U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33441815

Date: NOV. 5, 2024

Motion on Administrative Appeals Office Decision

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

The Petitioner, a cyber-physical system consultant who claims that he is also an entrepreneur, seeks second preference immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability, as well as a national interest waiver (NIW) of the job offer requirement attached to this EB-2 classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding the Petitioner had not established a waiver of the required job offer, and thus of the labor certification, would be in the national interest, and affirmed the denial on a subsequent motion to reopen and reconsider. We dismissed a subsequent appeal. The matter is now before us on a motion to reopen and reconsider.[1]

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). Upon review, we will dismiss the motion.

II. LAW

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our prior decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). Our review on motion is limited to reviewing our latest decision. 8 C.F.R. § 103.5(a)(1)(ii). We may grant motions that satisfy these requirements and demonstrate eligibility for the requested benefit.

III. ANALYSIS

In our prior appellate decision, incorporated here by reference, we upheld the Director conclusion that the Petitioner did not establish eligibility for a national interest waiver as he did not satisfy the second

[1] Although the Petitioner's Form I-290B, Notice of Appeal or Motion, marks only the box for a motion to reopen, the filing as a whole indicates that the Petitioner seeks both reopening and reconsideration of our prior appeal decision, and as such, we will deem this filing a combined motion.

prong of the adjudicative framework for the waiver under *Matter of Dhanasar*, which requires a petitioner to establish that they are well-positioned to advance their proposed endeavor. 26 I&N Dec. 884 (AAO 2016).

A. Proposed Endeavor

As an initial matter, we note that the Petitioner is listed as a consultant on a research project run by a neuroscientist at a U.S. medical college, and much of his evidence relates to this project. However, the proposed endeavor that forms the basis for the Petitioner's NIW petition is a separate, prospective project for which the Petitioner claims he will be a self-employed entrepreneur who will develop a tool to support the kind of research project on which he has been a consultant.

With respect to the specific proposed endeavor in this case, in the Petitioner's initial January 2021 statement, he stated that he would:

> Build cyber-physical systems to apply recently discovered biomarkers to make real-time identification and minor consciousness progression in brain injury, and more recently, COVID-9 comatose patients.

The Petitioner further explained that his "proposed tool . . . is a composition of interconnected systems that work as one whole, seeking to integrate data collection for real-time data analysis" and that the tool would "assess patients' persistent unresponsiveness from home, an ambulance, and small hospitals" without requiring a physician's presence.

B. Well-Positioned to Advance the Proposed Endeavor

The second *Dhanasar* prong shifts the focus from the proposed endeavor to the individual. *Matter of Dhanasar*, 26 I&N Dec. at 890. Under this prong, to determine whether petitioners are well-positioned to advance the proposed endeavor, 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.*

The Petitioner's initial supporting documentation includes a January 2021 letter of support from D-P-C-, a neuroscientist who is an assistant professor and the head of a research laboratory at a U.S. medical college. In her letter, D-P-C- described her research, explaining that she "has discovered cortical and motor biomarkers critical to precisely measur[ing] consciousness levels," and asserting that the Petitioner has been a consultant on her work. According to D-P-C-, the Petitioner's proposed endeavor will result in a tool "that will contribute to finding signs of residual cognition in those previously diagnosed as [in a] coma" and thus "drastically change recovery trajectories" of certain patients. In a letter dated December 2020, the chief executive officer of [redacted], stated that she was aware of the Petitioner's work "on the design of telecommunication signaling, signaling converters and protocol analyzers, and attested that "he compares favorably with the Product Development and Engineering leaders at her former and current company." Other letters date from 2015 and appear to have been written by U.S. researchers who expressed support for the Petitioner to

come to the United States for meetings to discuss his work as a guest researcher on an unrelated project at [redacted]

On appeal, the Petitioner included a September 2023 letter in which D-P-C- stated that she is in fact the Petitioner's partner in the proposed endeavor, but that neither she nor her colleagues "can serve in an executive or management capacity in the start-up endeavor once capitalization is achieved" due to a conflict of interest due to her established commitments as a principal investigator for several grants at her current employer, the U.S. medical college. As a consequence, D-P-C- attested that "we consider [the Petitioner] as the best candidate for the management responsibilities of the start-up." According to D-P-C-, they are planning to build the company in the next two years, and it is important to designate "a non-faculty person with deep understanding of the cortical biomarkers and entrepreneurial skills to exert this position," and she asserts that the Petitioner "will lead the next steps in the product development which includes building the device." The Petitioner also included documents to support his appeal, including evidence that in [redacted] 2023, D-P-C- and the Petitioner had sought publication of a manuscript and filed an invention disclosure with their employer.

On motion, the Petitioner states that he seeks to amend the underlying erroneous assumption by the Director that he is a biomedical researcher rather than an entrepreneur because, he claims, this left specific evidence unaddressed in considering whether he is well-placed to advance the proposed endeavor. The Petitioner also contends on motion that we erroneously declined to consider certain evidence that he had provided on appeal after we concluded it either post-dated the filing of the petition or otherwise should have been provided in response to a request for additional evidence. He asks that it now be considered on motion, claiming that the evidence was based on his preexisting work or otherwise on a continuum of development of his earlier work and that it addressed his role as an entrepreneur. Finally, on motion, the Petitioner submits additional documents for consideration.

With respect to NIW petitions from an entrepreneur, the Petitioner correctly notes on motion that *Dhanasar* provides that the USCIS policy manual further discusses the types of evidence that an entrepreneur can provide to show that they are well-positioned to advance the proposed endeavor. 6 *USCIS Policy Manual* F.5(D)(4), https://www.uscis.gov/policymanual. Such evidence may include:

- evidence of ownership and role in the U.S.-based entity;
- degrees, certifications, licenses, letters of experience;
- investments (e.g., an investment, binding commitment to invest, or other evidence demonstrating a future intent to invest in the entity by an outside investor, consistent with industry standards);
- incubator or accelerator participation;
- awards or grants
- intellectual property
- published materials about the petitioner, the petitioner's U.S.-based entity, or both
- revenue generation, growth in revenue, and job creation; and
- letters and other statements from third parties

In our prior appellate decision, we discussed the Petitioner's evidence in considering whether he established that he is well-positioned to advance the proposed endeavor. In doing so, we quoted the Director's decision specifically concluding that the Petitioner had not submitted sufficient evidence to

support the plan he provided for his entrepreneurial business endeavor, such as correspondence from potential employers, clients, or customers; evidence that he contacted the entities he sought as potential clients or they had any interest in collaborating with the Petitioner's business; or evidence his business was incorporated in the United States. Therefore, contrary to the Petitioner's assertions, the entrepreneurial aspect of his proposed endeavor was considered by the Director. In our appeal decision, we also noted that the Petitioner's master of science degree in telecommunications and network management, as an advanced degree in a Science, Technology, Engineering, and Mathematics (STEM) field that is tied to the proposed endeavor and related to work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness or national security, is an especially positive factor to be considered along with other evidence for purposes of the assessment under the second prong; however, we pointed out that a degree is not a sufficient basis to determine that he is well positioned to advance his proposed endeavor. *See* 6 *USCIS Policy Manual* F.5(D)(2); *see also Matter of Dhanasar*, 26 I&N Dec. at 891 (relying in part on Dhanasar had two master of science degrees in relevant fields as well as a Ph.D. in finding that prong two was satisfied). We also noted that the Petitioner had presented evidence relating to his past employment in telecommunications but found that this did not reflect his record of success in neuroscience research related to his specific endeavor. With respect to his assertions on motion, we further note the record does not show how the Petitioner's past experience in telecommunications establishes that he is well-positioned to advance the proposed endeavor as an entrepreneur.

The Petitioner also has not provided evidence that he has secured investments in the proposed endeavor or demonstrated his ability to secure funding for his endeavor. In her January 2021 letter of support, D-P-C- stated that the Petitioner "currently serves as a consultant for [her] work, which has been presently funded by the National Institute of Health." However, D-P-C- is referring to funding of her own research and work as the Primary Investigator and head of the laboratory for the research department at her employing institution, rather than to funding for the Petitioner's separate proposed entrepreneurial endeavor. The record does not show that the funding D-P-C- obtained for her research would be used to advance or further the Petitioner's entrepreneurial endeavor, nor has he shown that he has secured funding for his own separate, proposed endeavor.

Regarding his prior work, the Petitioner has not established how his claimed collaboration and alignment with researchers through his work as a consultant on D-P-C-'s grants shows how this advances his proposed endeavor. The Petitioner provided copies of D-P-C-'s own grants showing that she is the primary researcher and point of contact and various e-mails between D-P-C- and other researchers who have expressed an interest in collaborating with D-P-C- or supporting her research. The same evidence does not reflect an interest in the Petitioner's proposed endeavor to build cyber-physical systems to support the kind of research that D-P-C-'s is pursuing under her own grants. We examine the factors set forth in *Dhanasar* to determine whether, for instance, the individual's progress towards achieving the goals of the proposed endeavor, record of success in similar efforts, or generation of interest among relevant parties supports such a finding. *Id.* at 890. Here, the Petitioner has not sufficiently demonstrated a record of success or progress in advancing *his* proposed endeavor, particularly with respect to his record as of the filing date of the petition in 2021, with corroborating evidence.

With respect to the Petitioner's claim on motion that we erroneously failed to consider his appellate evidence, which he asserts was based on his continuing efforts to advance the proposed endeavor, a review of the appellate evidence includes confirmation that D-P-C- had submitted a proposed

manuscript for publication in *Nature Neuroscience* in [redacted] 2023. Although the Petitioner is listed as one of several co-authors, this manuscript appears to relate solely to D-P-C-'s own research rather than the proposed endeavor, and it post-dates the filing of the NIW petition. Additional evidence on appeal included an invention disclosure form that D-P-C- and the Petitioner filed with their employer in [redacted] 2023, over two years after the January 2021 filing date of the NIW petition. To the extent that this evidence relates to the Petitioner's record of success and progress on the proposed endeavor after the filing of the NIW petition, it does not establish the Petitioner's eligibility at the time of filing in January 2021. 8 C.F.R. §103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Moreover, a review of the [redacted] 2023 invention disclosure for the tool that the Petitioner claims he will develop for the proposed endeavor reflects that the Petitioner and D-P-C- checked relevant language agreeing to the following:

> (We) agree this invention is a [redacted] Invention and hereby assign all rights, title and interests in and to this invention to [redacted] I (we) further agree to execute all documents as requested to assign my (our) rights to [redacted] and to any patent application or other statutory form of intellectual property protection filed in connection with this disclosure, and to cooperate with [redacted] in securing protection of the disclosed invention.

As a consequence of the above agreement, the record does not show how the Petitioner will be able to advance the proposed endeavor as an entrepreneur if the technology on which his endeavor relies is in fact owned by the medical college that employs him and his partner, D-P-C-.

The Petitioner's evidence on motion before us includes documents, such as D-P-C-'s 2020 grant application, multiple letters of support from her employer, colleagues, and other researchers with respect to the 2020 grant application, all of which establish that D-P-C- was the Principal Investigator on a project with $2.6 million dollars in funding and that the Petitioner was one of several consultants; however, they do not show that the Petitioner is well-positioned to advance his own endeavor. The remaining evidence the Petitioner submits on motion relating to his own proposed endeavor, including documentation that he and D-P-C- filed a provisional application for a patent with the U.S. Patent and Trademark Office in [redacted] 2023 and sought to participate in their employer's Biomedical Business Plan Challenge in [redacted] 2024, also post-dates the filing of the NIW petition and therefore does not establish the Petitioner's eligibility at the time of filing the instant petition in January 2021. 8 C.F.R. §103.2(b)(1).

III. CONCLUSION

On motion, the Petitioner has not shown that the evidence submitted for the first time on appeal or the evidence now provided on motion establishes that he is well-positioned to advance his proposed endeavor as an entrepreneur as of the filing date of the NIW petition. Although the Petitioner asserts on motion that he was improperly assessed as a researcher under the *Dhanasar* standards, the record does not include the types of evidence to satisfy the second *Dhanasar* prong suggested in the USCIS Policy Manual as applicable to entrepreneurs. Therefore, the Petitioner has not established that he is well-positioned to advance the proposed endeavor as an entrepreneur and, as a consequence, that he

is eligible for the requested classification. Therefore, the motion will be dismissed. 8 C.F.R. § 103.5(a)(4).

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.