U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30044466

Date: MAR. 20, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a cyber-physical system consultant, seeks second preference immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding the Petitioner had not established a waiver of the required job offer, and thus of the labor certification, would be in the national interest. Subsequently, the Director affirmed the decision on motion. The matter is now before us on appeal. 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, petitioners must demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or as an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act. In addition, petitioners must show the merit of a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver if:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance the proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

[1] *See also 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v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

II. ANALYSIS

At initial filing, the Petitioner's cover letter stated:

> [The Petitioner] seeks a national interest waiver . . . so he may expand on his collaboration in neuroscience research, applying his vast experience in Information and Communication Technologies and Applied Electronics Design to build cyber-physical systems as novel tools for physicians to identify and monitor real-time restoration of consciousness and thus reduce long-term cognitive disability.

In addition, the Petitioner provided a statement reflecting:

> My goal is to combine the two lines of my interest. I aim to build cyber-physical systems to apply recently discovered biomarkers to make real-time identification and monitor consciousness progression in brain injury and, more recently, COVID-19 comatose patients. The proposed tool is not a monolithic device containing predetermined functionality. Instead, this is a composition of interconnected systems that work as one whole, seeking to integrate data collection for real-time data analysis using cloud computing resources and the novel 5G mobile network. This network offers incredible capabilities to achieve fast computing and minimize processing delay accelerating real-time acquisition and analysis. This system may store and process vital information to optimize current biomarkers and simultaneously apply those biomarkers to thousands of individuals nationwide. By doing so, during the COVID-19 pandemic for instance, one can assess patients' persistent unresponsiveness from home, an ambulance, and small hospitals without specialized physicians near the patient's bedside.

In order to demonstrate his ability to accomplish his endeavor, the Petitioner referenced his education, collaborations, research contributions, memberships, and conferences. Based on the Petitioner's statements and documentation contained in the record regarding his proposed endeavor, the Director informed the Petitioner in the request for evidence (RFE) of the satisfaction of the first prong, relating to substantial merit and national importance. *Dhanasar*, 26 I&N Dec. at 889. However, the Director determined, in part, the Petitioner did not meet the second and third prongs, pertaining to his position in advancing his proposed endeavor and whether waiving the job offer requirement would be beneficial to the United States. *Id.* at 890.

In response to the RFE, the Petitioner submitted a business plan for his proposed endeavor. In addition, the Petitioner provided evidence of his trainings and courses, experience in number portability, presentations, consulting work and employment, and contract certifications and awards. In denying the petition under the second prong, the Director indicated that the evidence, including support letters, did not show the Petitioner "played a significant role in the funded projects, was listed on the grants, or was the primary award contact of the grants." Further, the Director determined the Petitioner did not have a "determinative role in establishing or controlling the direction of the research, that he has received repeated funding as primary awardee, or is listed on the grants as sole researcher." In addition, the Director concluded the Petitioner has "a record of success or that [he is] well positioned to advance [his] proposed endeavor" and "none of this evidence show that [he has] a leading role in the project."

On motion, the Petitioner referenced his prior evidence and provided the previously submitted business plan. In affirming the denial, the Director stated:

> . . . You submitted a plan describing how you intend to pursue your entrepreneurial business in the United States. However, you did not provide sufficient evidence to support your business plan such as correspondence from prospective/potential employers, clients, or customers. You have submitted no evidence to indicate that you have registered a corporation in the United States. As a part of our business plan, you indicate that 'We have identified as potential customers Academic Medical Centers composed of accredited medical schools and major teaching hospitals, and tertiary care hospitals,' but you have not submitted any evidence that you have contacted these entities or that any of them have an interest in collaborating with your potential medical device company. The evidence does not show your model and plan and its support for work in the United States.

On appeal, the Petitioner provides new evidence and claims that "this appeal will be used to add novel evidence to overcome the 'grounds for denial' and outline current progress towards achieving the proposed endeavor." Because the Petitioner was put on notice and given a reasonable opportunity to provide this evidence, we will not consider it for the first time of appeal. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial"). Furthermore, the evidence relates to events occurring after the initial filing of the petition. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Moreover, a petitioner may not make material changes to a petition that has already been filed in an effort to make a deficient petition conform to USCIS requirements. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998).

Notwithstanding the above, the record supports the Director's determination that the Petitioner did not demonstrate that he is well positioned to advance his proposed endeavor under *Dhanasar's* second prong. The Petitioner possesses a master of science degree in telecommunications and network management. USCIS considers an advanced degree, particularly a Ph.D. in a Science, Technology, Engineering, and Mathematics (STEM) field tied to the proposed endeavor and related to work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness or national security, an especially positive factor to be considered along with other evidence for purposes of the assessment under the second prong. *See* 6 *USCIS Policy Manual* F.5(D)(2), https://www.uscis.gov/policymanual. However, a degree in and of itself is not a basis to determine that a person is well positioned to advance the proposed endeavor. *Id.* Furthermore, in *Dhanasar*, the record established that the petitioner held multiple graduate degrees including "two master of science degrees, in mechanical engineering and applied physics, as well as a Ph.D. in engineering." *Id.* at 891. We look to a variety of factors in determining whether a petitioner is well positioned to advance his proposed endeavor and education is merely one factor among many that may contribute to such a finding.

The Petitioner also presented evidence relating to his past employment in telecommunications. Again, the Petitioner claimed his proposed endeavor is to "expand on his collaboration in neuroscience research, applying his vast experience in Information and Communication Technologies and Applied Electronics

Design to build cyber-physical systems as novel tools for physicians to identify and monitor real-time restoration of consciousness and thus reduce long-term cognitive disability." However, the record does not reflect the Petitioner has a record of success in collaborating in neuroscience research by building cyber-physical systems to identify and monitor real-time restoration of consciousness. Instead, the Petitioner provided letters that make broad, general statements regarding his past involvement as a guest researcher and "offering his experience in electronic design and Machine learning algorithms." Here, the Petitioner not shown a track record of success in order to advance his proposed endeavor.

Moreover, as discussed by the Director, the Petitioner has not demonstrated his ability to secure funding for his endeavor. The letter from D-P-C- simply indicates that the Petitioner "currently serves as a consultant for this work, which has been presently funded by the National Institute of Health." In *Dhanasar*, the record established that the petitioner "initiated" or was "the primary award contact on several funded grant proposals" and that he was "the only listed researcher on many of the grants." *Id.* at 893, n.11. Here, the record does not show that the Petitioner was mainly responsible for obtaining funding for the research project.

Finally, the Petitioner has not established how his collaboration and alignment with researchers shows how *he* has had an impetus for progress in the field or that *he* has generated substantial positive discourse in the industry rather than relying on others to conduct the research and work. We examine the factors set forth in *Dhanasar* to determine whether, for instance, the individual's progress towards achieving the goals of the proposed endeavor, record of success in similar efforts, or generation of interest among relevant partis supports such a finding. *Id.* at 890. Here, the Petitioner has not sufficiently demonstrated a record of success or progress in advancing his proposed endeavor, including through his business plan with corroborating evidence.

As such, the Petitioner has not shown that he is well positioned to advance his proposed endeavor under *Dhanasar's* second prong.

III. CONCLUSION

As the Petitioner has not met the requisite second prong of the *Dhanasar* analytical framework, we conclude he has not demonstrated eligibility for or otherwise merits a national interest waiver as a matter of discretion. Therefore, analysis of his eligibility under the third prong outlined in *Dhanasar* would serve no meaningful purpose.[2] Accordingly, the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[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 alternate issues on appeal where applicants do not otherwise meet their burden of proof).