U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28559439

Date: MAY 21, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a customs and trade specialist, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or as an individual 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 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. The Director concluded that the Petitioner did not demonstrate she merits a discretionary waiver of the job offer requirement in the national interest. 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.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree.[1] 8 C.F.R. § 204.5(k)(2). A U.S. bachelor's degree or a foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. Id.

[1] Profession shall include, but not be limited to, architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) of the Act.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

8 C.F.R. § 204.5(k)(3)(ii).[2]

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[3] See Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); see also Visinscaia v. Beers, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); Rijal v. USCIS, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." Matter of Chawathe, 25 I&N Dec. at 376.

Once a petitioner demonstrates eligibility for the underlying classification, the petitioner must then establish eligibility for a discretionary waiver of the job offer requirement "in the national interest."

---

[2] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[3] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. See generally 6 USCIS Policy Manual F.5(B)(2), https: //www.uscis.gov/policy-manual.

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 USCIS may, as matter of discretion,[4] 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.

Id.

II. ANALYSIS

The Petitioner proposes to establish a customs and trade consultancy services business for which she would be its customs and trade specialist. The Director determined that the Petitioner established her eligibility for the underlying EB-2 classification as a member of the professions holding an advanced degree; however, she did not establish that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

A. Member of Professions Holding an Advanced Degree

The Director determined that the Petitioner qualifies as a member of the professions holding an advanced degree based on completion of a bachelor of science in industrial engineering. The Director made an error because the record does not include evidence showing she earned a bachelor of science in industrial engineering. The Petitioner submitted diplomas and academic transcripts indicating that on May 22, 2015, she earned both a master of customs and international commerce and a bachelor of customs and international commerce from [redacted] Venezuela. The Director does not mention either of these degrees in the decision and instead incorrectly referenced her earning a bachelor of science in industrial engineering.

After reviewing the record, although the Petitioner submitted her foreign diplomas and academic transcripts, she did not provide evidence showing either her master degree or bachelor degree is the foreign equivalent above that of a U.S. bachelor's degree. See 8 C.F.R. § 204.5(k)(2). Also, the Petitioner has not established that either degree is the foreign equivalent of a U.S. bachelor's degree, or that she has five years of progressive experience in her specialty. See 8 C.F.R. § 204.5(k)(2).

To show her work experience, the Petitioner submitted a letter from [redacted] in Venezuela. The letter states she "entered the [redacted] on December 16, 1995," and as of the date of the letter, July 16, 2018, she held the position of customs and tax technician. The letter does not include a description of the Petitioner's job duties over the course of her employment with [redacted] Therefore, we are unable to determine whether her work experience with [redacted] is progressive experience in her intended specialty. Also, the letter is insufficient to show she has five years of progressive experience. The diplomas indicate the Petitioner

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

completed her foreign degrees on May 22, 2015. The employment letter indicates she worked with [redacted] from 1995 through the date of the letter, July 16, 2018, which is only two years and seven months of work experience after she earned her degrees. Therefore, the Petitioner has not demonstrated she has at least five years of progressive experience in her specialty following her degrees as required by 8 C.F.R. § 204.5(k)(2).

The Petitioner did not demonstrate either of her degrees are the foreign equivalent above that of a U.S. bachelor's degree. Also, the Petitioner has not demonstrated that she has a U.S. bachelor's degree or a foreign equivalent degree followed by five years of post-baccalaureate experience. Therefore, we withdraw the Director's decision that the Petitioner qualifies as a member of the professions holding an advanced degree.

B. Individual of Exceptional Ability

The Director did not consider the Petitioner's claims for eligibility for the underlying EB-2 classification as an individual of exceptional ability in the sciences, arts, or business under section 203(b)(2)(B)(i) of the Act. To meet eligibility as an individual of exceptional ability, the Petitioner submitted evidence to meet three of the six initial evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). On remand, the Director should evaluate the Petitioner's documentation to determine whether she meets the requirements of an individual of exceptional ability.

C. Substantial Merit and National Importance

The first prong of the Dhanasar analytical framework, substantial merit and national importance, focuses on the specific endeavor that a petitioner proposes to undertake. The Director's decision concluded, "[t]he first prong, substantial merit and national importance, is met." However, the decision does not explain the basis for this determination.

The Director does not identify or describe the proposed endeavor. Also, the Petitioner did not complete Part 6 of the petition, "Basic Information about the Proposed Employment," and submitted statements with a broad description of her proposed endeavor, "to form and operate a [c]ompany in the [United States] dedicated to offering customs and trade consultancy services to U.S. and foreign [c]ompanies." Through this business, the Petitioner states that she intends to "analyze the operations of prospective clients (companies) and create and implement strategies and methods that will improve their operations in order to promote efficiency, productivity, and profitability, within their companies."

On remand, the Director should analyze the evidence to determine whether the record sufficiently describes the proposed endeavor, and whether the endeavor has substantial merit and national importance. 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. Matter of Dhanasar, 26 I&N Dec. at 889. If the Director concludes that the Petitioner's documentation does not meet the substantial merit or national importance requirements of *Dhanasar's* first prong, the decision should discuss the insufficiencies in the evidence and adequately explain the reasons for ineligibility.

D. Well-Positioned to Advance the Proposed Endeavor

For Dhanasar's second prong, the Director concluded that while the Petitioner "has gained skills and experience in his [sic] field of endeavor[,]" she did not demonstrate that she is well-positioned to advance the proposed endeavor. The decision does not identify or analyze the Petitioner's submitted evidence and does not explain the basis for this determination. On appeal, the Petitioner argues that her previously provided evidence shows she is well-positioned to advance her proposed endeavor, specifically pointing to her academic credentials, training certificates, letters of recommendation from individuals in her field, and her business plan.

In the second prong, the focus shifts to the petitioner and their positioning to advance their proposed endeavor, and we look at several factors in making this determination. We consider factors including, but not limited to: their education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals. Id. at 890.

An officer must fully explain the reasons for denying a petition in order to allow a 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)(l)(i); see also Matter of M-P-, 20 I&N Dec. 786, 787-88 (BIA 1994) (finding that a decision must fully explain the reasons for denial to allow the respondent a meaningful opportunity to challenge the determination on appeal). Here, the Director's decision did not adequately address the evidence submitted with the petition or in the request for evidence response.

Accordingly, we withdraw the Director's determination that the Petitioner does not meet the second prong of the Dhanasar framework. On remand, any new determination by the Director must consider the evidence offered for prong two, including the Petitioner's academic record, certifications and trainings, letters of recommendation, and her business plan. The Director should analyze the specific content of the record to determine if this documentation renders her 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.

E. Balancing Factors to Determine Waiver's Benefit to the United States

As to the third prong of Dhanasar, the Director stated the law and the relevant considerations in performing the third prong's balancing analysis and concluded that the Petitioner "has not established 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." However, the Director's decision did not discuss the evidence weighed in balancing those considerations nor address the Petitioner's specific claims, if any, as to the third prong. Without a proper evaluation of the factors identified in Dhanasar's third prong, we cannot meaningfully analyze whether the Director's determination for this prong was in error. Therefore, we withdraw the Director's determination that the Petitioner did not establish eligibility under the third Dhanasar prong. On remand, if the Director concludes that the Petitioner's documentation does not meet this prong, the decision should address the Petitioner's arguments and evidence, and explain the relative decisional weight given to each balancing factor.

III. CONCLUSION

Based on the foregoing, we are remanding the petition for the Director to consider whether the Petitioner has satisfied the eligibility requirements for the underlying EB-2 classification as either a member of the professions with an advanced degree or an individual of exceptional ability in the sciences, arts, or business. See section 203(b)(2)(B)(i) of the Act. In addition, the Director should properly apply all three prongs of the Dhanasar analytical framework to determine if the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. The Director may request any additional evidence considered pertinent to the new determination. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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