U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30867414

Date: MAY 14, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneur, seeks classification as a member of the professions holding an advanced degree or of exceptional ability, 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 employment based second preference (EB-2) 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v. Garland,* 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).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, but only if a petitioner categorically establishes eligibility in the EB-2 classification.

The regulation at 8 C.F.R. § 204.5(k)(2) defines advanced degree to mean any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States

baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree and so permit classification as an EB-2 permanent immigrant. Progressive experience can be demonstrated by the Petitioner by providing letters from current or former employers showing that they have at least five years of progressive post-baccalaureate experience in the specialty. The regulation at 8 C.F.R. § 204.5(g)(1) requires letters from current or former employers include the name, address, and title of the writer, and a specific description of the duties performed.

If we conclude that a petitioner has an advanced degree or is of exceptional ability such that they have established their eligibility for classification as an immigrant in the EB-2 classification, we evaluate the national interest in waiving the requirement of a job offer and thus a labor certification.

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

A. EB-2 Classification

Upon de novo review of the record, we will withdraw the Director's conclusion the Petitioner demonstrated they were an advanced degree professional eligible for classification as an employment based second preference immigrant.

The Director determined that the Petitioner qualifies as a member of the professions holding an advanced degree. The record contains a credential evaluation equating a combination of the Petitioner's graduate and post-graduate education to a U.S. juris doctor degree. To be eligible under section 203(b)(2), 8 U.S.C. § 1153(b)(2)(A), the Petitioner must have a single degree that is the "foreign equivalent degree" to a United States master's degree or a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree plus five years of progressively responsible work experience. So, the credential evaluation is not probative to establish the Petitioner's categorical eligibility for classification as an employment based second preference immigrant.

The record contains the Petitioner's bachelor of art in law degree issued by the [redacted] in [redacted] Mongolia after a four-year course of study. The Educational Database for Global Education (EDGE), maintained by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), reflects that baccalaureate degrees earned after a four- or five-year course of study in Mongolia are the single source equivalent to a United States bachelor's degree.

But the documentation of progressively responsible work experience contained in the record labors under inconsistencies which raise doubts about whether the Petitioner has accumulated at least five years of progressively responsible post-baccalaureate work experience in their entrepreneurial specialty. 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).

The Petitioner submitted an unsworn statement declaring that they "have been working as an independent entrepreneur running [their] own shoes business since September 2010." They submitted additional documentation with their unsworn statement in the form of a certificate identifying them as an official distributor of [redacted] products and a franchise contract executed between themselves and a franchisor based in [redacted] People's Republic of China, granting them "the complex exclusive rights of [redacted] brand owned by the Franchisor in the [Petitioner's] business."

They also submitted a rental verification letter for their business premises with a commercial lease contract signed December 7, 2021 for a term between December 20, 2021 and June 20, 2022. But, in response to the Director's request for evidence (RFE), the Petitioner submitted conflicting documentation. Chiefly, the Petitioner submitted another rental verification letter with a commercial lease contract. However, this contract was signed March 12, 2021 (before the contract the Petitioner submitted with their initial petition) and was for a term starting March 12, 2021 and ending after the term of the rental contract the Petitioner initially submitted. Or in other words, the Petitioner submitted an older contract running for a longer duration of time than the contract they submitted initially with

the petition. And neither of the contracts contained a lease payment obligation corresponding to the lease amount listed in the accompanying rental verification letter.

The Petitioner also submitted other documents that conflicted with other representations they made in the unsworn statement they submitted when they initially filed their petition. The Petitioner's unsworn statement asserts that they commenced their period of self-employment and business in September 2010. But the Petitioner submitted an assessment checklist for trading activities issued by specialized inspection agency which represented that the business in the "shoes trade" started operations in 2013. The fire safety certificates, governor's office district permit certificates, and point of service card reader agreement with [redacted] Bank do not address the deficiencies we have identified above.

And the Petitioner did not claim categorical eligibility under nor did the record contained sufficient evidence to evaluate the Petitioner's eligibility for EB-2 classification as an individual of exceptional ability. The Petitioner should be prepared to address their categorical eligibility for EB-2 classification in any future proceedings requiring a petitioner to demonstrate eligibility as an advanced degree professional or individual of exceptional ability.[1]

B. National Interest Waiver

The Director denied the petition, concluding that whilst the Petitioner was well positioned to advance their substantially meritorious proposed endeavor, the proposed endeavor was not of national importance such that on balance a waiver of the requirement of a job offer and labor certification would be beneficial to the United States. We agree with the Director's overall decision that the Petitioner does not qualify for a national interest waiver, but we do not agree with and will withdraw the Director's specific finding that the Petitioner was well positioned to advance their proposed endeavor.

1. Substantial Merit and National Importance

Although the evidentiary standard in immigration proceedings is the lowest preponderance of the evidence standard, the burden is on the Petitioner alone to provide material, relevant, and probative evidence to meet that standard. Section 291 of the Act, 8 U.S.C. § 1361. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *see also* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). First, a petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits.

The evidence and argument the Petitioner introduced into the record does not help them carry their burden of production and persuasion. In support of their assertions of eligibility under the *Dhanasar*

[1] As the resolution of the issues pertaining to the Petitioner's eligibility for a waiver of the job offer requirement, and thus of a labor certification, under the *Dhanasar* analytical framework are dispositive of this appeal, further investigation and analysis of the Petitioner's categorical eligibility for EB-2 classification by issuing a request for evidence would serve no legal purpose.

analytical framework, the Petitioner provided their definitive statement, resume, business plan, Illinois corporate registration documents, letters and agreements of intent to invest, bank statements, educational documents, work experience documents, industry reports and articles about retail shoe stores and immigrant entrepreneurs, recommendation letters, expert opinion letter, professional certificates and memberships, purported awards, recognitions, training and participation certificates.[2]

The Petitioner proposed to develop a retail shoe store operating under their "proposed company, [redacted] The Petitioner planned to "offer a wide variety of shoes for kids, healthcare workers, women, and men, and unique shoes tailored to different workplace environments." The Petitioner anticipated that they would open ten stores in SBA designated HUBZones in Illinois, Wisconsin, California, and Florida. The Petitioner anticipates that they will "generate total revenue of $17,451,000 over five years with gross profits of around $8,621,000. Total taxes paid by the company in five years is estimated to be $1,678,530. In addition, the business would generate employment for 95 full-time, 21 part-time, and 11 contractor employees by the fifth year of its operations."

To satisfy the first prong under the *Dhanasar* analytical framework, the Petitioner must demonstrate that their proposed endeavor has both substantial merit and national importance. The first prong focuses on the specific endeavor that the individual proposes to undertake. An endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. *Dhanasar* at 889. The Petitioner described their endeavor as an "entrepreneur." The record before us contains evidence of the characterization of the Petitioner's proposed endeavor as a "entrepreneur" which falls within the range of areas we concluded could demonstrate endeavor of substantial merit. So, the record supports the substantial merit of the Petitioner's proposed endeavor.

Nevertheless, the Petitioner's substantially meritorious proposed endeavor lacks the requite national importance when evaluated under the first prong of the *Dhanasar* analytical framework. The Petitioner proposed their endeavor would have national impact because it is amongst "entrepreneur-driven businesses [that] enable the development of new markets and the creation of new wealth." This in turn "contributes to the government's goal" for supply chain development and security and can also "help increase national income and tax revenue."

The record contains numerous documents in the form of articles and industry reports corresponding to the importance of entrepreneurship and retail, specifically shoe stores. But these relate more to the substantiality of the proposed endeavor's merit than its national importance. In determining national importance, the focus is not on the importance of the industry in which the petitioner will work or even their past success. The focus is on "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec.at 889.

In *Dhanasar* we said that "we look for broader implications." And it is here that the Petitioner's proposed endeavor's deficiencies are revealed. The record does not adequately describe how the Petitioner's retail shoe store or stores would broadly implicate matters of supply chain security and development to a level of national importance. That is not to say that the broader implications of the Petitioner's shoe retail services are evaluated from a geographic perspective. Broader implications

[2] While we may not discuss every document submitted, we have reviewed and considered each one.

are not necessarily geographically evaluated; implications within a field which demonstrate a national or even international influence of broader scale can rise to a level of national importance. But the record as it is presently constituted does not sufficiently describe how the sale of shoes the Petitioner intends to accomplish will influence supply chains at any level commensurate with matters rising to a level of national importance.

The letters the Petitioner submitted did not reflect how the proposed endeavor implicates national importance because the letters focused on the Petitioner's past work. When evaluating the national importance of a proposed endeavor under the first prong of *Dhanasar*, we are concerned with its potential prospective or future impact. The Petitioner's demonstration of prior similar work selling shoes in Mongolia does not have an influence on the proposed endeavor's potential prospective impact based on its national importance.

The Petitioner also asserts that the job creation and payroll taxes stemming from its proposed endeavor is likely to have positive economic effects. The Petitioner anticipates increasing gross income, a hiring spree increasing their head count, and increasing their expenditures on salary. But it is not clear from the record how this job creation for the proposed endeavor itself would have a substantial prospective positive economic effect commensurate with national importance. For example, the Petitioner's business plan forecasted it would "generate total revenue of $17,451,000 over five years with gross profits of around $8,621,000. Total taxes paid by the company in five years is estimated to be $1,678,530. In addition, the business would generate employment for 95 full-time, 21 part-time, and 11 contractor employees by the fifth year of its operations." But the record does not support the significance of the proposed endeavor's potential to employ 127 total workers within five years of establishment material, relevant, or probative evidence. And the record does not sufficiently establish whether the aspirational payroll and income tax figures mentioned by the Petitioner impact government income and benefit the U.S. economy at a level commensurate with matters of national importance. Moreover, as with its employment creation aspirations, the Petitioner's aspirations for tax generation from the activities of their proposed endeavor are not adequately supported in the record with material, relevant, and probative evidence. For example, the letter and memoranda of intent do not sufficiently describe the amount of payroll expenditure and tax generation from the intention they harbor for germinating prospective franchises. The Petitioner's aspirations simply do not demonstrate the national importance of the endeavor because they, whether realized or not, would not extend beyond the endeavor itself to have an impact on a level of national importance. The record does not contain sufficient probative, material, or relevant evidence showing how the endeavor's hiring plan would influence the area's unemployment rate or how the endeavor's operations and revenue would rise to a level of national importance.

Furthermore, the Petitioner's intention to base their company in a Small Business Administration (SBA) HUBZone is unpersuasive. The HUBZone program's goal is to promote business growth in underutilized business zones with the goal of awarding 3% of federal contract dollars to companies that are HUBZone certified. Joining the HUBZone program makes a business eligible to compete for certain federal contracts in the "set-aside" category. There are several required qualifications to participate in the program, but the most dispositive requirement for purposes of our analysis is that the business seeking to participate in the HUBZone program must be at least 51% owned by U.S. citizens, a community development corporation, an agricultural cooperative, an Alaska Native corporation, a Native Hawaiian organization, or an Indian tribe. Whilst it is unknown and the record is silent about

what if any federal programs exist in the "set-aside" category for residential and commercial cleaning services like the one proposed by the Petitioner, the record is crystal clear that the Petitioner's proposed endeavor would be wholly owned and controlled by the Petitioner and that the Petitioner is not a U.S. citizen, a community development corporation, an agricultural cooperative, an Alaska Native corporation, a Native Hawaiian organization, or an Indian tribe. And to the extent the Petitioner asserts that they would base their company in an SBA HUBZone designated underutilized business zone, the record does not adequately establish that increased employment in these designated underutilized business zones would have positive economic effects commensurate with national importance. So, the fact that the Petitioner' proposed endeavor may be in a HUBZone is wholly irrelevant to whether the Petitioner's endeavor rose to a level of national importance.

The Petitioner's appeal highlights many years of selling shoes with success in Mongolia and stresses that it is their execution of their proposed endeavor which elevates it to a level of national importance. But the Petitioner's argument spotlights a fundamental misunderstanding of the first prong of the *Dhanasar* framework. The first prong of the *Dhanasar* framework focuses on the proposed endeavor; not on the Petitioner's execution of that proposed endeavor. The *Dhanasar* framework is consequently unconcerned with the likelihood of the success of the proposed endeavor. The Petitioner's contentions about their successful past performance in the endeavor they propose, as well as evidence and information of their achievements and recognition would better serve a demonstration of eligibility under the second prong of the *Dhanasar* framework. The relevant inquiry for evaluation of an endeavor's national importance is whether the prospective positive impact judged by the endeavor's broader implications or positive economic effects apply beyond just narrowly conferring the proposed endeavor's benefit. The Petitioner here has not demonstrated how their retail shoe sales touch matters of national importance.

The advisory opinion submitted by the Petitioner does not illustrate how the Petitioner's proposed endeavor implicates a concern of national importance, either. The writer focused their analysis on the Petitioner's "research and development work." But the Petitioner intends to sell shoes in the United States. It is not adequately described in the record what "research and development" the Petitioner intends to perform in pursuit of selling shoes. Mainly, the writer speaks of the Petitioner's past performance of selling shoes and operating businesses. The writer also states that the Petitioner's work will support the national interest by selling "environmentally conscious items." But it is not sufficiently clear from the record what footwear items the Petitioner intends to sell would be labeled "environmentally conscious," how they are "environmentally conscious," and how matters of national importance are nationally, or even globally, implicated or other broader implications of national importance emanate from the sale of "environmentally conscious items." Moreover, whilst the writer mentioned some economic effects that could be credited to the Petitioner's proposed endeavor, their figures conflicted with those the Petitioner highlighted. For example, whilst the Petitioner forecasted that their endeavor would "generate total revenue of $17,451,000 over five years," the author of the advisory opinion stated that the Petitioner's proposed endeavor was "projected to earn 5.19 million dollars in revenue within the first five years of operations." So, we conclude that the Petitioner has not established that their proposed endeavor is of national importance.

2. Well Positioned to Advance the Proposed Endeavor

And we must withdraw the Director's conclusion that the record established that the petitioner was well positioned to advance the proposed endeavor under the second prong of the *Dhanasar* framework. In evaluating whether a petitioner is well positioned to advance their proposed endeavor, we review the following and any other relevant factors:

- A petitioner's education, skill, knowledge, and record of success in related or similar efforts;
- A petitioner's model or plan for future activities related to the proposed endeavor that the individual developed, or played a significant role in developing;
- Any progress towards achieving the proposed endeavor; and
- The interest or support garnered by the individual from potential customers, users, investor, or other relevant entities or persons.

It is not clear from the totality of the evidence in the record how an individualized consideration of the multifactorial analysis under *Dhanasar's* second prong would demonstrate how well positioned the Petitioner is to advance their proposed endeavor. As stated above, a petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Y-B-*, 21 I&N Dec. at 1142 n.3. The record contains evidence of the Petitioner's bachelor of arts in law education. But it is not evident from the degree certificate how a petitioner with a baccalaureate level education of arts in law is well positioned to advance an entrepreneurial endeavor in a sales field.

Moreover, the record does not reflect how the Petitioner's prior performance of the duties described in the experience letters is either a similar effort as that of their proposed endeavor or how it constitutes a record of success. And the Petitioner's business plan identified a target audience for their proposed endeavor, but it did not demonstrate how the social media and web marketing plan they advanced would advance their proposed endeavor other than their own aspirational statements. The business plan instead only placed heavy emphasis on what the Petitioner had done in their past and their qualifications to continue the same activities in the future. And the Petitioner's submission of an Illinois trademark or service mark application and corporate tax returns does not meaningfully reflect progress to achieving the proposed endeavor.

The recommendation letters the Petitioner submitted are not material, relevant, or probative evidence in the record of interest or support in the endeavor the Petitioner proposed in their petition. The letters largely speak effusively of the Petitioner's work ethic, demeanor, or representations of their skill or experience in their interactions. And whilst one of the letter writers identifying themselves as a "friend and a small business owner" engaged with the Petitioner's past business to purchase shoes during a vacation in Mongolia, the letter did not identify a further interest in the Petitioner's proposed endeavor other than the expressions of support and encouragement normally associated with a "friend."

The Petitioner also submitted three "letters" or "agreements" from individuals interested in investing an aggregate of $300,000 over five or six years in the Petitioner's retail shoe endeavor. One of the "agreements" was unsigned. The Petitioner's business plan indicates an intention to invest $710,000 into the business as "seed capital." The evidence the Petitioner has submitted does not sufficiently describe how the Petitioner will obtain, invest, or procure the remaining funds they required to "seed" their endeavor as described in their business plan. Nevertheless, demonstration of an intent to invest, by itself is not sufficient to automatically demonstrate how well positioned the Petitioner is to advance their proposed endeavor. This is only one factor amongst many factors which are evaluated together

to determine how well positioned a petitioner is to advance a proposed endeavor. So, the Petitioner has not demonstrated with material, relevant, and probative evidence that they are well-positioned to advance their proposed endeavor.

3. Whether on Balance a Waiver is Beneficial

The third prong requires a 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. On appeal, the Petitioner asserts that the national interest in their proposed endeavor is sufficiently urgent to warrant a waiver, and that the United States would benefit from their contributions to the field of endeavor. As the Petitioner has not established that they meet the first or second prong of the *Dhanasar* framework, they have not shown that they are eligible for and otherwise merit a national interest waiver, and we reserve this issue. *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).

III. CONCLUSION

As the Petitioner has not met the requisite prongs of the *Dhanasar* analytical framework, we find that they have not established that they are eligible for or otherwise merit a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.