U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32484334

Date: JUL. 31, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a human rights attorney, seeks employment-based second preference (EB-2) immigrant classification as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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 although the Petitioner qualifies as an individual of exceptional ability, the record did not establish that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Director also explained that the Petitioner had not complied with the regulation at 8 C.F.R. § 204.5(k)(4)(ii), requiring submission of the employee-specific sections of the labor certification. 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. 8 C.F.R. § 204.5(k)(2).

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).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] 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 U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[3] 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.

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, that to apply for an exemption of the job offer, "the petitioner must submit Form ETA -750B, Statement of Qualifications of Alien, in duplicate."

II. ANALYSIS

As an initial matter, and as explained in the Director's request for evidence (RFE) and decision, the Petitioner did not submit the Form ETA-750B, as required by the regulation at 8 C.F.R. § 204.5(k)(4)(ii).[4] Although the Petitioner did provide the required form on appeal, because he was put on notice and given a reasonable opportunity to provide this evidence, we will not consider it for the first time on appeal. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).
[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.
[3] *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).
[4] In the alternative, the Petitioner may provide Sections J, K, and L of the ETA Form 9089, Application for Permanent Employment Certification.

and given a reasonable opportunity to provide it for the record before the denial"). For this reason alone, the petition is not approvable.

A. Proposed Endeavor

The Petitioner has also presented insufficient evidence regarding the proposed endeavor he intends to pursue. The Petitioner submitted supporting documentation indicating he is currently employed as a human rights attorney and asserts his job duties at a non-governmental organization (NGO) currently include managing a team of attorneys assisting individuals "who cannot bear to afford the heavy legal fees pertinent to their cases." While the Form I-140, Immigrant Petition for Alien Workers, indicates that his current occupation is "advocate/human rights activist" with an annual income of ten thousand dollars, Part 6, "Basic Information About the Proposed Employment," is blank. As explained by the Director in the RFE, "continuing employment in one's position, field, or industry is not an endeavor sufficient to evaluate [it under the *Dhanasar*] framework." In other words, being employed in an occupation does not constitute an endeavor. *See generally* 6 *USCIS Policy Manual* F.5(D)(1), https://www.uscis.gov/policymanual ("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.")

In response to the RFE, the Petitioner asserted he "possses[es] multi-facet[ed] achievements encapsulating covering artistic contribution to serving as attorney defending clients from civil to criminal, human rights and free dispensation efforts for less privileged segments of the society." The Petitioner also submitted his resume, containing the objective of "help[ing] less fortunate people of society by safeguarding their human and legal rights and turning their weakness in to [*sic*] their benefit and protection." On appeal, the Petitioner submits further evidence of the work he has performed, including for the NGO that employs him. The Petitioner asserts his participation in work with global partners on legal aid projects will allow him to support U.S. initiatives to combat the human immunodeficiency virus (HIV). The Petitioner also states that, as an attorney, he has developed and presented insights on different areas of the law.

Overall, the Petitioner has demonstrated his prior experience as a human rights attorney, his current employment in that position, and his interest in human rights advocacy. However, the Petitioner has not addressed what role he plans to occupy in human rights advocacy in the future with sufficient specificity. For example, he has not indicated whether he endeavors to continue as a human rights attorney or in another role related to HIV initiatives. Similarly, if the Petitioner intends to work as a human rights attorney, he does not indicate whether he intends to open his own practice or practice under an employer. And though the Petitioner has provided a list of specific job duties for his current and past positions, he has not proffered such information for any future position. Without more, the Petitioner has not sufficiently articulated his proposed endeavor or detailed its nature.

B. *Dhanasar* Analysis

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.

The Director determined that although the Petitioner had established the national importance of the proposed endeavor, he had not demonstrated its substantial merit. However, without more information about his specific proposed endeavor and how he plans to apply his knowledge and experience in the United States, we cannot conclude the Petitioner has met his burden of establishing it has both substantial merit and national importance as required by the first prong of the *Dhanasar* analysis. As such, the Director's determination that the Petitioner's proposed endeavor is of national importance is withdrawn.

Because the Petitioner has not established eligibility under the first prong of the *Dhanasar* analysis, we conclude the Petitioner has not demonstrated eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.[5] We also reserve a determination of the Petitioner's eligibility for the underlying immigrant classification.[6] *Id.*

III. CONCLUSION

The appeal will be dismissed for the above reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[5] Because our findings here are dispositive of this appeal, we need not reach, and therefore reserve, his arguments on appeal regarding the remaining prongs. *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 alternate issues on appeal where an applicant is otherwise ineligible).

[6] Although we will not address this issue further, we note that the Director did not explain their conclusion that the Petitioner qualifies as an individual of exceptional ability. While we may agree that he has satisfied at least three of the initial evidentiary criteria, the Director did not explain, and our review indicates the Petitioner did not sufficiently establish, that he possesses a degree of expertise significantly above that ordinarily encountered in his field.