U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31283857

Date: JULY 10, 2024

Appeal of Texas Service Center Decision

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

The Petitioner is a photography director who seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver (NIW) 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 Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding that the record did not establish that the Petitioner qualified for the underlying visa classification, nor did she merit a discretionary waiver of the job offer requirement in the national interest. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of exceptional ability individuals. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5. If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having the requisite degree of expertise and will substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

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 USCIS may, as matter of discretion, 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.

USCIS' decision to grant or deny an NIW is discretionary in nature. *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts of Appeals, as well as the Third Circuit in an unpublished decision).

II. ANALYSIS

We begin discussing the issue in which the Director mentioned another foreign national's filing within the decision on this petition. While we agree that the Director committed an error in briefly discussing a filing that was not associated with this Petitioner, we do not agree with her statement questioning whether the Director ever properly reviewed her petition at all. Subsequent to mentioning another foreign national's filing, the remainder of the Director's discussion appears directly related to this Petitioner leaving little doubt that they properly reviewed the petition.

A. Eligibility for the EB-2 Classification

The Director determined that the Petitioner was not eligible for the EB-2 classification as an individual of exceptional ability. The Director determined the Petitioner met the criteria relating to an official academic record under 8 C.F.R. § 204.5(k)(3)(ii)(A), at least ten years of full-time experience under 8 C.F.R. § 204.5(k)(3)(ii)(B), and membership in a professional association relating to 8 C.F.R. § 204.5(k)(3)(ii)(E). Although the Director indicated the Petitioner met three of the regulatory criteria, within a final merits determination they subsequently decided the evidence in its totality did not show that she was recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).

Even though the Director made a favorable decision under the membership criterion, we do not agree that the record supports that outcome. To meet the membership requirements, the Petitioner must show membership in a "professional association." 8 C.F.R. § 204.5(k)(3)(ii)(E). The regulation defines "profession" to include "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries" or "as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. § 204.5(k)(2) (incorporating by reference Section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32)).

Before the Director, the Petitioner provided evidence of her membership in the Professional Photographers of America (PPA). She offered the organization's "About Us" website page, her

membership card, and her membership certificate. We note that the presence of the term professional within an association's name bears no weight when we evaluate whether an organization under this criterion is actually for those in the professions. Instead, we follow the statutory and regulatory concepts of a profession to decide whether the organization is professional in nature.

We begin noting the Petitioner did not provide evidence relating to the PPA's membership requirements. But she did submit the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) occupational profile for "Photographers." The Petitioner did not provide the Director with the most recent *Handbook* version, which was dated April 18, 2022, when she filed the petition. That version, under the portion of the *Handbook* titled "How to Become a Photographer" provided: "Postsecondary education is not required for most photographers. However, many photographers take classes or earn a bachelor's degree to improve their skills and employment prospects." Although the *Handbook* reflected "[e]ntry-level positions in photojournalism or in industrial or scientific photography generally require a college degree in photography or in a field related to the industry in which the photographer seeks employment," the Petitioner's membership here is not within one of those specialized areas. The *Handbook's* education section closes providing that "[b]usiness, marketing, and accounting classes may be helpful for self-employed photographers." According to the evidence the Petitioner provided for the record, a U.S. bachelor's degree or its foreign equivalent is not the minimum requirement for entry into her occupation.

As the Petitioner-provided evidence regarding PPA shows that it does not require its members to be professionals as defined in the regulations, it does not qualify as a professional association. The Petitioner's membership evidence in the PPA therefore does not establish that she meets this criterion, and we withdraw the Director's favorable determination. Further, because the Director only granted three criteria, and we withdrew one of those, the Petitioner no longer can demonstrate she meets at least three of the criteria. This makes it unnecessary that we consider her claims under a final merits determination referenced in *Kazarian*, 596 F.3d at 1119–20.

Ultimately, the Petitioner has not demonstrated that she qualifies for second-preference classification as an individual of exceptional ability. This issue is dispositive of this appeal. Nevertheless, we will discuss her eligibility under *Dhanasar's* framework.

B. National Interest Waiver

When the Petitioner filed the petition, her work as a photographer spanned 16 years, nine of which were spent running her own business. She founded her own company in the United States and her endeavor will provide services with a target market of event organizers, corporate events, conferences, and trade shows.

1. Substantial Merit and National Importance (Collectively *Dhanasar's* First Prong)

The first prong, 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. *Dhanasar*, 26 I&N Dec. at 889.

The Petitioner indicated the proposed endeavor would expand its presence from one location in the United States to at least two others which would "not only contribute to the local economies, but also provide opportunities for clients across the nation to access their high quality services." The Petitioner surmised this would "actively contribute to the growth and development of the photography industry in the United States, fostering creativity, generating employment opportunities, and ultimately enriching the visual landscape of the nation." The Petitioner explained how photography contributes to society and impacts the economy. But we aren't evaluating the national importance of photo production companies, or even photography in general. The Director concluded the proposed endeavor's impact did not extend to the photography field more broadly commensurate with the national importance requirement.

On appeal, the Petitioner claims she provided evidence—through the proposed endeavor's business plan—to show the economic benefits the business will potentially have in the United States. She specifically notes the portion of the business plan detailing the endeavor's growth potential over a five-year period. Over the referenced five-year period, the business plan predicts the endeavor will generate sales ranging from $500 thousand in the first year, to more than $1.9 million in year five.

However, the business plan by itself does not sufficiently detail the basis for its financial projections, or adequately explain how these projections will be realized. The Petitioner has not provided corroborating evidence, aside from claims in her business plan and her own statement, that her company's staffing levels and business activity stand to provide substantial economic benefits in the regions where she intends to operate or in the United States. The Petitioner must support her assertions with relevant, probative, and credible evidence, but she has not done so here. *See Chawathe*, 25 I&N Dec. at 376.

We further note the company's business plan does not adequately support the Petitioner's claims that her proposed endeavor has national importance. The business plan provides the company's "commitment to delivering exceptional visual experiences, coupled with its customer-centric approach, will set it apart from competitors and position it as the preferred choice for [those] in need of high-quality visual content." But a significant shortcoming of the business plan is the lack of sufficient content and analysis relating to the endeavor's major competitors, to include their strengths and weaknesses. Also, the vague statement of what will set the proposed endeavor apart from the competition lacks a clear strategy for differentiating it in the market. This adversely affects the Petitioner's claims relating to the endeavor's potential prospective impact to the broader field or industry.

The business plan's marketing strategy consists of website and digital marketing (e.g., search engine optimization, Google Ads, etc.), having a social media presence, and word-of-mouth. While these are essential components in today's business landscape, they appear to represent baseline expectations rather than a distinctive approach. A more robust and competitive marketing plan could include: (1) specific, innovative tactics the endeavor would utilize within its digital marketing (e.g., interactive content, partnering with micro-influencers, etc.); (2) clear differentiation from competitors' online methods; or (3) measurable goals and key performance indicators for each marketing initiative. Enhancing these areas could demonstrate a more comprehensive and strategic marketing approach.

The Petitioner did not explain how such a routine marketing strategy would increase the endeavor's potential to have broader implications in the industry.

The Petitioner provided information relating to four companies she has serviced since her organizations were registered to conduct business in the United States in 2021.[1] The proposed endeavor's potential to prospectively impact the industry relies, in part, on whether the business can effectively attract and retain customers. The failure to establish the endeavor is able to do so significantly reduces its potential to have much of any impact in the industry locally, much less at a broader level in the way that the *Dhanasar* decision requires. The rote marketing strategy presented in the business plan tends to undermine the Petitioner's claims under *Dhanasar's* first prong.

The business plan here lacks information relating to what will differentiate the business from its competitors. For example, and as discussed above, a detailed marketing strategy or an adequate customer acquisition plan. An entrepreneur should not offer a business plan lacking in significance, adequacy, or completeness and expect USCIS to perfunctorily deem it sufficient to establish the endeavor potentially will have a broad impact in the field. The mere presence of a business plan lacking in key elements does not demonstrate an endeavor has national importance, as such a presentation lacks probative value. Probative evidence is the type that "must tend to prove or disprove an issue that is material to the determination of the case." *Matter of E-F-N-*, 28 I&N Dec. 591, 593 (BIA 2022) (quoting *Matter of Ruzku*, 26 I&N Dec. 731, 733 (BIA 2016)). The business plan does not adequately support the Petitioner's contentions here.

In the appeal, the Petitioner discusses a letter from [redacted] an adjunct professor at [redacted] The Petitioner claims the Director "omitted the vast analysis regarding the economic implications of [the Petitioner's] endeavor elaborated by said expert without offering an explanation for doing so. Ignoring said opinion is arbitrary and capricious." But after this statement, the Petitioner failed to specify what analysis the Director ignored, or what economic implications the professor's analysis might have specifically demonstrated about the proposed endeavor.

Despite this shortcoming, we reviewed the professor's letter where he described the proposed endeavor's national importance, and we were unable to locate his description of her endeavor's "economic implications." Instead, he utilized 28 paragraphs offering a general description of what photographers and photography provide to the U.S. economy. In his lone departure from that generalized content, the professor discussed digital publishing revenue projections within the United States noting "the average revenue per user for digital publishing in the United States continues to trend upwards, indicating a healthy forecast for the industry's future. Therefore, the proposed endeavor has significant potential to employ U.S. workers and other substantial economic effects." However, the professor provides no analysis to support his conclusion, which requires multiple assumptions and logical leaps, and we are unwilling to navigate that uncharted territory with him.

"[W]here an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence." *Matter of Caron Int'l, Inc.*, 19 I&N

[1] We use the plural form "organizations" as the Petitioner filed the petition utilizing one name for her proposed endeavor, but when responding to the Director's request for evidence she noted that she created a new organization under a different name that would perform the same functions.

Dec. 791, 795 (BIA 1988); *see also Sagarwala v. Cissna*, 387 F. Supp. 3d 56, 65–66 (D.D.C. 2019) (finding that USCIS is justified in determining that an opinion letter is not persuasive where it does not cite to the source of its contents, is not corroborated by other probative evidence, but instead generally offers conclusory and unsubstantiated statements). We conclude the professor's letter here squarely fits these scenarios where it warrants very little evidentiary value.

The Petitioner plans on expanding the proposed endeavor beyond its current location in Florida to Kentucky and Tennessee employing 25 personnel by the end of year five. In much of the same way that the Petitioner did not sufficiently detail the basis for its financial projections, it also falls short of illustrating how the Petitioner calculated the staffing projections. These appear to be hopeful speculation at best. The Petitioner cannot meet her burden of proof simply by claiming a fact to be true, without adequate supporting evidence. *See Chawathe*, 25 I&N Dec. at 376 (finding the filing party must submit relevant, probative, and credible evidence that leads the trier of fact to believe that the claim is "more likely than not" or "probably" true).

The remaining positive effects and national impacts the Petitioner claims relate to vague concepts such as benefiting art and culture, or the impacts she presents are not curtailed to her industry in photography, but instead extends to the event organizing industry or to business development through photographing corporate events. While the business plan the Petitioner provided in their response to the Director's request for evidence alludes to educating photography students—activities she reiterates in the appeal brief—it is unclear from the remainder of the filing how these activities factor into her proposed endeavor. The Petitioner's claims do not demonstrate the endeavor has national importance.

Because the Petitioner has not sufficiently established the national importance of her proposed endeavor as *Dhanasar's* first prong requires, she has not demonstrated eligibility for an NIW of the job offer requirement.

2. We Reserve *Dhanasar's* Remaining Second and Third Prongs

As we explain above, *Dhanasar's* second and third prongs require the Petitioner to demonstrate she is eligible for an NIW meeting additional requirements. But because the Petitioner has not established that her proposed endeavor satisfies the *Dhanasar* framework's first prong, she is not eligible for an NIW and further discussion of the second and third prongs would serve no meaningful purpose. Consequently, we will not address and we reserve the Petitioner's remaining appellate arguments. *Patel v. Garland*, 596 U.S. 328, 332 (2022) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25–26 (1976) (finding agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision)); *see also Matter of Chen*, 28 I&N Dec. 676, 677 n.1, 678 (BIA 2023) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.