U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30628050

Date: JUL. 01, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in the area of nutritional supplements, 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner merited a national interest waiver as a matter of discretion. The matter is now before us on appeal pursuant to 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.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. [If a doctoral degree is customarily required for the specialty, the non-citizen must possess a U.S. doctorate or a foreign equivalent degree. (delete if doctorate not an issue)] 8 C.F.R. § 204.5(k)(2).

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,[1] 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. EB-2 CLASSIFICATION

The Director concluded in her decision that the Petitioner "qualifies for the exceptional ability requirement" based on the evidence of his degree and letters providing proof of experience. However, as noted by the Petitioner on appeal, he did not seek eligibility as an individual of exceptional ability but as a member of the professions holding an advanced degree. Because this appears to be a typographical error by the Director, based on both the statements in her request for evidence (RFE) and the language in her decision, we will consider her conclusion to relate to the Petitioner's eligibility as a member of the professions holding an advanced degree. But we do not agree with that conclusion and withdraw it per the analysis below.

The Petitioner submitted a copy of his bachelor of administration diploma, along with transcripts showing four years of study towards this degree and an educational evaluation equating it to a bachelor's degree in business administration from an accredited college or university in the United States. We agree with the Director's conclusion that this evidence establishes that the Petitioner holds the foreign equivalent of a U.S. bachelor's degree.

Turning to the evidence of the Petitioner's post-degree work experience in the specialty, the regulation at 8 C.F.R. § 204.5(g)(1) states that this shall be in the form of letters from current or former employers which provide a specific description of the duties performed. Where such letters are unavailable, other evidence will be considered. Here, in her decision the Director mentioned a letter providing proof of the required experience and concluded that the Petitioner had established eligibility. This appears to be the letter from the accountant who served the Petitioner's business, [redacted] from 2006 to 2016, stating that the Petitioner served as the managing partner of this business. We note that a translation certificate was submitted along with the English translation of this letter, in accordance with 8 C.F.R. § 103.2(b)(3). But the record does not include a copy of the original letter in the Portuguese language, without which we cannot verify the authenticity of the translation. Accordingly, we cannot consider this evidence in determining whether the Petitioner gained at least five years of progressive, post-baccalaureate work experience.[2]

The record also includes documents relating to Nutrition Import, including its registration on September 5, 2006 and the Petitioner's sale of his interest in the company to his partner in 2016. In

[1] *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).

[2] Even if we were to consider the English translation without the original, the letter lists the Petitioner's duties in this position in broad terms which do not show that he gained the required experience in his specialty.

addition, the Petitioner submitted three sales order sheets dated November 22, 2013 showing the purchases by [redacted] of a variety of sports nutrition products from a company in New Jersey. While these documents affirm that the Petitioner was a partner and manager of this company for approximately 10 years, and that it was actively trading for some period in late 2013, this evidence does not establish that the Petitioner was engaged in the full-time management of this business for at least five years. We note that the Petitioner states in his resume that during the period of his involvement with [redacted] he was also serving as the founder and manager of another company, [redacted] which he states operated and franchised sports nutrition and health supplement retail locations in several areas of Brazil. Although no further information about [redacted] is provided, his concurrent ownership and management of two companies raises concerns regarding the amount of time devoted to his duties for each of them. The Petitioner also listed his employment with these companies on the required ETA Form 750B, Application for Alien Employment Certification, but he did not provide any detail about the duties he performed or the hours he worked for each of these companies on that form. Unlike his resume, the Petitioner signed and dated this document, attesting to the truth and correctness of the information provided.

Other evidence submitted by the Petitioner relating to this requirement includes several letters from individuals stating that they did business with the Petitioner and [redacted] One of those letters is from M-B-d-S-, who states that while working for a different company in 2006 he was contacted by the Petitioner to set up the importation of a supplement brand to Brazil. He states that the Petitioner "personally prepared the orders and did the calculations for the formatting of the national price list," and that the partnership resulted in the success of a particular supplement throughout Brazil. But there is no indication of how long this project lasted, and we note that the writer included his resume which states that he began working for [redacted] as a sales representative in February 2008.

Other letters similarly describe doing business with the Petitioner in the sports supplement market in later years in his role with [redacted] but also do not indicate how long these projects or interactions lasted and thus do not demonstrate that the Petitioner accrued at least five years of full-time, post-degree experience in directing the company prior to selling his interest.

Considering the deficiencies in the evidence noted above, we conclude that it does not demonstrate that the Petitioner gained the required five years of progressive, post-baccalaureate experience in the specialty. He is therefore not eligible as a member of the professions holding an advanced degree, and we withdraw the Director's conclusion. While this issue is dispositive of his appeal, we will also consider the merits of the Petitioner's request for a national interest waiver below.

III. NATIONAL INTEREST WAIVER

The Petitioner proposes to start and manage a company to be engaged in the sports nutrition and health supplements market. He submitted a business plan which identifies two main areas of operation for this proposed company: consulting and training for existing companies and entrepreneurs seeking to export products, and attracting foreign investment to develop and produce new products in the United States, to be sold to customers such as gyms, food supplement specialty stores, and personal trainers and sports consultants. The plan projects that the business would employ six other individuals in the [redacted] Florida area and generate annual revenue of $1.65 million in its fifth year of operation.

A. Substantial Merit and National Importance

The first prong of the *Dhanasar* analytical framework, 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. *Matter of Dhanasar*, 26 I&N Dec. at 889.

In her decision, the Director concluded that the Petitioner's proposed endeavor has neither substantial merit nor national importance. Regarding the former, the Director specifically stated that while the business plan and articles discussed topics including health infrastructure, small business, and e-commerce, they did not provide sufficient information regarding the area of sports nutrition to demonstrate that the proposed endeavor has substantial merit. But we disagree with this analysis, and withdraw the Director's determination. The evidence regarding the size of the sports nutrition industry is sufficient to establish the substantial merit of the proposed endeavor in the area of business.

Turning to the proposed endeavor's national importance, the Director noted that the Petitioner's business plan, and the articles he submitted regarding entrepreneurship and small businesses in the United States, did not focus on the importance of his endeavor. On appeal, the Petitioner asserts that the Director did not consider the response to the request for evidence (RFE) written by his attorney. Specifically, he notes that the RFE response discussed how his proposed endeavor would be innovative in the area of food supplements, as he would develop supplements catered to individuals in specific occupations and athletes in specific sports. However, neither the appeal nor the RFE response refers to a section of the business plan, or other evidence in the record, which discusses this aspect of the proposed endeavor, nor could we locate such a discussion in our review. 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"). As the record lacks evidence that the Petitioner proposes to engage in this type of targeted research and development of supplements as a part of his endeavor, we will not consider these statements by counsel.

The Petitioner also refers to counsel's statements in the RFE response about the economic benefits to the United States from his proposed endeavor. An endeavor may have national importance, even if focused on one geographic area in the United States, if it has significant potential to employ U.S. workers or has other substantial positive economic effects. *Dhanasar* at 889-90. Specifically, he notes that the company "would create jobs, drive employment opportunities, and reduce unemployment rates." The Petitioner's business plan projects that the company would employ seven individuals, including himself, and also includes statistics about unemployment in the United States and poverty levels in the [redacted] area. But the plan provides only generic job descriptions for these seven positions, and does not explain what these individuals would do in the context of his specific company. It is therefore not apparent how the Petitioner's proposed endeavor will create these jobs. In addition, when claiming that his company will also indirectly create 55 jobs, the Petitioner relies upon a broad "employment multiplier" figure for the consulting industry, even though it is not apparent which of his seven employees would be involved in consulting. With this lack of explanation and detail to support the Petitioner's job creation projections, the evidence does not show that his proposed endeavor has significant potential to employ U.S. workers.

Further, even if the Petitioner's business plan supported its projections with specific and relevant information, he does not explain how the direct employment of seven individuals would have a substantial positive economic effect in the [redacted] area, or appreciably reduce unemployment rates as he claims.

The Petitioner also quotes the section of his counsel's RFE response which asserts that his proposed endeavor will potentially improve public health and promote a healthy lifestyle. The section refers to a report from the United States Centers for Disease Control (CDC) which discusses how poor diet and low levels of physical activity can lead to obesity and chronic disease, and asserts that the supplements produced and marketed by the Petitioner's company "could contribute to improved public health outcomes." But the CDC report makes no mention of nutritional supplements, and two reports from the National Institutes of Health (NIH) about nutritional supplements do not support the Petitioner's assertions or those of counsel. Rather than improving health, the NIH report states that some supplements "might enhance [an athlete's] performance only when they add to, but do not substitute for, this dietary foundation." Similarly, the Petitioner's assertions that the products that his proposed company would develop and market would promote "an active and healthy lifestyle in the United States" are unfounded.

As noted by the Director, much of the evidence submitted in response to the RFE focused on the impact of small businesses in the United States. Other evidence, such as an article on the website www.newamericaneconomy.org, stressed the importance of immigrant entrepreneurs to the U.S. economy. But when evaluating potential substantial merit and national importance, we look to the specific proposed endeavor. *Id.* at 889. Evidence pertaining to an entire industry, field, or group is insufficient to demonstrate that a specific proposed endeavor meets the first prong of the *Dhanasar* analytical framework.

For all of the reasons discussed above, we conclude that the Petitioner has not established that his proposed endeavor is of national importance.

III. CONCLUSION

A petitioner must meet all three prongs of the *Dhanasar* analytical framework in order to establish their eligibility for a national interest waiver. Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the second and third prongs of the framework. *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 an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.