U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31110228

Date: MAY 31, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur and management consultant, seeks classification as a member of the professions holding an advanced degree. *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. 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 record did not establish that the Petitioner qualifies for the national interest waiver. The matter is now before us on appeal under 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.

To qualify for a national interest waiver, a petitioner must first show eligibility 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.

Once a petitioner demonstrates EB-2 eligibility, 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 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;

[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).

- The individual is well positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

The Director concluded that the Petitioner qualifies as a member of the professions holding the equivalent of an advanced degree as defined at 8 C.F.R. § 204.5(k)(2) an advanced degree. The issue on appeal is whether 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 determined that the Petitioner had established the substantial merit of his proposed endeavor, but otherwise had not satisfied the three prongs of the *Dhanasar* national interest test.

As explained below, the Director's decision rests on an incorrect information about the Petitioner's proposed endeavor, and we will remand the matter for a new decision based on the record.

The Petitioner earned a bachelor's degree in business management in Brazil in 2012. He ran several businesses in Brazil, including a tax consultancy, a provider of digital marketing services, and a swimming pool business. The Petitioner entered the United States in December 2019 as an F-2 spouse of a nonimmigrant student. In the United States, the Petitioner ran a swimming pool business from 2020 to 2022, and he established a business development company in 2022.

The Petitioner had previously filed a petition on his own behalf in October 2020, with receipt number [redacted] In that petition, the Petitioner sought a national interest waiver based in part on his swimming pool business. The 2020 petition included a statement from the Petitioner that reads, in part: "I believe that my professional experience in Brazil, over the last 10 years, has enabled me to act strongly in the segment of civil construction, but specifically in the segment of fiber pools by commercializing and installing them." The Petitioner later withdrew the petition.

In October 2022, the Petitioner filed a second petition, which is now before us. The Petitioner's "Definitive Statement" submitted with the 2022 petition mentioned his pool business, but only in the context of his past employment history. The record shows that the Petitioner sold his interest in the pool business. In a statement submitted with the 2022 petition, the Petitioner stated that his proposed endeavor is to provide "consulting services" as an "international business developer," through a consulting company that he established in January 2022. The 2022 petition also included a business plan for the new consulting company.

After issuing a request for evidence (RFE) in in June 2023 and considering the Petitioner's response, the Director denied the petition in September 2023. In the denial notice, the Director quoted the Petitioner's 2020 statement about "construction . . . of fiber pools" and stated: "Prior to the issuance of the RFE, the petitioner's proposed endeavor was to construct fiber pools and install them for consumers. Subsequent to the issuance of the RFE, the petitioner's updated endeavor's intention is to 'serve differentiate services' and 'impact the Management Consulting Services industry.'" The Director determined that the Petitioner had made an impermissible material change to the petition, and therefore the evidence concerning the Petitioner's management consulting business is "not . . . probative in determining that the petitioner's proposed endeavor has national importance."

On appeal, the Petitioner states:

> Firstly, it is crucial to emphasize that [the Petitioner's] initial filing [in 2020] was indeed related to pool construction. However, a significant development occurred when [the Petitioner] decided to sell the pool company during the adjudication process, leading to the withdrawal of the initial petition. Subsequently, we refiled the petition with an entirely different focus, which omitted any mention of the pool business.
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> Secondly, USCIS's analysis of the first prong appears to rely on information pertaining to the original pool construction business, which is no longer relevant due to the withdrawal and refiling of the petition.

We agree with the Petitioner that the Director should have considered the present petition on its own merits, based on its own record of proceedings, and that the Director erred by relying on the Petitioner's statements in support of the earlier, withdrawn petition.

Director correctly observed that *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998) does not permit a petitioner to make material changes after a petition has been filed. In *Izummi*, however, we stated that if a petitioner wished to introduce a new plan "which [was] materially different from the original plan, he should have withdrawn the instant petition and . . . file[d] a new" petition. *Id.* at 176. This is what the Petitioner has done in the present case, withdrawing the first petition and filing a new one based on a different proposed endeavor. The September 2022 business plan for the Petitioner's consulting business was part of the petition when the Petitioner filed it in October 2022, and therefore it was not a material change that the Petitioner introduced after the new petition's filing date.

The denial of the petition rested in large part on the Director's conclusion that the Petitioner had materially changed the proposed endeavor after filing the petition. Because the record does not support that conclusion, we will withdraw the Director's decision and remand the matter for a new decision in which the Director will consider the merits of the proposed endeavor described in October 2022.

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