U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30242339

Date: MAR. 18, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner 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v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).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 Nebraska Service Center denied the petition, concluding that 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 that 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 concluded the Petitioner's proposed endeavor did not demonstrate eligibility for a favorable act of discretion to grant a national interest waiver of the requirement of a job offer, and thus the labor certification, under the first prong of the *Dhanasar* analytical framework. We reach the same decision as the Director, albeit on another basis.

A. Substantial Merit and National Importance

The Petitioner initially proposed to "offer affordable transportation solutions for…small businesses across the USA by hiring local professionals (truck drivers, freight brokers, and more)." In support, the Petitioner submitted a letter from their attorney, their personal affidavit, copies of their educational credentials with associated transcripts, and a copy of their resume. The evidence the Petitioner initially submitted did not sufficiently demonstrate the national or even global implications to their field or any broader implications rising to a level of national importance, did not adequately describe how well the

Petitioner was positioned to advance the proposed endeavor, and did not satisfactorily 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. So the Director issued a request for additional evidence (RFE) to consider the merit of the proposed endeavor, its national importance, how well positioned the Petitioner was to advance the proposed endeavor, as well as the Petitioner's eligibility for a waiver of the job offer requirement and thus of a labor certification under the analytical framework we first discussed in *Matter of Dhanasar*.

The Petitioner's response significantly departed from the proposed endeavor they indicated in their initial filing. In response to the RFE, the Petitioner submitted an expert opinion letter from [redacted] dean's research professor in management and global business at [redacted], a business plan, proof of establishment of the business entity intended to house the proposed endeavor, and recommendation letters. Contrary to their initial intention to "offer affordable transportation solutions for...small business across the USA by hiring local professionals (truck drivers, freight brokers, and more)," the Petitioner's proposed endeavor morphed into the Petitioner's ownership and operation of a "school that will offer high-level education lessons in trucking and the English language, as well as find the best employment opportunities for trucking professionals in their field." In essence, the Petitioner transformed their proposed endeavor from a trucker or trucking logistics professional into an English and trucking trade educator and job placement specialist for truckers. The Petitioner's response to the RFE constituted a wholesale change of their proposed endeavor. Contrary to the Petitioner's assertions, the passage of time whilst a petition is pending adjudication does not permit a Petitioner to wholly change their proposed endeavor. A petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc Comm'r 1998). And the change the Petitioner made is not the benign adjustment of tasks and focus within the trucking industry the Petitioner describes. The Petitioner's RFE response constituted a materially different endeavor wherein they would teach trucking as well as English and "find the best employment opportunities for trucking professionals in their field" instead of hiring "truck drivers and freight brokers" as they had initially planned. The Petitioner's materially significant transformation of their proposed endeavor rendered it ill-defined and amorphous. The Petitioner's reversal introduced ambiguity into their proposed endeavor which prevented analysis into its substantial merit or national importance.

The *Dhanasar* framework cannot be applied to two dueling proposed endeavors. A petitioner must identify the specific endeavor they propose to undertake. *See Matter of Dhanasar*, 26 I&N Dec. at 889. So it is not possible to determine the substantial merit and national importance of an endeavor when a Petitioner cannot consistently articulate the nature of the endeavor. On that basis alone, we could dismiss the appeal without further discussion.

And in light of the material change the Petitioner made to their proposed endeavor in response to the RFE, we share the Director's reasonable concerns with the accuracy and concomitant reliability of several of the Petitioner's assertions and supporting documentation. Doubt cast on any aspect of a petitioner's evidence may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For example, per the Petitioner's resume we note the Petitioner has owned [redacted] the corporate entity they

intend to house their proposed endeavor in, since shortly after it was incorporated in [redacted] 2020. And the Petitioner represents on appeal that their proposed endeavor is nascent, proposed, and "FUTURE" in nature. But the broad and vague duties the Petitioner listed in their resume were written in the present tense and represented that the Petitioner had been performing them since 2020. The record does not contain evidence adequately clarifying this discrepancy. And this discrepancy looms large in the context of the material reconstitution of the Petitioner's proposed endeavor from the initial petition to the response to the RFE and impedes an evaluation of the proposed endeavor's substantial merit[1] and national importance.

USCIS may, in its discretion, use as advisory opinion statements from universities, professional organizations, 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 or opinion statements from experts supporting the petition is not presumptive evidence of eligibility. *Id.* The Petitioner submitted an expert opinion statement authored by [redacted] professor at [redacted] But the Petitioner's reversal of the nature of their proposed endeavor renders the contents of the expert opinion irrelevant to an evaluation of the endeavor's substantial merit or national importance. For example, the expert opinion speaks in terms of a current operating business where the Petitioner educates truck drivers on the finer points of trucking, the English language, and assists with job placement. But the Petitioner contends that they are proposing a currently inoperative "FUTURE" endeavor. And the opinion's inaccuracies are patent upon identification that the materials the writer took into account in rendering their expert opinion were "primary documentary evidence, regarding [the Petitioner's] education, professional training, employment and future plans" provided by the Petitioner. As we have explained earlier, the Petitioner's resume contained broad and vague duties written in the present tense representing the Petitioner had been performing them since 2020. The deficiencies of the Petitioner's documentation may have prohibited the writer from convincingly articulating the potential prospective impact of the Petitioner's endeavor so that a meaningful evaluation can be made to determine if it rose to a level of national importance.

The Petitioner submitted a business plan prepared after the issuance of the RFE by a company that, according to its public facing promotional website information, creates business plan documents from templates for its clients to obtain favorable immigration outcomes. The business plan also suffers from the same inconsistencies and discrepancies we note above, sourced from a combination of the Petitioner's confusing source documentation and the material change in the Petitioner's proposed endeavor. It is unclear in the business plan, for example, whether the Petitioner's proposed endeavor is truly proposed and for the "FUTURE" or is in fact ongoing as described in the Petitioner's resume. And this opacity renders any of the other representations made in the business plan, such as hiring growth and rising revenues, unsupported. The Petitioner's business plan is not sufficiently probative, material, or relevant evidence of whether the Petitioner's proposed endeavor rose to a level of national importance.

III. CONCLUSION

[1] Whilst the Director is not incorrect that the inconsistencies and discrepancies the Petitioner introduced into the record, an evaluation of the need of the proposed endeavor's services is not germane or relevant to the demonstration of a proposed endeavor's substantial merit.

The record contains insufficient evidence to establish they met the first prong of the *Dhanasar* analytical framework. Because the Petitioner has not established that the proposed endeavor has substantial merit or national importance, as required by the first *Dhanasar* prong, they are not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or third *Dhanasar* prong. *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 alternative issues on appeal where an applicant is otherwise ineligible). So we conclude the Petitioner has not established that they are eligible for or otherwise merit a national interest waiver as a matter of discretion. The petition will remain denied and the appeal is hereby dismissed.

ORDER: The appeal is dismissed.