U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31111165

Date: JUN. 05, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an exercise trainer and group fitness instructor, seeks classification as a member of the professions holding an advanced degree or of exceptional ability. *See* 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 EB-2 immigrant 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v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).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 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 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. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

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

The Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus of a labor certification, would be in the national interest.

The Director denied the petition, concluding that whilst the Petitioner was well positioned to advance their proposed endeavor, the proposed endeavor was not of national importance such that on balance a waiver of the requirement of a job offer and labor certification would be beneficial to the United States. We agree with the Director's overall decision that the Petitioner does not qualify for a national interest waiver, but we do not agree with and will withdraw the Director's specific finding that the Petitioner was well positioned to advance their proposed endeavor.

A. The Proposed Endeavor

In Part 6 of the initial petition, the Petitioner described their endeavor as a "exercise trainer and group fitness instructor" operating a "fitness services and sports consulting company specializing in

functional training, body building, and labor gymnastics." Specifically, the Petitioner's proposed endeavor, as described in their statements and their business plan, sought to benefit the overall public health of the United States by providing in person and virtual fitness services business to business (B2B) and business to consumer (B2C). The Petitioner averred that their promotion of regular exercise by and through their functional training, body building, and labor gymnastics services would help prevent "depression, anxiety, and attention deficit hyperactivity disorder (ADHD). [Exercise as promoted by the Petitioner's proposed endeavor] also relieves stress, improves memory, improves sleep quality, and generally improves mood." The Petitioner further stated "everyone who practices sports reduces the risk of physical or mental illness and ensures more energy in everyday life." Additionally, the Petitioner identified other benefits stemming from their proposed endeavor, namely direct and indirect job creation, increasing salary expenditures and concomitant tax collection, "knowledge transmission," and social and environmental impact. In support, the Petitioner submitted an expert opinion letter authored by [redacted] lecturer, [redacted] business plan, recommendation letters, resume, work experience documentation, and educational documentation.[1]

B. Substantial Merit and National Importance

Whilst the Director found that the Petitioner's proposed endeavor had substantial merit, they also concluded that the Petitioner did not demonstrate that their proposed endeavor was of national importance because the Petitioner did not demonstrate the national, or even global, impact of their proposed endeavor, any broader implications of the proposed endeavor, or its potential positive economic effects. For the below reasons, we agree.

The evidentiary standard in immigration proceedings is the lowest preponderance of the evidence standard, but the burden is on the Petitioner alone to provide material, relevant, and probative evidence to meet that standard. Section 291 of the Act, 8 U.S.C. § 1361. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *also see* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). First, a petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres to the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits. The Petitioner's evidence and argument does not help them carry their burden of production and persuasion because it is not persuasive relevant, material, or probative evidence relating to the national importance of the Petitioner's proposed endeavor under the first prong of the *Dhanasar* framework.

The relevant inquiry for evaluation of an endeavor's national importance is whether the prospective positive impact of the endeavor's national or even global impact, broader implications, or positive economic effects apply beyond just narrowly conferring the proposed endeavor's benefit. The Petitioner here has not demonstrated how conferring the potential benefit of their proposed endeavor to the companies and individuals they intend to solicit have any implication or benefit rising to a level beyond them and touching matters of national importance nationally, or even globally, or any identified broader implications. The Petitioner cited to various "Budget[s] of the U.S. Government"

[1] While we may not discuss every document submitted, we have reviewed and considered each one.

to bolster their contention the proposed endeavor was nationally important. Specifically, the Petitioner indicated specific expenditures reserved in the budget for "Advanced Research Project Agency for Health (ARPA-H), mental and physical health crisis, and promotion of equity and reduction of disparities in health programs. Firstly, it is noted that the Petitioner is referring to the yearly budget proposal the White House sends to Congress outlining proposed government spending for the fiscal year. It is not indicative of actual appropriations or spending by government agencies. Moreover, it is not sufficiently clear in the record how a fitness services and sports consulting endeavor, such as the one advanced by the Petitioner, aligns with the proposed expenditures contained in the budget. Or in other words the record does not adequately link how the Petitioner's fitness services and sports consulting endeavor would support the mental and physical health crisis, promotion of equity and reduction of disparities in health programs, and federal research and development in health through advanced research projects expenditure proposals the Petitioner highlights. Consequently, we are unable to evaluate how the Petitioner's contemplated service relate to the studies the Petitioner cited as government initiatives supporting their work. And, even if they did relate, we would still conclude they did not implicate matters rising to a level of national importance because any benefit or influence, such that it is, would apply mainly only to those businesses and individuals that work directly with the Petitioner. This is akin to how the benefit of someone's teaching is generally only directly beneficial to the students being taught and not wider population. In *Dhanasar* we discussed how teaching would not impact the field of education broadly in a manner which rises to national importance. *Dhanasar* at 893. By extension activities which only benefit a small subset of individuals and companies, like the Petitioner's proposed financial management endeavor, would not rise to a level of national importance. And the Petitioner's intention to engage in "knowledge transfer," which is similar to teaching, does not elevate their proposed endeavor to a platform of national importance for the same reasons. In sum the record supports the conclusion that the potential impact of the endeavor of as a "exercise trainer and group fitness instructor" operating a "fitness services and sports consulting company specializing in functional training, body building, and labor gymnastics" would benefit only the individuals and entities engaging the service.

Additionally, the record does not demonstrate with material, relevant, and probative evidence how the proposed endeavor's benefits broadly implicate matters of national importance. In *Dhanasar*, we noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have a national importance for example, because it has national or even global implications within a particular field." *Id.* The broader implications of the proposed endeavor, national and/or international, can inform us of the proposed endeavor's national importance. That is not to say that the implications are viewed solely through a geographical lens. Broader implications can reach beyond a particular proposed endeavor's geographical locus and focus. The relevant inquiry is whether the broader implications apply beyond just narrowly conferring the proposed endeavor's benefit. The Petitioner's business plan identified the proposed endeavor would "empower [small and medium size businesses] to achieve financial efficiency and drive growth through strategic planning and financial management." The Director considered these potential benefits when they determined the Petitioner's proposed endeavor was of substantial merit. However, as we stated previously, there is insufficient evidence in the record to support the impact of the Petitioner's endeavor would permeate beyond the immediate sphere of those individuals and entities engaging the Petitioner for their services. In other words, the record does not adequately establish the broader implications of the Petitioner's proposed endeavor rising to a level of national importance. It is not clear from the record how the "functional training, body building, and labor gymnastics" of individuals engaging the services of the Petitioner

would implicate matters in public health at a level of national importance. And to the extent that the Petitioner asserts that the national importance of their proposed endeavor is apparent upon aggregation of the benefits realized by their clients engaging their services, the record as it is presently composed does not convincingly reflect the level at which this aggregation would implicate an issue rising to a level of national importance.

We also stated in *Dhanasar* that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id* at 890. The Petitioner roots the potential positive effects of their fitness services and sports consulting company in their potential for job creation and revenue generation. The Petitioner anticipates a hiring spree increasing their head count from seven to 17 individuals over five years and increasing their expenditures on salary, but it is not clear from the record how this job creation for the proposed endeavor itself would have a substantial prospective positive economic effect commensurate with national importance. Specifically, the business plan anticipated that the endeavor would employ 17 employees paying $738,480 in salary. The Petitioner also stated, based on a job multiplier extrapolation, that their proposed endeavor would generate 35.29 indirect jobs. The Petitioner asserted that this would generate total payroll tax and income tax revenue of $265,235.12 in five years of operation based on salary. But the record does not adequately demonstrate the significance of these figures in the context of the economy it seeks to influence. Or in other words, it is not readily apparent from the record to what degree matters of national importance are implicated broadly by the forecasted economic milestones the Petitioner intends to reach through their proposed endeavor. So, even though the Petitioner anticipates increasing gross income, a hiring spree increasing their head count, and increasing their expenditures on salary, it is not clear from the record as described above how this job creation for the proposed endeavor itself would have a substantial prospective positive economic effect commensurate with national importance. The Petitioner's aspirations do not demonstrate the national importance of the endeavor because they, whether realized or not, would not extend beyond the endeavor itself to have an impact on a level of national importance. The record also does not contain sufficient probative, material, or relevant evidence showing how the endeavor's hiring plan would influence the area's unemployment rate or how the endeavor's operations and revenue rose to a level of national importance.

USCIS may, in its discretion, use as advisory opinion statements from universities, professional organization, or other sources submitted in evidence as expert testimony. *See Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, the submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.* Moreover, letters from relevant third-party reviewers such as prospective investors, retailers, or other industry experts will generally be more persuasive to support the merits of an entrepreneur's business, business plan, product, or technology. The Petitioner commissioned a letter from by [redacted] lecturer, [redacted] We observe that the letter's content lacks relevance when it comes to the evaluation of whether the Petitioner's fitness services and sports consulting company rises to a level of national importance. For example, in addressing the national importance of the Petitioner's endeavor, the writer discussed the general benefit to the United States of personal training businesses considering the social distancing and self-isolation practiced due to the COVID-19 pandemic. However, aside from an overarching statement that the Petitioner's endeavor would operate in this field and that the Petitioner had experience in the field, the writer does not specifically identify how the provision of services from the

Petitioner's proposed endeavor would impact the public health of the United States or positive economic effect in a manner implicating matters of national importance or what broader implications emanate therefrom. Or in other words, the letter overwhelmingly only discusses the importance of the Petitioner's field as well as the Petitioner's previous experiences. But this does not relate or correspond to the national importance of the Petitioner's proposed endeavor. In sum, the letter does not provide any meaningful analysis of the endeavor's broader implications or potential prospective economic impact rising to the level of national importance. Consequently, we conclude that the Petitioner has not established that their proposed endeavor is of national importance.

C. Well Positioned to Advance the Proposed Endeavor

We disagree with the Director and hereby withdraw the Director's conclusion that the record established the Petitioner was well positioned to advance the proposed endeavor under the second prong of the *Dhanasar* framework. In evaluating whether a petitioner is well positioned to advance their proposed endeavor, we review the following and any other relevant factors:

- A petitioner's education, skill, knowledge, and record of success in related or similar efforts;
- A petitioner's model or plan for future activities related to the proposed endeavor that the individual developed, or played a significant role in developing;
- Any progress towards achieving the proposed endeavor; and
- The interest or support garnered by the individual from potential customers, users, investor, or other relevant entities or persons.

It is not clear how an individualized consideration of the multifactorial analysis under *Dhanasar's* second prong would demonstrate how well positioned the Petitioner is to advance their proposed endeavor. The record as currently constituted would still not reflect how the Petitioner's prior performance of the duties described in the experience letters is either a similar effort as that of their proposed endeavor or how it constitutes a record of success. Whilst the Petitioner submitted a business plan describing a plan or model for future activities, the record does not reflect any progress to achieving the proposed endeavor other than registering their company. The establishment of their company and engagement by clients and customers alone is not strong evidence of progress. Finally, the recommendation letters the Petitioner submitted are not material, relevant, or probative evidence in the record of interest or support in the endeavor the Petitioner proposed in their petition. As stated above, a petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. at 1142 n.3 (BIA 1998); *also see* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). So, the evidence in the record does not sufficiently describe how well situated the Petitioner would be to advance their petition's proposed endeavor.

III. CONCLUSION

The Petitioner has not met the requisite first and second prong of the *Dhanasar* analytical framework. Because these issues separately and together are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the remaining arguments concerning eligibility under the remaining third prong of *Dhanasar*. *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-I, 26 I&N Dec. 216, 526n.7 (BIA 2015) (declining to reach alternate issues on appeal where an applicant is otherwise eligible). We conclude the Petitioner has not established that they are eligible for or otherwise merit a national interest waiver of the job offer requirement, and thus of a labor certification. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.