U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32653857

Date: SEP. 03, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a security systems and electrical engineer, seeks employment-based second preference (EB-2) immigrant classification as an advanced degree professional or a person of exceptional ability, as well as a discretionary national interest waiver of the job offer requirement attached to this 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 that the Petitioner does not qualify for the EB-2 classification based on exceptional ability or as an advanced degree professional, and the record also did not establish that a waiver of the required job offer, and thus labor certification, would be in the national interest. This matter is now before us on appeal, which we review de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).[1] The Petitioner bears the burden of establishing eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Upon de novo review, we will dismiss the appeal.

I. LAW

To be eligible for a national interest waiver, a petitioner must first establish eligibility for the underlying EB-2 visa classification, as an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A), (B) of the Act; 8 C.F.R. § 204.5(k)(1).

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

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate that they warrant a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions, which states that U.S. Citizenship

[1] This is a second appeal following our prior remand to the Director on the Petitioner's first appeal of the initial denial.

and Immigration Services (USCIS) may, as matter of discretion,[2] grant a national interest waiver if the petitioner establishes that: (1) the proposed endeavor has both substantial merit and national importance; (2) they are well positioned to advance their proposed endeavor; and (3) on balance, waiving the job offer and thus labor certification requirements would benefit the United States. *Id.*

II. ANALYSIS

The Director determined that although the Petitioner has a foreign engineering degree equivalent to a U.S. bachelor's degree, he did not establish that he is an advanced degree professional because the record did not show at least five years of progressive post-degree experience. 8 C.F.R. § 204.5(k)(2), 204.5(k)(3)(i)(B), 204.5(g)(1). As for the EB-2 classification based on exceptional ability, the Director found that the Petitioner met at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), but concluded, upon a final merits assessment, that the record did not demonstrate a degree of expertise significantly above that ordinarily encountered in the security systems industry. 8 C.F.R. § 204.5(k)(2) (defining "exceptional ability"); *see also* 6 *USCIS Policy Manual* F.2, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2 (discussing a two-part exceptional ability framework). On appeal, although the Petitioner summarily reasserts his EB-2 classification eligibility, he does not accurately address or meaningfully dispute the Director's specific findings as they relate to the Petitioner's claimed eligibility for the underlying EB-2 classification.[3]

The remaining issue on appeal is whether he warrants a discretionary national interest waiver under *Dhanasar*'s three-pronged framework. The Director found that the record did not establish that the Petitioner's proposed endeavor has substantial merit or national importance and thus he did not meet *Dhanasar*'s first prong. He alleges that the Director failed to consider all the relevant evidence in evaluating the claimed national importance of the proposed endeavor and failed to provide a reasoned analysis. We conclude that the Petitioner's proposed endeavor has substantial merit, and thus withdraw the Director's finding to the contrary. However, we agree with the Director that the evidence does not establish that the proposed endeavor has national importance as contemplated by *Dhanasar*.

Under the *Dhanasar* framework, the first prong, "substantial merit" and "national importance," focuses on the specific endeavor the Petitioner proposes to undertake. *Dhanasar*, 26 I&N Dec. at 889. The endeavor's merit under this prong may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In assessing whether the proposed endeavor has national importance, we consider its potential prospective impact. *Id.*

The Petitioner intends to work as an electrical engineer and operate his own company that designs, sells, and installs "smart" technology products for homes and offices, including integrated systems that manage automation of various electronics such as smart phones, appliances, TVs, HVAC, and door locks, as well as security monitoring, energy and air quality control, and even lighting and sound.

As an initial matter, the Director found that the Petitioner's business plan and assertions submitted below in response to a request for evidence (RFE) regarding his new position as a chief executive

[2] *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts in holding that USCIS' decision on a national interest waiver is discretionary in nature).

[3] Given our resolution of this appeal on a separate dispositive issue as discussed below, we do not reach the underlying EB-2 classification eligibility here, even if we were to assume a meaningful appeal challenge on this threshold issue.

officer (CEO) materially changed his initially proposed endeavor to work as an independent security systems and electrical engineer previously articulated in his detailed 19-page statement he provided at the time of filing. As the Director noted, petitioners must establish eligibility at the time of filing, and consequently, a petition may not be approved at a future date based on new material facts subsequent to the filing of the petition. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Here, if the Petitioner's RFE response proposes an activity in an entirely different field or occupation, that may be deemed as a material change to the petition that will not be considered in assessing eligibility. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998) (holding that a petitioner may not make material changes to a petition to make otherwise a deficient petition conform to USCIS requirements). However, on appeal, the Petitioner does not address the Director's finding that his newly proposed role as a CEO following the RFE constitutes a material change that impedes USCIS' ability to assess whether the Petitioner's proposed endeavor has national importance.

Even if the proposed endeavor as described in the RFE response simply clarifies the proposed endeavor in the Petitioner's initial statement, the totality of the evidence, including the business plan, does not establish that it has national importance. In determining whether the proposed endeavor has national importance, we consider and look for evidence of the endeavor's potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889-890. Although the proposed endeavor as a security systems and electrical engineer and as CEO of his own company has merit, the record does not demonstrate it would have significant potential to employ U.S. workers, have substantial positive economic impact, broadly impact the industry on national or global level beyond his business and customers, or otherwise have broader economic or societal implications rising to the level of national importance.

In reasserting that his proposed endeavor has national importance, the Petitioner relies on his academic credentials and past experience, as indicated in his resume, statement, business plan, support letters, as well as the same market information included in the industry reports he submitted below noting the significance of the "smart systems" technology field. He further reiterates that, given his background and expertise, which he claims highly qualifies him for employment in the smart home technology design and installation markets and their increasing demands, his proposed business will have substantial positive economic and societal impact. However, the referenced evidence and assertions focus on his experience and skills and relates to *Dhanasar*'s second prong, which pertains to whether he is well positioned to succeed in his endeavor and "shifts the focus from the proposed endeavor to the foreign national." *Id.* at 890. For assessing the national importance of a proposed endeavor under *Dhanasar*'s first prong, we look to its "potential prospective impact." *Id.* at 889. Thus, as relevant here, we assess whether the specific endeavor the Petitioner proposes to undertake has broader national significance, rather than his profession or industry in which he proposes to engage. *Id.* Here, as a CEO of his company, the Petitioner proposes to lead and expand it by utilizing his expertise on the latest smart technologies in distributing and selling innovative products to all potential customers, including electronic wholesalers, retailers, and individual customers. He further asserts that his company will import and also design some of its products and provide installation services. However, the record does not contain any evidence that his claimed innovative products and proposed business methods were or would be adopted by the industry or otherwise have far-reaching implications. Although we acknowledge that the proposed endeavor could have a positive impact on his career and business, he has not persuasively explained, and the record (primarily including his business plan, support letters, and the industry reports which generally highlight the emerging importance and popularity of the use of smart home technologies) does not demonstrate how his proposed work would

have the broader implications for the industry and U.S. economy as he claims, beyond his business and clientele.

The record, for instance, does not show that the proposed endeavor would have "significant potential to employ U.S. workers" or "substantial positive economic effects, particularly in an economically depressed area," which *may* indicate national importance. *Id.* at 890. The Petitioner's business plan includes an organizational chart and a five-year plan listing him as CEO initially overseeing three employees, comprising a sales manager, a production manager, and one installation manager; and by year five, 24 employees including five additional managers, an accountant, six installation technicians, one administrative assistant, and other specialists and representatives. The business plan also projects, based on its own sales forecast, $600,000 of total revenue in year one; and by year five, a total revenue of $5 million, which, along with the other related figures such as expenses, taxes, and net income, is projected to continue to increase in the future. These projections, however, lack corroborating evidence that would objectively substantiate them. Further, while the business plan also includes organizational plans and duty descriptions, the record does not include any evidence-based justifications for the increasing staffing projections and the claimed need for business expansion. Moreover, the Petitioner does not specifically claim, and the record does not indicate, that his business would benefit economically depressed areas. Even assuming the accuracy of the sales projections, the record does not show substantial positive economic effects particularly in an economically depressed area. The Petitioner's reliance on his aspirational business plan, support letters, and general industry reports, thus, does not demonstrate that his proposed endeavor has a significant potential to employ U.S. workers or will have substantial positive economic effects that may indicate national importance.

The Petitioner nonetheless continues to highlight, and we acknowledge, his past accomplishments in Kazakhstan, documented in part by evidence of his patent in Kazakhstan on "utility models" that help monitor air quality and manage systems automation, which he indicates may elevate the importance of his proposed endeavor. However, he does not claim, and the record does not include any evidence, that his foreign patent made any industry-wide impact in the United States, and he does not specify how it relates to or evidences the national importance of his proposed endeavor in the future in this country. It is also unclear if the patented utility models will be used in his current proposed endeavor. The Petitioner also submits for the first time on appeal a filing receipt of a U.S. provisional patent application he filed in 2024 on a heater-comforter system. While this document states that he may mark any products he invents that are covered by the application as "Patent Pending," the record lacks evidence that he has in fact invented, manufactured, or sold any such products. Further, the filing receipt clearly states that his U.S. provisional patent application "will not be examined for patentability and will become abandoned not later than twelve months after its filing date."[4] It is also unclear how this document relates to the Petitioner's specific endeavor and its national importance. The remaining appeal documents are duplicate copies of the same documents he submitted below.

While we acknowledge his desire to contribute to the U.S. smart home and security systems industry, he has not established with specific, probative evidence that his proposed endeavor will have broader implications in his field, have significant potential to employ U.S. workers, or have substantial positive economic or societal effects. *Matter of Chawathe,* 25 I&N Dec. at 375-76 (holding that in reviewing

[4] According to the United States Patent and Trademark Office's public website, "[a] provisional patent application allows [a person] to file without a formal patent claim, oath or declaration, or any information disclosure (prior art) statement." *See* https://www.uspto.gov/patents/basics/apply/provisional-application [last accessed September 3, 2024].

the record we consider not only the quantity, but also the quality, including relevance and probative value, of the evidence). The Petitioner therefore has not met *Dhanasar*'s national importance prong and thus has not established his eligibility for a national interest waiver.

As the identified ground for denial, among others, the Petitioner's inability to satisfy *Dhanasar*'s first prong is dispositive of this appeal, we decline to reach his remaining appeal arguments as they relate to the Director's determination that he did not establish his eligibility for the underlying EB-2 classification or satisfy the second and third *Dhanasar* prongs for a national interest waiver. *See, e.g.*, *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to reach issues that are unnecessary to the ultimate decision).

ORDER: The appeal is dismissed.