U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32384186

Date: JUL. 30, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a biotechnologist researcher, 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v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).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 qualified for employment based second preference permanent immigrant classification as an individual of exceptional ability, but the record did not reflect they had established that 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 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 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;
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> (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;
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> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
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> (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, 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. EB-2 Classification

In the first instance, we note the Director's RFE concluded the Petitioner qualified for the employment based second preference immigrant classification because the Petitioner held "a Bachelor's degree in Engineering and is a candidate in a Ph.D. program." However, in the decision, the Director concluded the Petitioner "satisfie[d] the *Dhanasar* requirement for exceptional ability" because they submitted their "Bachelor's degree, current Doctoral research assignment, and evidence of previous employment."

As stated above, a petitioner can demonstrate their eligibility for the EB-2 category either as an advanced degree professional or an individual of exceptional ability. An advanced degree professional is an individual who has earned a degree above a baccalaureate degree or has earned a baccalaureate degree accompanied by five years of post-baccalaureate work experience in the specialty. And a petitioner may qualify for EB-2 permanent immigrant classification as an individual of exceptional

ability if they possess "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business" upon demonstrating eligibility under three of the six criteria contained at 8 C.F.R. § 204.5(k)(2) that the final totality of the evidence reflects they merit recognition as having a degree of expertise significantly above that ordinarily encountered in the field.

The Director's conclusions about the basis of the Petitioner's eligibility for EB-2 classification contrast between the Director's RFE and the ultimate decision. Consequently, we withdraw the Director's decision and remand this matter so that the Director can substantiate the basis for the Petitioner's eligibility or ineligibility for classification in the EB-2 permanent immigrant category.

On remand, the Director could choose to evaluate whether the Petitioner has demonstrated that they have accumulated at least five-years of post-baccalaureate work experience in their specialty. In the course of their evaluation the Director may note the Petitioner earned their bachelor's degree in engineering in 2021, less than five years before they filed the petition on March 2, 2023, keeping in mind that 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).

Further, as stated above, an individual can demonstrate eligibility for second preference permanent immigrant classification as an individual of exceptional ability by submitting at least three of the types of evidence contained at 8 C.F.R. § 204.5(k)(3)(ii) and listed above. Only upon demonstration that a Petitioner met at least three of the criteria contained in the regulation will the agency conduct a final merits determination to decide whether the evidence in its totality shows that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. The Director's decision concluded the Petitioner "satisfie[d] the *Dhanasar* requirement for exceptional ability." But our precedent decision in *Dhanasar* set forth a three-prong analytical framework to evaluate if a petitioner merited a favorable act of discretion to waive the requirement of a job offer, and thus of the labor certification. Our precedent decision in *Dhanasar* did not contain any "requirement for exceptional ability." Additionally, the Director concluded that the Petitioner's submission of their "Bachelor's degree, current Doctoral research assignment, and evidence of previous employment" demonstrated their exceptional ability. But it is not clear which criteria the Petitioner met by submitting their "Bachelor's degree, current Doctoral research assignment, and evidence of previous employment" and how the totality of that evidence demonstrates a degree of expertise significantly above that ordinarily encountered in the field.

When the Director examines whether the Petitioner has demonstrated they are an individual of exceptional ability meriting classification in the employment based second preference permanent immigrant classification on remand, they could evaluate if the Petitioner's bachelor's degree is 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. The Petitioner has earned a bachelor's degree in engineering with a "subplan" or concentration in scientific computing. The Director may consider if the evidence in the record supports scientific computing's applicability to biotechnology bearing in mind that scientific computing generally describes the science of utilizing advanced computing capabilities to understand and solve complex physical problems whilst biotechnology conversely relates to biological (not physical) systems, living organisms, and their component parts like the neural progenitor cells and malformations of cerebral cortex or cortical development described in the Petitioner's proposed endeavor. Or in other words, the Director may choose

to investigate if the Petitioner's bachelor's degree in engineering with a "subplan" or concentration in scientific computing is related to the Petitioner's claimed area of exceptional ability.

On appeal, the Petitioner draws attention to other evidence in the record that they contend demonstrates their exceptional ability, namely their membership in the Society of Neuroscience and "evidence of recognition for [their] achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations." But the record contains insufficient evidence to establish the minimum requirements for admission to membership in the Society of Neuroscience and if those requirements demonstrate that membership in the Society of Neuroscience is reserved for professionals. Accordingly, the Director could request evidence to ponder how the Petitioner's individual membership in the Society of Neuroscience as a "graduate student" supports their membership in an organization of professionals, which ordinarily may not include students who have not yet attained professional status but are instead in the pursuit of their chosen profession.

The Director could also request evidence from the Petitioner to support the Petitioner's contention on appeal regarding how the "evidence of recognition for [their] achievements and significant contributions to the industry or field by peers, government entities, or professional or business organizations" demonstrates their exceptional ability. The Petitioner submitted four letters of recommendation authored by three professors at United States institutions of higher education and a senior scientist in the biolaboratory industry. The Director may choose to consider if this evidence supports the Petitioner's "work on the role of glia in synaptogenesis" and investigation of "the relationship between microglial pruning of thalamocortical synapses and male-specific neurodevelopmental disorders" indicating a role for "non-genetic causes, such as air pollution and stress" in neurodevelopmental disorders is an achievement or significant contribution to their field. The Director could also consider if the Petitioner's "research on macrophage-based muscle regeneration" resulting in "structural and functional repair in patients with cardiotoxic injury" is an achievement or significant contribution to the field of biotechnology "characterizing the transcriptomic landscape of neural progenitor fate determination and development of analysis tools and experimental methods for integrating information across high-throughput technologies." On appeal, the Petitioner asserts their "first-authored paper, [redacted] is an achievement and significant contribution to their field because it has 74 citations. The Director could choose to investigate if 74 citations is an achievement or significant contribution to the Petitioner's claimed field.

So, the Director may consider on remand and request evidence to consider which of the six criteria contained in 8 C.F.R. § 204.5(k)(3)(ii) the Petitioner's evidence supports, and if the evidence supports at least three of the six regulatory criteria, consider if upon a final merits determination the evidence in its totality shows that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

B. Eligibility for Discretionary Waiver of the Job Offer, And So a Labor Certification, in the National Interest.

If the Director determines on remand that the Petitioner is eligible for classification in the EB-2 permanent immigrant category, the Director can proceed to determine whether a discretionary waiver

of the job offer requirement, and thus a labor certification, is warranted. Section 203(b)(2)(B)(i) of the Act.

In *Dhanasar*, we concluded the first prong, substantial merit and national importance, focused on the specific endeavor the noncitizen proposed to undertake. The endeavor's merit could be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. And in determining whether the proposed endeavor has national importance, we consider its potential prospective impact. In *Dhanasar* we also said that "we look for broader implications." *See Dhanasar*, 26 I&N Dec. at 889. Broader implications are not necessarily evaluated from a narrow frame of reference such as geography; implications within a field which demonstrate a national or even international influence of broader scale can rise to a level of national importance. Additionally, many proposed endeavors that aim to advance STEM technologies and research, whether in academic or industry settings, not only have substantial merit in relation to U.S. science and technology interests, but also have sufficiently broad potential implications to demonstrate national importance. *See generally* 6 *USCIS Policy Manual*, F.5(D)(2), https://www.uscis.gov/policy-manual. As the Director evaluates the substantial merit and national importance of the Petitioner's proposed endeavor, they may elect to consider if the evidence in the record supports the aim of the Petitioner's endeavor to advance STEM research when they "examine the role of the cell cycle in neural progenitor cells" and if that work has sufficiently broad potential implications from the publication of its results such that it triggers matters of national importance.

And the Director may evaluate the evidence in the record to determine if the Petitioner is well positioned to advance their proposed endeavor. The Director may 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. Not every individual who has conducted original research and published findings will be found to be well-positioned to advance their proposed endeavor. The Director may opt to examine the Petitioner's prior research projects to determine if they are related or similar efforts to their proposed endeavor in biotechnology, and specifically the role of the cell cycle in neural progenitor cells. They may also evaluate the evidence in record consisting of the Petitioner's baccalaureate education in engineering with a "subplan" or concentration in scientific computing's applicability to research into the role of the cell cycle in neural progenitor cells. And the Director could examine the four independent advisory opinion letters submitted by the Petitioner to evaluate if they offer meaningful detail in an adequately material, relevant, and probative matter to establish the Petitioner's expertise in cell cycle research in neural progenitor cells, and their past record of success in their current and other related fields. Moreover, the Director may choose to further examine if the evidence supports that the rate at which the Petitioner's work has been cited is high relative to others in the field. The Director may also choose to consider if the evidence in the record reflects the Petitioner has a cognizable plan or model for their endeavor's future. The Petitioner stated that they intend to continue their work as they pursue their Ph.D. at the [redacted] However, the pursuit of their Ph.D. would not advance their endeavor in a permanent or indefinite manner because the pursuit would culminate with their matriculation and potentially leave their endeavor in limbo. An offer of employment is not a requirement for approval, nor is the lack of a job offer a negative factor in analyzing the evidence the Petitioner submits into the record. But when the prosecution of an endeavor itself depends on a constricted and finite event, such as the course an

educational curriculum heading towards matriculation, the absence of a permanent indefinite conduit like a specific post-doctoral, faculty, or industry employment position to further their proposed endeavor may be a matter the Director could elect to explore to determine if the Petitioner is well-positioned to advance their proposed endeavor.

On remand, the Director may evaluate whether the Petitioner has demonstrated 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. On remand the Director could consider the impracticality of a labor certification, the benefit to the U.S. of a petitioner's contributions, the urgency of a petitioner's contributions to the national interest, the capacity for job creation, and any adverse effects on U.S. workers when conducting the balancing of the national interests of waiving the requirements of a job offer and therefore a labor certification.

III. CONCLUSION

For the foregoing reasons, the matter will be remanded to the Director. The Director may request any additional evidence considered pertinent to rendering a decision under the foregoing analysis, and we express no opinion regarding the ultimate resolution of this case on remand.

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