U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31651484

Date: JUL. 17, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an individual interested in employment in the dental field, seeks classification as a member of the professions holding an advanced degree or of exceptional ability, Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this employment based second preference (EB-2) classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so. *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v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

The Director of the Texas Service Center denied the petition, concluding the Petitioner did not demonstrate eligibility as an individual of exceptional ability for classification in the employment second preference permanent immigrant category and had not established a waiver of the required job offer, and thus of the labor certification, would be in the national interest. 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 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. The regulation at 8 C.F.R. § 204.5(k)(2) defines advanced degree to mean any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered

the equivalent of a master's degree and so permit classification as an EB-2 permanent immigrant. Progressive experience can be demonstrated by the Petitioner by providing letters from current or former employers showing that they have at least five years of progressive post-baccalaureate experience in the specialty. The regulation at 8 C.F.R § 204.5(g)(1) requires letters from current or former employers include the name, address, and title of the writer, and a specific description of the duties performed.

In the alternative, an individual can demonstrate eligibility for second preference permanent immigrant classification as an individual of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." To demonstrate exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

But meeting at least three criteria does not, in and of itself, establish eligibility for this classification. We will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

If we conclude that a petitioner has an advanced degree or is of exceptional ability such that they have established their eligibility for classification as an immigrant in the EB-2 classification, we evaluate the national interest in waiving the requirement of a job offer and thus a labor certification. Whilst neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). *Dhanasar* states that USCIS may as a matter of discretion grant a national

interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen is well positioned to advance the proposed endeavor, and (3) 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 first prong, substantial merit and national importance, focuses on the specific endeavor the noncitizen 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.

The second prong shifts the focus from the proposed endeavor to the noncitizen. To determine whether the noncitizen is well positioned to advance the proposed endeavor, we consider factors including but not limited to the individual's education, skills, knowledge, and record of success in related or similar efforts. A model or plan for future activities, progress towards achieving the proposed endeavor, and the interest of potential customers, users, investors, or other relevant entities or individuals are also key considerations.

The third prong requires the petitioner to demonstrate that, on balance of applicable factors, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. USCIS may evaluate factors such as whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen to secure a job offer or for the petition to obtain a labor certification; whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the noncitizen's contributions; and whether the national interest in the noncitizen's contributions is sufficiently urgent to warrant forgoing the labor certification process. Each of the factors considered must, taken together, indicate 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.

II. ANALYSIS

A. National Interest Waiver

On appeal, the Petitioner asserts that their proposed endeavor is substantially meritorious and nationally important, that they are well-positioned to advance their proposed endeavor, and that on balance of applicable factors it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification so that they can undertake their proposed endeavor. But the evidence the Petitioner has submitted into the record is not relevant, material, or probative to support their assertion of eligibility for a national interest waiver under the *Dhanasar* analytical framework. So, we agree with the Director, albeit on a different basis, to conclude that a favorable exercise of discretion to waive the job offer requirement and thus a labor certification is not warranted.

The Petitioner's initial petition contained a "autobiografia" which described their professional and personal history in the field of dental surgery. The Petitioner also submitted several recommendation

letters, their resume/curriculum vitae, professional certifications, and educational credentials. The record reflects the Petitioner functioned as a dental surgeon in their own country and has been working in the United States as a dental assistant.

But Part 6 of the Form I-140 submitted by the Petitioner did not contain any basic information about the Petitioner's proposed endeavor. So, the Director issued a request for evidence (RFE) instructing the Petitioner to furnish details concerning their proposed endeavor and submit a completed and executed Form ETA 750B. The Petitioner's response to the RFE and their executed Form ETA 750B indicated they intended to work in the United States as an endodontist.

The Director subsequently issued a second RFE requesting the Petitioner submit evidence supporting their eligibility for classification as an employment based second preference permanent immigrant as well as a waiver of the requirement of a job offer, and thus a labor certification, in the national interest. The Petitioner's response to the second RFE introduced a new endeavor that significantly departed from the endodontist endeavor the Petitioner proposed in their initial filing. In the response to the RFE, the Petitioner transformed themselves from an endodontist into an entrepreneur owning and operating a business entity concerning the training and development of dental assistants. The proposed endeavor essentially morphed into the Petitioner serving as the chief executive officer of their own entrepreneurial business. But the addition of the Petitioner's entrepreneurial business did not enhance or clarify the Petitioner's proposed endeavor to be an endodontist. To the contrary, it transformed the proposed endeavor into a wholly different one. Through their entrepreneurial entity, the Petitioner proposed to focus on "assisting the preparation of professionals" chiefly foreign dental assistants, by offering "online, in-person and hands-on, qualification and improvement courses" with an aim to "reach the entire American territory." None of their duties involved providing services resembling those performed by an endodontist. In fact, the company's business plan reflected that no endodontists and only dental assistants, receptionists, information clerks, and film and video editors would be employed in the endeavor.

The Petitioner's materially significant transformation into an entrepreneur rendered their proposed endeavor ill-defined and amorphous. A petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner may not make material changes to a petition, such as converting a plan to be an endodontist into being the owner of a business with no connection to endodontic services. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc Comm'r 1998). The Petitioner's transfiguration of their proposed endeavor from the initial petition to the response to the RFE introduced significant ambiguity into their proposed endeavor which prevented an analysis into its substantial merit or national importance.

A petitioner must identify the specific endeavor they propose to undertake. *See Matter of Dhanasar*, 26 I&N Dec. at 889. It is not possible to determine the substantial merit and national importance of an endeavor when a Petitioner cannot consistently articulate the nature of the endeavor. So, we conclude that the Petitioner has not established that their proposed endeavor is of substantial merit and national importance. And because the Petitioner has not established that their proposed endeavor has substantial merit and national importance, as required by the first *Dhanasar* prong, they are not eligible for a national interest waiver. We reserve our opinion regarding the second and third *Dhanasar* prongs applicability to this proposed endeavor as well as the Petitioner's eligibility for EB-2 immigrant

classification. *See INS v Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *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).

B. Employment Based Second Preference Category Eligibility

We withdraw the Director's conclusion regarding the Petitioner's categorical ineligibility for EB-2 permanent immigrant classification. The Petitioner did not specify if they sought EB-2 classification as an advanced degree professional or as an individual of exceptional ability. In support of their educational qualifications, the Petitioner submitted a copy of their título de cirurgião dentista accompanied by several professional certificates issued by a variety of entities in subjects related to the dental field.

The Director issued a request for evidence (RFE) seeking evidence of the Petitioner's exceptional ability and did not seek evidence to evaluate the Petitioner's eligibility for classification as an advanced degree professional.

The record contains the Petitioner's título de cirurgião dentista issued by [redacted] in [redacted] Brazil. The Educational Database for Global Education (EDGE), maintained by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), reflects that a título de cirurgião dentista earned after a four- or five-year course of study in Brazil is the single source equivalent to a first professional degree in dentistry in the United States.

The record also contains documents styled as "historico escolar" or "school transcript" that describe the course of study for the título de cirurgião dentista having consisted of four "terms." The evidence in the record does not adequately establish with material, relevant, or probative evidence how long a "term" lasted such that we can conclude whether the Petitioner earned the título de cirurgião dentista after a four- or five-year course of study.

So, we will withdraw the Director's conclusion that the Petitioner was ineligible for EB-2 classification. And, since the resolution of the issues pertaining to the Petitioner's eligibility for a waiver of the job offer requirement, and thus of a labor certification, under the *Dhanasar* analytical framework are dispositive of this appeal, further investigation and analysis of the Petitioner's categorical eligibility for EB-2 classification by issuing a request for evidence would serve no legal purpose. Nevertheless, the Petitioner should be prepared to address their categorical eligibility for EB-2 classification in any future proceedings requiring a petitioner to demonstrate eligibility as an advanced degree professional or individual of exceptional ability.

III. CONCLUSION

Because the Petitioner has not established that the Petitioner's proposed endeavor is substantially meritorious or nationally important, as required by the first prong of the *Dhanasar* analytical framework, they are not eligible for a national interest waiver. We reserve our opinion regarding whether the record demonstrates the Petitioner's categorical eligibility for EB-2 permanent immigrant

classification or satisfies the remaining prongs of the *Dhanasar* analytical framework. *See INS v Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that the Petitioner does not merit a favorable exercise of discretion to waive the requirement of a job offer, and therefore a labor certification.

ORDER: The appeal is dismissed.