relevant to the third prong's considerations of whether it would be impractical for the Petitioner to secure a job offer. For these additional reasons, the revised endeavor is a material change made after filing and will not be accepted. *Id.*

endeavor. They do not relate to whether that endeavor would have substantial merit or national importance. The Petitioner has not met the first *Dhanasar* prong.

III. CONCLUSION

The Petitioner has not submitted the DOL form required by 8 C.F.R. § 204.5(k)(4)(ii), and so has not properly applied for a national interest waiver. Additionally, he has not met the requisite first prong of the *Dhanasar* test. Because both of these issues are dispositive of the appeal, we need not address the Petitioner's eligibility under the other two *Dhanasar* prongs, and hereby reserve those issues. *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 the applicant did not otherwise meet their burden of proof).

The Petitioner has not established that he 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.