U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31125005

Date: MAY 22, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a chef and entrepreneur in the restaurant industry, seeks second preference immigrant classification (EB-2) as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant 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 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

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. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

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."

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

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

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,[3] 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. Exceptional Ability

The Petitioner stated he "is a professional of exceptional ability, with a degree of expertise significantly above that ordinarily encountered in the business sector." However, the Director did not address the underlying EB-2 classification. In the decision, the Director stated the Petitioner "does not assert nor does the record establish that he is eligible for the EB-2 classification as a member of the professions holding an advanced degree," and indicated that "he must establish that he qualifies as an individual of exceptional ability." Later in the decision, the Director stated that "USCIS will discuss if the beneficiary qualifies for the requested classifications as a member of the professions holding an advanced degree or as an alien of exceptional ability," However, the Director did not provide analysis as to either underlying EB-2 classification. On appeal, the Petitioner contends that the Director erred in classifying him as an advanced degree professional and asserts that he is an individual of exceptional ability.

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification. While we agree with the Director's ultimate conclusion that the Petitioner did not establish that a waiver of the required job offer would be in the national interest, it is appropriate to remand the matter because the Director did not make an initial determination as to whether the Petitioner qualifies as an individual of exceptional ability.[4]

Regarding the Petitioner's claim that he is an individual of exceptional ability, the Director should first determine whether the Petitioner meets at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii), and if so, then conduct a final merits determination.

[3] *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).

[4] The Petitioner did not claim, and the record did not establish, that the Petitioner is an advanced degree professional. For example, the Petitioner's stated endeavor/occupation is a chef and entrepreneur at his own restaurant. The Petitioner has not established that a chef and entrepreneur is a profession as defined by section 101(a)(32) of the Act and 8 C.F.R. § 204.5(k)(2).

Evidence in the form of letter(s)from current or former employer(s) showing that the individual has at least ten years of full-time experience in the occupation for which he or she is being sought. 8 C.F.R. § 204.5(k)(3)(ii)(B).

The plain language of the regulation requires that letter(s) 1) be from current or former employers and 2) establish ten years of *full-time* experience *in the occupation* (emphasis added).

To establish eligibility for this criterion, the Petitioner submitted an employment letter showing that he has worked for the company, [redacted] in a full-time basis from March 2005 to October 2019. Considering the foregoing, the Director should determine whether the Petitioner has sufficiently established "at least ten years of full-time experience in the occupation" as required by the regulation.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The regulation at 8 C.F.R. § 204.5(k)(2) defines a "profession" as an occupation listed at section 101(a)(32) of the Act, 8 U.S.C. §1101(a)(32),[5] or an occupation whose minimum requirement for entry is a U.S. baccalaureate degree or its foreign equivalent.

In support of the criterion, the Petitioner provided receipts as evidence that he is a member of the International Association of Culinary Professionals (IACP) and that he pays an annual membership fee. In addition, he submitted a "Statement" from the chairman of The Panela De Barro Institute of Gastronomy as evidence that he is a contributing member of this organization. The Director should consider whether the Petitioner's submission, without any supporting evidence, such as the membership requirements, is sufficient to establish that IACP and The Panela De Barro Institute of Gastronomy are professional organizations.

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)(F).

In support of this criterion, the Petitioner submitted letters of recommendation from his local government officials, an expert opinion letter, and copies of certificates and awards. Considering the foregoing, the Director should determine whether the Petitioner has sufficiently established he has been recognized for achievements and significant contributions to his industry or field, as required under the criterion.

B. National Interest Waiver

In addition, while we agree with the Director that the Petitioner did not establish he merits a national interest waiver, we also agree with the Petitioner that the Director's decision does not provide adequate analysis under the three prong *Dhanasar* framework.

[5] The occupations listed in this section are architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

An officer must fully explain the reasons for denying a visa petition 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 (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).

The Director determined that the Petitioner's proposed endeavor was of substantial merit, but concluded the Petitioner did not establish that his proposed endeavor had national importance. Although the Director listed the documents submitted by the Petitioner and generally concluded that they were insufficient, the decision does not sufficiently analyze this evidence and explain why it was deficient. The Director should analyze the evidence provided by the Petitioner to determine whether the record sufficiently demonstrates that the endeavor has national importance. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *See Dhanasar*, 26 I&N Dec. at 889. The Director should focus on the Petitioner's proposed endeavor rather than his specific occupation. An endeavor having significant potential on the broader implications for a field or region generally may rise to the level of having national importance for the purpose of establishing eligibility for a national interest waiver. *See generally 6 USCIS Policy Manual*, *supra*, at F.5(D)(l). If the Director concludes that the Petitioner's documentation does not meet the national importance requirements 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 the Petitioner was not well positioned to advance the proposed endeavor.[6] However, on appeal, the Petitioner points out that the Director acknowledged that he was well-positioned in the request for evidence (RFE), but the "denial decision contradicts this by stating [the Petitioner] is not well positioned, without providing a clear rationale for this reversal in stance." The Petitioner further states that "[t]his inconsistency is not only confusing but also indicative of an arbitrary assessment process." We agree. The Director should analyze the evidence to determine if the Petitioner is well positioned to advance the proposed endeavor and consider all 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 must 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.

As to the third prong, the Director did not discuss the evidence weighed or address the Petitioner's specific claims.[7] Without a proper evaluation of the factors identified in *Dhanasar*, the Director's determination for this prong was also insufficient.

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[6] *Dhanasar's* second prong places its focus on the individual. To determine whether they are well positioned to advance the proposed endeavor, we consider factors including, but not limited to: (1) their education, skills, knowledge and record of success in related or similar efforts; (2) a model or plan for future activities; (3) any progress towards achieving the proposed endeavor; and (4) the interest of potential customers, users, investors, or other relevant entities or individuals. *Dhanasar*, 26 I&N Dec. at 890.

[7] 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. In performing this analysis, we may evaluate factors such

III. CONCLUSION

We will remand the matter since the Director's decision did not adequately address the evidence submitted with the petition or in response to the RFE. The Director should issue a new decision containing sufficient analysis of the submitted evidence that affords the Petitioner the opportunity to present a meaningful appeal. The Director may request any additional evidence considered pertinent to the 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.

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as: whether, in light of the nature of the individual's qualifications or the proposed endeavor, it would be impractical either for them to secure a job offer or to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from their contributions; and whether the national interest in their contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, establish 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. *Id.* at 890-91.