U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30172724

Date: MAY 21, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a musician and software engineer, 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 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 Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner is eligible for a national interest waiver as a matter of discretion. 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.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

If a petitioner demonstrates eligibility for the underlying EB-2 classification, 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 national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver 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.

II. ANALYSIS

A. EB-2 Classification

The Petitioner is a musician and a software engineer. He submitted a diploma and transcripts for his master's degree in music from the [redacted] in Florida. In addition, he submitted diplomas and transcripts for his bachelor's degrees in music and computer information systems from [redacted] in Louisiana. The Director concluded that the Petitioner qualifies as a member of the professions holding an advanced degree. However, as the record does not otherwise establish by a preponderance of the evidence that the Petitioner is eligible for a national interest waiver as a matter of discretion, we will reserve the issue of the Petitioner's eligibility for the EB-2 classification.[2]

B. National Interest Waiver

1. Substantial Merit

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. *Dhanasar*, 26 I&N Dec. at 889.

The Petitioner states that his proposed endeavor is to, "[c]reate a special software ecosystem oriented to music education, especially children and young talent. . . It will facilitate the learning process based on artificial intelligence and augmented reality. . . This educational platform ecosystem is intended to be an essential online tool to complement the standard class system." The record includes articles and reports on the benefits, trends, the current landscape, and the future of music education. We conclude that the proposed endeavor has substantial merit.

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[1] *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 is discretionary in nature).

[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 an applicant is otherwise ineligible).

2. National Importance

In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Id.* The Director determined the record did not establish that the Petitioner's proposed endeavor would have substantial positive economic effects or the potential to significantly employ U.S. workers. We agree as the record does not show the number of employees the proposed endeavor will generate or its economic impact. However, the Director concluded that the proposed endeavor met the *Dhanasar* requirement of national importance due to its potential to broadly enhance societal or cultural welfare. Upon de novo review of the record, we disagree with the conclusion that the record establishes the proposed endeavor's potential to broadly enhance societal or cultural welfare and therefore withdraw the Director's decision on national importance.

First, we note that the record shows a change in the proposed endeavor between the initial filing and the response to the request for evidence (RFE). With the initial filing, the Petitioner submitted a proposed endeavor statement and a personal statement that described his proposed endeavor to design and develop a software ecosystem. The software is built to complement the standard classroom music education for teachers and students to make their educational experience more efficient. In response to the RFE, the Petitioner then submitted an updated proposed endeavor statement and personal statement along with a new business plan, incorporating a business called [redacted] This changed the proposed endeavor from creating a software ecosystem with the help of users inputting information into the system, to owning a business employing developers, designers, and engineers, and serving as the owner, CEO, and project manager, to run a company.

In addition, the AI-powered platform changed from complementing the standard classroom music education system to possibly replacing it. The updated personal statement states that along with supplementing the classroom system, his proposed endeavor will support professional musicians to develop new skills and techniques and discover new ways of using technology to create and perform music. The updated endeavor also details his intent to support students who have limited access to music teachers and quality music education; all new details which expand the focus and the analysis of the original proposed endeavor. Here, the record contains contradictions as to who will use the platform and how the platform will be used.

The Director addressed this in her decision by stating, "[u]pon re-review of the evidence submitted with the original petition, there does not appear to be any mention of the creation of a company. . . . Due to this, the national importance of the endeavor had to be reevaluated to account for this inclusion in the proposed endeavor." While not addressed by the Director, we note that the Petitioner must establish eligibility at the time of filing. *See* 8 C.F.R. 103.2(b)(1). The original filing did not include a business plan, nor the creation of this business as it was incorporated after the RFE was issue. However, as the Director based their analysis on the changed endeavor, and the Petitioner did not have an opportunity to properly address this issue, we will also provide an analysis based on the changed endeavor.

Dhanasar states that a proposed endeavor may have national importance because it has, "national or even global implications within a particular field, such as certain improved manufacturing processes or medical advances." *Dhanasar*, 26 I&N Dec. at 889. Although the proposed endeavor will have an online presence that could reach more individuals to have a societal or cultural impact, the record does

not establish how broad its scope will be outside of the teacher and student reach in the initial submission. In the RFE response, it appears the program would be available to more people, but it is not clear how it will be promoted, aside from using the internet and social media, to show how broad its scope will be. In *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893. Further, the record does not establish that the proposed endeavor is innovative in a way that would breakthrough the industry to have national or global implications, reaching further than the program's users. The record addresses the proposed endeavor's consistency with the trend of technology being used to further music education. For example, the article from World Bank discusses the importance of technology in the education landscape, and while we acknowledge the importance of this field, the record does not establish that the petitioner's endeavor is novel or exclusive to the Petitioner to lend itself to industry advances. Therefore, the record does not establish that the Petitioner's proposed endeavor will broadly impact the field to rise to national importance.

An endeavor may have national importance if it has, "significant potential to employ U.S. workers" or "other substantial positive economic effects, particularly in an economically depressed area." *Dhanasar* at 890. The proposed endeavor statement discusses the model he will implement where the program's artificial intelligence mode will be available to all users in the initial stage so the software can collect information. The initial submission does not show that the proposed endeavor requires employees or that there will be any employees. It states that the program will have its users input information as they use it and the artificial intelligence will learn from this information. With the RFE response, the business plan describes one of the Petitioner's duties as CEO being, "recruiting and hiring employees;" however the record does not show the number of employees, the jobs he will create, or an adequate amount of money being allocated to pay for enough salaries to rise to the level of national importance. Therefore, the record does not establish that this proposed endeavor has the potential to employ U.S. workers to a level of national importance.

As for the proposed endeavor's economic impact, the RFE response states that, "[c]reative industries, including music, are recognized as essential drivers of innovation and economic growth. The United National Conference on Trade and Development report acknowledges their significance in creating new markets and opportunities for small businesses and entrepreneurs." The record does not show how the Petitioner's specific proposed endeavor stands to impact the economy. The record shows the focused impact of his proposed endeavor is on music education and the impact that could have on the users of this platform, but not an impact it could have on the economy.

The Petitioner states in the initial filing that there is an extreme shortage of music education in the United States and discusses how important music education is to cognitive development. This claim is supported by industry articles and reports. While we acknowledge the submitted industry reports and articles and the importance of music education, they do not show the national importance of the Petitioner's proposed endeavor. It is the importance of the specific endeavor we must analyze and not the industry itself. In addition, although it appears the Petitioner's proposed endeavor would help support the program's users in the music education community, the record does not establish that the Petitioner's proposed endeavor would significantly impact the music education shortage described as the record. It does not show his endeavor would increase music education programs or the number of teachers in the United States, but it would work within the structure that already exists.

We note that the Director denied the petition under *Dhanasar's* prong two analysis, stating that the Petitioner was not well-positioned to advance the endeavor and prong three, that the record did not establish, on balance, it would be beneficial to the United States to waive the requirement for a job offer, and thus of a labor certification. In addition, the appeal solely addresses the Director's prong two and prong three analysis. The record establishes the Petitioner has a master's degree in music as well as bachelor's degrees in music performance and computer information systems and has prior experience in related fields, however we conclude he has not met *Dhanasar's* prong two criteria. The record does not establish progress towards achieving the proposed endeavor. Although he did submit a business plan and incorporate his company, as we discussed above, this was done after his initial filing. Examples of additional steps toward achieving the proposed endeavor could include: obtaining patents or trademarks, third party investment, evidence that his work has influenced the proposed endeavor, or contracts with individuals using his work.[3]

While we do not discuss each piece of evidence individually, we have reviewed and considered the record in its entirety. As the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework, the Petitioner has not demonstrated eligibility for a national interest waiver. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the *Dhanasar* framework. *See Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

III. CONCLUSION

The Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework. We therefore conclude by a preponderance of the evidence that the Petitioner has not established that he is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

[3] *See generally 6 USCIS Policy Manual* F.5(D)(1), https://www.uscis.gov/policy-manual