U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 31125012

Date: MAY 16, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a civil engineer, seeks classification as an individual of exceptional ability in the sciences, arts, or business. *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.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that she qualifies as an individual of exceptional ability or that she merits a national interest waiver as a matter of discretion. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

## 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. Section 203(b)(2)(B)(i) of the Act.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). However, meeting the minimum requirements by providing at least three types of initial evidence does not, in itself, establish that the individual meets the requirements for exceptional

ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. *Id.* The officer must determine whether the petitioner, by a preponderance of the evidence, has demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then demonstrate they merit 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 USCIS may, as matter of discretion,[1] grant a national interest waiver if the petitioner shows:

- 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 Petitioner, a civil engineer, seeks to open and direct the operations of an information technology (IT) and gamification consulting firm in the State of Florida.

A. Eligibility for Underlying EB-2 Classification

Regarding the underlying EB-2 classification, the Director proceeded to a final merits determination because the Petitioner demonstrated that she met the initial evidence requirements. Specifically, the Director concluded that she met four of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii) pertaining to academic records, licenses, memberships, and recognition for achievements and significant contributions to the field. Although the Petitioner also claimed she could satisfy the criteria relating to experience letters and high salary, the Director concluded that she did not meet those criteria.

In denying the petition, the Director determined that the Petitioner was not an individual of exceptional ability. Specifically, the Director concluded that although the Petitioner met at least three of the six criteria under 8 C.F.R. § 204.5(k)(3)(ii), the record lacked evidence that the Petitioner has "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." On appeal, the Petitioner asserts that the denial decision lacks a proper evaluation of the totality of the evidence and asserts that the Director did not explain in writing the specific reasons for denial as required by 8 C.F.R. § 103.3(a)(1)(i).

In a final merits determination, USCIS must analyze all of a petitioner's accomplishments and weigh the totality of the evidence to determine whether the petitioner, by a preponderance of the evidence, has demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See* section 203(b)(2)(B)(i) of the Act; 8 C.F.R. § 204.5(k)(2); *see also* 6 *USCIS Policy Manual*, *supra,* at F.5(B)(2). Moreover, the Director must articulate the specific reasons as to why they conclude that the petitioner, by a preponderance of the evidence, has not demonstrated that

[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).

they qualify for exceptional ability classification. *Id.* On appeal, the Petitioner contends that the Director failed to consider all the submitted evidence together in the final merits determination.

We agree with the Petitioner's claim that the Director's final merits analysis does not reflect consideration of the totality of the evidence as required. Although the Petitioner submitted evidence relating to all six of the criteria at 8 C.F.R. § 204.5(k)(3)(ii), the final merits discussion did not identify any of the submitted evidence or provide any analysis of such evidence. Specifically, rather than acknowledging the documentary evidence submitted by the Petitioner in support of her eligibility for the underlying classification, the Director simply concluded, in one sentence, that she was not an individual of exceptional ability. Moreover, we also note that the Director did not discuss the evidence in the record and how the evidence established that the Petitioner met four of the initial criteria; rather, the Director only stated the conclusion that these criteria were met. Because the Director did not properly consider all the Petitioner's evidence in the final merits analysis, the decision did not sufficiently address why she did not demonstrate her eligibility for the requested classification.

As correctly asserted by the Petitioner, the Director must explain in writing the specific reasons for denial when denying a petition. 8 C.F.R. § 103.3(a)(1)(i). This explanation should be sufficient to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See, e.g., Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). Here, the Director's decision did not satisfy this requirement.

Accordingly, we will withdraw the Director's decision and remand the matter for further review and entry of a new decision. The new decision should include an analysis of the totality of the record, including the evidence submitted in support of all claimed initial evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii).

B. National Interest Waiver

As to the Petitioner's eligibility for a national interest waiver, the Director determined that the Petitioner did not satisfy any of the three prongs of the *Dhanasar* analytical framework. On appeal, the Petitioner contends that the Director both ignored and did not give due regard to substantial evidence submitted in support of her eligibility under *Dhanasar's* first prong, and further asserts that the Director imposed a higher standard of proof than the preponderance of the evidence in evaluating her request for a national interest waiver.

Regarding the substantial merit and national importance of the proposed endeavor, the Director concluded that the endeavor had substantial merit but not national importance. The Director acknowledged the Petitioner's business plan and personal statement, but determined both were insufficient to demonstrate that the proposed endeavor had national importance. On appeal, the Petitioner asserts that the Director's analysis was restrictive and did not include analysis of all submitted evidence, noting that the "wide array" of evidence she submitted, including an expert opinion letter, letters of recommendation, and industry articles and reports, were not acknowledged or addressed. She further asserts that the Director ignored the fact that she is a high-skilled professional in a STEM area.

Collectively considering the evidence submitted prior to the Director's decision, we agree with the Petitioner that her evidence was not given due consideration therein. In addition, we note that the Director erroneously conflates elements of *Dhanasar's* second prong into their national importance analysis. Specifically, the Director states as a basis for denial under the first prong that the Petitioner did not submit evidence of a record of success in similar efforts, any progress for achieving the proposed endeavor, and the interest of potential customers, users, investors or other relevant entities or individuals. Such evidence, however, relates to whether the Petitioner is well positioned to advance her proposed endeavor and is appropriately examined when analyzing the second prong. Finally, we note that the Director erroneously concluded that "the [Petitioner] has not established that her proposed endeavor of founding and leading a company in accounting services is of national importance," when her stated endeavor is to be the CEO of an IT and gamification consulting company.

Again, an officer must fully explain the reasons for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786. The Director should review the record to determine whether the Petitioner has demonstrated her proposed endeavor has significant national or global implications with respect to IT and gamification consulting, significant potential to employ U.S. workers, or other substantial positive economic effects. If the Director concludes that the Petitioner's evidence does not meet the national importance requirement of *Dhanasar's* first prong, the decision should discuss the insufficiencies in the evidence and adequately explain the reasons for ineligibility.

For *Dhanasar's* second prong, the Director concluded that the Petitioner was not well positioned to advance the proposed endeavor but did not sufficiently explain the basis for the determination. On appeal, the Petitioner argues that the Director did not sufficiently evaluate her academic qualifications, professional achievements, and years of experience in the field, and reiterates her qualifications and commitment to advance her proposed endeavor. Although the Director identified the types of documents submitted by the Petitioner and generally concluded that they were insufficient, the decision does not sufficiently analyze this evidence or explain why such evidence was deficient.

The Director should analyze the evidence to determine if the Petitioner is well positioned to advance the proposed endeavor and should consider all of the evidence offered for prong two, including the Petitioner's academic record, certifications and trainings, expert opinion letter, and letters of support and recommendation. The Director should analyze the specific content of the record to determine if this documentation renders the Petitioner well positioned to advance the proposed endeavor. If the Director concludes that the Petitioner's documentation does not meet *Dhanasar's* second prong, the decision should discuss the insufficiencies in the evidence and adequately explain the reasons for ineligibility.

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. While the Director's decision identifies some of the factors to consider when determining whether a petitioner qualifies under *Dhanasar's* third prong and indicates that the Petitioner had not established eligibility under this prong, the Director did not adequately discuss the evidence and sufficiently explain the basis for this determination. If the Director determines that the Petitioner's documentation does not

meet this prong, the decision should address all of the Petitioner's arguments and evidence, and explain the relative decisional weight given to each balancing factor.

## III. CONCLUSION

For the above reasons, we will withdraw the Director's decision and remand this matter for further consideration and entry of a new decision. On remand, the Director should review the entire record, including the Petitioner's appeal, and determine whether she has established eligibility for both the underlying classification as an individual of exceptional ability and each of the three prongs of the *Dhanasar* framework. The Director may request any additional evidence considered pertinent to the determination prior to issuing a new decision.

**ORDER:** The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.