U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29846638

Date: MAR. 1, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner is a marketing manager who 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 (NIW) 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 Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition). While the Director determined the Petitioner qualifies for the underlying visa classification as a member of the professions holding an advanced degree, they decided adversely on her claims that she merits a discretionary waiver of the job offer requirement in the national interest.

The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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 an NIW, 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. Section 203(b)(2)(B)(i) of the Act.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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 NIW petitions. *Dhanasar* states that USCIS may, as matter of discretion, grant an NIW 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.

The purely discretionary determination of whether to grant or deny an NIW rests solely with USCIS. *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (citations omitted).

II. ANALYSIS

When she filed the petition, the Petitioner characterized the proposed employment as a marketing manager who would plan, direct, or coordinate marketing policies and programs, such as determining the demand for products. She further indicated she had amassed seven years of experience as a marketing manager in her home country. The Petitioner proposed to create her own limited liability company that would provide marketing, communications, and digital marketing services and she would offer marketing training for professionals who want to specialize in the field.

Her business plan indicated she would initially focus on e-commerce, small businesses, and event promotion companies in all regions of her home state. Based on the growth potential in marketing in her area and a projected shortage of workers and her willingness to hire personnel, she claims her endeavor could positively benefit the U.S. economy by impacting the primary industries closest to her business and to economically depressed areas, as well as other positive impacts to society.

A. Substantial Merit and National Importance

We do not necessarily agree with the Director's favorable determination regarding the first prong. 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. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889. The Director concluded the Petitioner's endeavor met the prong one requirements. Based on the below analysis, we withdraw the Director's overall favorable ruling on prong one.

Here, our focus is on the national importance element of prong one. In the request for evidence (RFE) response, the Petitioner listed several areas in support of her claims that her endeavor was of national importance to include: the general economic growth of the United States; international competitiveness through developing strategies to compete in the global marketplace; regional development by highlighting the local area's unique attractions and hospitality opportunities; job creation through expanding her business; and innovation and leadership emanating from her office's creativity. It is within some of these expansive concepts that the Petitioner places too much focus on the occupation of marketing managers and too little on what she will actually be doing in the proposed endeavor. For instance, the Petitioner has not adequately tied general economic growth and international competitiveness to her endeavor as opposed to those concepts benefitting from successful businesses in general.

Turning to direct job creation, this is an aspect more directly associated with Petitioner's endeavor. Within the business plan in the record, the Petitioner projects to employ eight personnel with a total employee compensation of over $2.3 million by the end of year five. She also references the indirect and induced jobs opportunities that will result from the services her prospective company performs. In addition to compensation, the Petitioner's business plan predicts $3.5 million in revenue, approximately $390 thousand it's employees will pay in taxes on their wages, and nearly $600 thousand in operating costs over the five-year period. Although the business plan offers insight into the U.S. consulting market and prospects for the general and operations manager profession, the Petitioner has not sufficiently explained how the business will realize those projections. Lacking from the record is evidence that corroborates the salient portions of the business plan and how the forecasted data will come to fruition.

Regarding economic benefits in a depressed area, the *Dhanasar* decision explains 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." *Dhanasar,* 26 I&N Dec at 890. First, simply having the potential to employ U.S. workers does not rise to the requisite standard in *Dhanasar* that mandates that potential be significant. *Id.* Second, even though these effects are not required to be national in scale, they must demonstrate a potential prospective impact that is "substantial" to a particular area, region, or industry to have national importance. *Id.*

Here, through the business plan and the remaining evidence, the Petitioner has not demonstrated the "significant potential to employ U.S. workers . . . in an economically depressed area . . . ." that is required. *Id.* Even if we presume the business plan projections are realized, also missing is the Petitioner's explanation of the manner in which these forecasted figures will offer *substantial* economic benefits to the area or to her industry. The Petitioner must provide sufficient evidence to support her claims that these estimates rise to the level of national importance and have a broad impact in her field. *Id.* at 893.

The Petitioner attributes her likely success, in part, to her 12 years of experience in marketing management and several external factors to include competitive pricing, creating and increasing a customer base, relying on other local companies to increase her company's visibility, customer service skills, highly qualified staffing, social media advertising for her own agency, and search engine optimization to improve her company's visibility in online searches. However, the Petitioner's focus on her own experience is not an aspect under direct consideration for prong one and is more aligned with the requirements of the second prong where she must demonstrate she is well positioned to advance the proposed endeavor. And we determined in *Dhanasar* that the foreign national's teaching activities did not rise to the level of having national importance because they would not impact the field of science, technology, engineering, and math education more broadly. *Id.* The record does not demonstrate that the Petitioner's proposed endeavor will substantially benefit the field of marketing, as contemplated by *Dhanasar*: "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances." *Id.* The evidence does not suggest that the Petitioner's consulting services business would impact the marketing field more broadly.

We acknowledge the role the marketing industry, as a whole, plays in the U.S. economy and any attendant benefits to the economy from entrepreneurial immigrants. But simply working in the marketing field or starting a small business in that industry falls short of demonstrating the level of national importance required by this visa classification. And we focus less on an industry itself or on a shortage of U.S. workers in any particular field, but instead on "the specific endeavor that the foreign national proposes to undertake." *Id.* at 889.

The documentation in the record does not sufficiently establish the national importance of the Petitioner's proposed endeavor as required by the first prong of *Dhanasar*, and we withdraw the Director's favorable determination under prong one. Because the Petitioner was not placed on notice of these issues for the appeal, we will evaluate the prong two requirements included in the Director's denial.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the individual. To determine whether they are well positioned to advance the proposed endeavor, we consider factors including, but not limited to: their education, skills, knowledge and record of success in related or similar efforts; 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.* at 890.

Although the record reflects the Petitioner possesses sufficient education, skills, and knowledge of the marketing industry in Brazil, it does not establish that she has a similar record of success in that same field in the United States. Additionally, the Petitioner does not adequately argue how her previous marketing experience has properly prepared her to begin and operate a business in the United States. We note the day-to-day necessities of running a business requires knowledge and skills distinct from the Petitioner's background in marketing. And while her business plan might offer some insight into certain considerations for business operations, it is not so detailed that it should serve as an adequate replacement for actual business experience.

As we noted in *Dhanasar*, while the "influence on the field as a whole" standard in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998) (*NYSDOT*), might have seemed to be a reasonable notion in that that past success could predict future benefit, practical experience following *NYSDOT's* publication "revealed that there are some talented individuals for whom past achievements are not necessarily the best or only predictor of future success." *Dhanasar*, 26 I&N Dec. at 889 n.6. Of particular importance is the requirement that when claiming or evaluating past achievements as a predictive gauge, such a record of success must be "in related or similar efforts." *Id.* at 890. We highlight the Petitioner's experience is in marketing and not in operating a marketing management office or even a business, and she has not offered adequate arguments that they are sufficiently similar. Here, the Petitioner's experience in marketing may not be a reliable predictor that she is well positioned to advance the proposed endeavor.

The Petitioner provided her business plan projecting a monthly financial cost of over $80,000 factoring in wages, monthly fixed costs, and the cost of office assets or equipment. The Petitioner indicated she needs funds to run the business for three months before it must generate revenue, or it could possibly go out of business. The business plan reflected she would use her own money to launch the company

without depending on funding from third parties. However, the Petitioner did not provide documentation to corroborate her claims that she possesses sufficient funds to meet this three-month commitment.

Although the Director did not directly discuss any recommendation letters the Petitioner presented, they did conclude that her work did not appear to constitute a record of success or progress in her field, nor had she garnered a degree of interest in her work from relevant parties to show she was well positioned to advance her proposed endeavor. On appeal, the Petitioner discusses the letters to support her opinion that she is well positioned to advance her endeavor.

A review of the letters does not sufficiently corroborate the Petitioner's opinion. The letters discuss the Petitioner's work in marketing and advertising in Brazil, but not how those activities are similar to her proposed endeavor. While the authors each praised her work, none of them indicated that her work involved dealing with U.S. companies or for advertising campaigns within the United States, which is part of her stated endeavor, and where she seeks to pursue it. Ultimately, none of the letters discuss achievements, recognition, or significant contributions to the field that would persuade us that she is well positioned to advance her endeavor in the United States.

Relating to progress the Petitioner has made towards achieving the proposed endeavor, she offered the business plan and within the appeal she indicates she is taking a course in her field of study and improving her proficiency in English. Regarding the business plan, that document might be helpful in laying out some of the considerations for standing up and operating a new business, but it does not adequately aid the Petitioner in demonstrating she is well positioned to advance the proposed endeavor.

Finally, the Petitioner claims interest exists for her endeavor's services based on one letter from a Brazilian company who expanded their work into the United States in 2021. First, the letter is dated five months after she filed the petition and two months after the Director issued the RFE placing her on notice that the record was deficient of this type of evidence. We note the letter does not reflect that the company expressed any interest in the Petitioner's future marketing organization performing work for them prior to the petition filing date. A request for an immigration benefit "must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be through adjudication." 8 C.F.R. § 103.2(b)(1). Any additional evidence submitted in connection with a benefit request at a later date, including evidence responding to a request from USCIS, must also establish "eligibility at the time the benefit request was filed." 8 C.F.R. § 103.2(b)(12); *Robinson v. Napolitano*, 554 F.3d 358, 364 (3d Cir. 2009).

Even if we were to consider how this commitment letter impacts the Petitioner's petition, it would not convince us that she has met the second prong. While a single letter is a positive element towards demonstrating interest of potential customers, this letter is not sufficiently detailed to persuade us in that direction. The letter is not accompanied by other probative evidence demonstrating the size of this company or the extent of marketing or advertising it wishes the Petitioner's future organization to perform for it. As we noted above, the commitment letter does not demonstrate she is well positioned to advance her proposed endeavor.

The record lacks other material that could reflect favorably upon the Petitioner's claims. There is no evidence of actual ownership of a U.S-based entity, licenses to operate in the specified location, financing from outside investors, awards or grants, copies of contracts or other agreements, etc. For the above collective reasons, the Petitioner has not established that she satisfies the second prong of the *Dhanasar* framework.

C. Whether on Balance a Waiver is Beneficial

As explained above, the third prong requires the petitioner to demonstrate 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. Here, however, the Petitioner has not established that she is well positioned to advance her proposed endeavor as required by the second prong of the *Dhanasar* framework. As such, the Petitioner is not eligible for an NIW and further discussion of the balancing factors under the third prong would serve no meaningful purpose.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.