U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31281629

Date: JUNE 24, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur and physical therapist, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, 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 the record establishes that the Petitioner qualifies as a member of the professions holding an advanced degree, but the record does not establish that the Petitioner is eligible for a national interest waiver as a matter of discretion. 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).

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish 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,[1] 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.

II. ANALYSIS

A. EB-2 Classification

The Director concluded that the Petitioner qualified for the EB-2 classification as a member of the professions holding an advanced degree based on her physiotherapist degree along with her years of experience in the specialty. However, as the record does not establish by a preponderance of the evidence that the Petitioner otherwise merits a national interest waiver as a matter of discretion, we will reserve the issue of the Petitioner's eligibility for the EB-2 classification.[2]

B. National Interest Waiver

1. Substantial Merit

The first prong, 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. *Dhanasar*, 26 I&N Dec. at 889. The Petitioner's proposed endeavor is, "[t]o run a physical therapy clinic in the [redacted] area, Florida, specializing in physical therapy assessment, pain relief and prevention, methods to avoid surgery, improved mobility and balance, trauma, paralysis, stroke recovery, accident prevention, and rehabilitation services." The record includes industry reports and articles on the benefits of physical therapy, the impact of chronic illness on mental health and the economy, promoting health in the workplace; along with information on the growing shortage of workers in the physical therapy field in the United States. We conclude that the Petitioner's proposed endeavor has substantial merit.

2. National Importance

In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Id.* The Director determined that the record did not establish the Petitioner's proposed endeavor would have a broader impact on the field, rising to the level of national importance.

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[1] *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).

[2] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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).

On appeal, the Petitioner states that the proposed endeavor will be a, "[m]ultifaceted contributor to the broader field of healthcare. Through its specialized services, the clinic addresses the specific needs of senior citizens, participates in the imperative to reduce healthcare costs, and indirectly enhances workplace productivity." However, we conclude that the record does not establish the proposed endeavor will have a broader impact on the field.

Dhanasar states a proposed endeavor may have national importance because it has, "national or even global implications within a particular field, such as certain improved manufacturing processes or medical advances." *Dhanasar* 26 I&N Dec. at 889. However, in *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893.

Similarly, the record does not establish that the Petitioner's proposed endeavor will impact more than the Petitioner's direct client base. For example, the business plan states that the Petitioner will make weekly videos online to show new discoveries within the physical therapy field and innovative treatments using new technologies. However, these discoveries and innovative treatments are not proprietary to the Petitioner; in other words, she is not making original discoveries and innovative treatments. Instead, she is disseminating information others have found or started in the field and the record does not establish how sharing publicly available information would have a broader impact on the field, rising to the level of national importance. Further, she states that these videos are a marketing tool to obtain more clients. Therefore, while these direct clients may directly benefit from this information and the Petitioner's services, the record does not establish that they will extend beyond her clients and have a broader impact. In addition, the record contains an expert opinion letter that states the Petitioner, "[w]ill work in her field of physical therapy introducing her innovative methodologies to improve the lives of the American people." However, there is no explanation of what her "innovative methodologies" are or how they will improve the lives of the American people more broadly. Therefore, we conclude that the record does not establish the Petitioner's proposed endeavor will have a broader impact on the field of physical therapy.

The Petitioner emphasizes that her proposed endeavor will be focused on the elderly population and that the United States is seeing a demographic shift towards an aging population and therefore, her proposed endeavor is "timely and relevant on a national scale." The Petitioner points to the evidence in the record highlighting an aging population, the prevalence of chronic diseases amongst this population, and emphasizing the importance of physical therapy to address the problem. Although her proposed endeavor may be timely and relevant, for a proposed endeavor to have national importance, it must have a broader prospective impact. However, as stated above, the record does not establish the proposed endeavor will have an impact beyond the direct clients she will serve.

Dhanasar states a proposed endeavor may have national importance if it has, "significant potential to employ U.S. workers" or "other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 890. The Petitioner asserts her company will employ 7 employees in its first year of operation and 18 employees by the end of its fifth year of operation. In addition, using industry calculations the Petitioner estimates that her company will lead to the creation of 37 indirect jobs. She states these jobs will benefit the economy by paying taxes and that the employees will spend money on goods and services in the area, increasing the consumer base. The record does not establish that the staffing levels are substantial enough to rise to the level of national importance. In addition, the

record does not show that the economic impact these employees will have on the local economy will be substantial or that the proposed endeavor will be in an "economically depressed area."

The Petitioner states that there are various government initiatives for the industry showing that the physical therapy industry enhances societal welfare. In addition, the expert opinion letter discusses the importance of the field of physical therapy stating, "[p]hysical therapists play vital roles in today's health care environment and are recognized as essential providers of rehabilitation and habilitation, performance enhancement, and prevention and risk-reduction services." We acknowledge the importance of the industry; however, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on the "the specific endeavor that the foreign national proposes to undertake." *Dhanasar* at 889. Here, the Petitioner improperly relies upon the importance of the industry to establish the national importance of her proposed endeavor. Without sufficient documentary evidence of the specific proposed endeavor's broader impact in the industry, the Petitioner's proposed endeavor does not meet the "national importance" element of the first prong of the *Dhanasar* framework.

Finally, the Petitioner contends that there is a growing shortage of those in the physical therapy field and points to USCIS designating registered nurses and physical therapists as shortage occupations under the U.S. Department of Labor's "Schedule A." The record does not establish that her proposed endeavor stands to impact or significantly reduce the claimed national shortage. Further, shortages of qualified workers are directly addressed by the U.S. Department of Labor through the labor certification process. In addition, per the business plan, the proposed endeavor may create new physical therapy jobs. However, the United States does not have a shortage of physical therapy jobs, but qualified workers to fill them.

We note that the appeal included a new business plan along with additional industry articles and reports. However, we will not consider this evidence for the first time on appeal as it was not presented before the Director. *See Matter of Soriano,* 19 I&N Dec. 7 64, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose" and that "we will adjudicate the appeal based on the record of proceedings" before the Chief); *see also Matter of Obaigbena,* 19 I&N Dec. 533 (BIA 1988).

While we do not discuss each piece of evidence individually, we have reviewed and considered the record in its entirety. As the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework, the Petitioner has not demonstrated eligibility for a national interest waiver. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the *Dhanasar* framework. *See Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

III. CONCLUSION

The Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework. We therefore conclude by a preponderance of the evidence that the Petitioner has not established that she is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.