U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29547222

Date: JUNE 6, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a mental health specialist, requests classification under the employment-based, second-preference (EB-2) immigrant visa category and a waiver of the category's job-offer requirement. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(B)(i), 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) has discretion to excuse job offers in this category – and thus related requirements for certifications from the U.S. Department of Labor (DOL) – if petitioners demonstrate that waivers of these U.S.-worker protections would be "in the national interest." *Id.*; *see also Brasil v. Sec'y, Dep't of Homeland Sec.*, 28 F.4th 1189, 1193 (11th Cir. 2022) (holding that a decision on a national interest waiver is discretionary).

The Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the merits of her national interest waiver request. On appeal, she contends that, in finding insufficient evidence of her positioning to advance her proposed endeavor and a waiver's overall benefit to the United States, the Director misapplied our framework for adjudicating national interest waivers. *See Matter of Dhanasar*, 26 I&N Dec. 884, 889-891 (AAO 2016).

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the record supports the Director's finding of insufficient evidence that the Petitioner is "well positioned" to advance her proposed venture. We will therefore dismiss the appeal.

I. LAW

To establish eligibility for national interest waivers, petitioners must first demonstrate their qualifications for the EB-2 category, either as members of the professions holding "advanced degrees" or noncitizens of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act. To protect the jobs of U.S. workers, this immigrant visa category usually requires prospective employers to offer noncitizens jobs and to obtain DOL certifications to permanently employ them in the country. *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D). Petitioners may avoid the

job offer/labor certification requirements by demonstrating that waivers of the U.S.-worker protections would be in the national interest. Section 203(b)(2)(B)(i) of the Act.

Neither the Act nor regulations define the term "national interest." So, to adjudicate these waiver requests, we have established a framework. If otherwise qualified as advanced degree professionals or noncitizens of exceptional ability, petitioners may warrant waivers of the job-offer/labor certification requirements by demonstrating that:

- Their proposed U.S. work has "substantial merit" and "national importance;"
- They are "well positioned" to advance their intended endeavors; and
- On balance, waivers of the job-offer/labor certification requirements would benefit the United States.

Matter of Dhanasar, 26 I&N Dec. at 889-91.

II. ANALYSIS

A. The Proposed Endeavor

The record shows that the Petitioner, a Colombian national and citizen, earned degrees in psychology and as a child development specialist in her home country. She then worked as a psychologist evaluator and research assistant. Her experience includes: providing social support during training to members of the Wayuu indigenous community; participating in Zika virus studies assessing patients' long-term health and development; studying early learning and development; and measuring the quality of early childhood education in Colombia.

In the United States, the Petitioner states her intent to provide mental health services focusing on children and their parents in the wake of the COVID-19 pandemic. She states that she would: conduct surveys at early educational facilities to diagnose post-pandemic states of families; formulate projects to measure changes; and facilitate the discussion of new treatment approaches.

The Director found the Petitioner qualified for EB-2 classification as an advanced degree professional. *See* section 203(b)(2)(A) of the Act. The Director also concluded that, by demonstrating that her proposed endeavor has substantial merit and national importance, she met *Dhanasar*'s first prong. *See Matter of Dhanasar*, 26 I&N Dec. at 889-90. We will now review the Director's findings regarding *Dhanasar*'s second prong: whether she demonstrated that she is well positioned to advance her proposed venture.

B. Positioning to Advance the Endeavor

When determining whether a petitioner is well positioned to advance their proposed endeavor, USCIS focuses on the noncitizen. *Matter of Dhanasar*, 26 I&N Dec. at 890. Relevant factors include:

- the individual's education, skills, knowledge, and record of success in related or similar efforts;
- the existence of a model or plan for future activities;
- any progress towards achieving the proposed endeavor; and

- the interest of potential customers, users, investors, or other relevant entities or individuals.

Id.; *see generally* 6 *USCIS Policy Manual* F.(5)(D)(1), www.uscis.gov/policy-manual.

USCIS does not require a petitioner to demonstrate the likelihood that their endeavor would succeed. *Id.* But they "must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor." *Id.*

As evidence of her positioning to advance her U.S. proposal, the Petitioner submitted a variety of materials, including: copies of her educational documents and an evaluation of her foreign credentials; certificates regarding courses, work, and attendance at conferences in her field; her Colombian psychologist license; a "professional plan" regarding her proposal; and letters from an expert, professors, and colleagues in the field.

The Director found the Petitioner's evidence insufficient to demonstrate that she is well positioned to advance her U.S. proposal. The Director stated that the expert and recommendation letters in the Petitioner's response to the Director's request for additional evidence (RFE) "were already provided alongside your initial petition." In any event, the Director found such letters insufficient to demonstrate the Petitioner's positioning to advance her proposal. Citing precedent decisions, the Director stated that "the submission of solicited letters supporting the petition is not presumptive evidence of eligibility." *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988); *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008). The decision further states:

> Evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition, and an individual with a record of success should be able to produce unsolicited materials reflecting that success.

On appeal, the Petitioner notes that, contrary to the Director's finding, she did not previously submit the expert and recommendation letters in her RFE response. She also asserts the Director's misapplication of *Caron*. Noting *Caron*'s issuance in 1988, before promulgation of the current immigrant visa petition regulations in 1991, the Petitioner contends that "the decision does not correspond with the eligibility criteria in *Dhanasar*." She states that USCIS overlooked the letters in her RFE response and improperly relied on *Caron*.

Caron holds that USCIS may reject or afford lesser evidentiary weight to expert opinions that conflict with other information or are "in any way questionable." *Matter of Caron*, 19 I&N Dec. at 795. *V-K-* also notes that an expert opinion "does not purport to be evidence as to 'fact.'" *Matter of V-K-*, 24 I&N Dec. at 502 n.2. Contrary to the Petitioner's assertion, *Caron* remains valid precedent despite the regulations' later issuance and applies to this case. Thus, we agree with the Director that "the submission of solicited letters supporting the petition is not presumptive evidence of eligibility." *See Matter of Caron*, 19 I&N Dec. at 795 (stating that the immigration service "is responsible for making the final determination regarding a beneficiary's eligibility for the benefit sought").

We disagree, however, with the Director's statement that "[e]vidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission

with the petition." That blanket statement is not always true. Rather, "the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. To the extent the Director disregarded the expert and recommendation letters in the Petitioner's RFE response because they were prepared to support the petition, the Director erred.

Also, as the Petitioner argues on appeal, the Director's decision uses language suggesting the application of an erroneous evidentiary standard. The decision faults the Petitioner for "not demonstrat[ing] that you have a leading, critical, or indispensable role in the endeavor." This language resembles an evidentiary requirement for petitioners in the employment-based, first-preference (EB-1) category for noncitizens with "extraordinary ability." *See* section 203(b)(1)(A) of the Act. That EB-1 criterion requires "[e]vidence that the [noncitizen] has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." 8 C.F.R. § 204.5(h)(3)(viii).

In the context of an EB-2 national interest waiver petition, a noncitizen's performance in a "leading, critical, or indispensable role" in their proposed endeavor may tend to show that they are well positioned to advance the venture. But such performance is not a requirement for a national interest waiver. The decision's language suggests that the Director mistakenly confused an EB-1 evidentiary requirement for a national interest waiver criterion under EB-2. Thus, the Director erroneously faulted the Petitioner for omitting evidence that she "ha[s] a leading, critical, or indispensable role in the endeavor."

Despite those errors, however, the record supports the Director's finding of insufficient evidence that the Petitioner is well positioned to advance the proposed endeavor. Contrary to the relevant factors in *Dhanasar*, the Petitioner has not shown: a record of success in related or similar efforts; the existence of a detailed model or plan for future activities; progress towards achieving her proposal; or the interest of potential customers, investors, or other relevant entities or individuals. *See Matter of Dhanasar*, 26 I&N Dec. at 890.

The record indicates that the Petitioner's U.S. proposal would involve a combination of clinical and research activities in the psychology field. She has not stated whether she would seek a U.S. employer or establish her own psychology practice. The Petitioner has not indicated that she ever operated her own practice, or her receipt of job offers from U.S. employers. The record also lacks evidence that she has authored published research or obtained research funding.

As previously indicated, the Petitioner submitted a "professional plan" regarding her U.S. proposal. But the plan lacks details. It does not specify whether she would seek a U.S. employer or establish her own psychology practice. It also does not specify how she would receive funding to conduct her proposed research.

The Petitioner also has not demonstrated that she has made progress towards achieving her proposal. The record lacks evidence that she has taken steps to obtain a U.S. psychologist license, find a U.S. employer, establish her own psychology practice, or obtain research funding.

Further, the Petitioner submitted a letter from an official of the U.S. Centers for Disease Control and Prevention (CDC) praising some of her prior work for the agency. But the record does not indicate interest in her U.S. proposal from prospective patients, customers, governmental agencies, or other organizations.

The expert opinion letter, from a U.S. psychology professor, finds the Petitioner well positioned to advance her U.S. proposal based on her: academic record; certifications and licensure; and experience. Contrary to the relevant factors stated in *Dhanasar*, however, the expert did not consider: the Petitioner's record of success in related or similar efforts; the existence of a detailed model or plan for her future activities; progress she has made towards achieving the proposed endeavor; and the interest of potential customers, investors, or other relevant entities or individuals. The expert's letter therefore does not persuade us that the Petitioner is well positioned to advance her proposal. *See Matter of Caron*, 19 I&N Dec. at 795 (holding that the immigration service may reject or afford lesser evidentiary weight to expert testimony that conflicts with other information or "is in any way questionable").

For the foregoing reasons, a preponderance of the evidence does not demonstrate that the Petitioner is well positioned to advance her proposed endeavor. We will therefore affirm the petition's denial.

C. The Purported Benefits of a Waiver

Our conclusion that the Petitioner has not demonstrated sufficient positioning to advance her proposed endeavor resolves this appeal. We therefore decline to reach and hereby reserve her appellate arguments regarding the purported benefits of a waiver to the United States. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies need not make "purely advisory findings" on issues unnecessary to their ultimate decisions); *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 did not otherwise qualify for relief from removal).

III. CONCLUSION

The Petitioner has not demonstrated that she is well positioned to advance her proposed endeavor. Thus, under our framework, she does not qualify for a national interest waiver. We will therefore affirm the petition's denial for lack of a job offer and labor certification.

ORDER: The appeal is dismissed.