U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33407161

Date: SEP. 03, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an environmental consultant, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 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 Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established 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

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. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> > (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who

> because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
>
> > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

We set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) 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.*

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. 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.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's 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.

The third prong requires the 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, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s)

[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 in nature).

considered must, taken together, indicate 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.[2]

II. ANALYSIS

In adjudicating the petition, the Director indicated in her decision that the Petitioner failed to comply with the form instructions and did not submit the required initial evidence to establish his eligibility for the classification. 8 C.F.R. 103.2(a)(1), (b)(8)(ii). However, in doing so, the Director referenced documentation that would be required to establish the second prong of *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), which is not included in the form instructions as referenced by the Director.

Further, the Director does not indicate in the decision whether the Petitioner had demonstrated his qualifications for the underlying EB-2 visa classification. We note that the Director's request for evidence (RFE) indicated that the Petitioner had a bachelor's degree and five years of progressive experience; however, our review of the record on appeal does not support that conclusion. In the Petitioner's statement submitted with his petition, he stated that, "having studied Aquaculture Engineering before de [redacted] Ecuador, where despite I didn't graduate I completed 90% of my career." The Petitioner did not submit evidence of a bachelor's degree, and instead submitted documentation regarding his desire to be classified as an alien of extraordinary ability, which he notes on appeal. As the Director erred in her determination regarding the Petitioner's eligibility for the EB-2 visa classification and did not properly assess the evidence provided by the Petitioner, it is appropriate for us to remand the matter for the Director to determine if the Petitioner has established his eligibility for the underlying EB-2 visa classification in the first instance.

Further, although the Director concluded that the Petitioner had established the substantial merit and national importance of the proposed endeavor, the Petitioner had not established that he was well positioned to advance his proposed endeavor. The Director mentioned the evidence submitted, but only stated that there was "a lack of evidence supporting claims made" in the Petitioner's letters of recommendation but did not provide a specific explanation or analysis of the evidence that was provided.

As we have concluded that the Director erred in her determination that the Petitioner demonstrated his qualification for the underlying EB-2 visa classification and provided an incomplete analysis of the evidence in the record regarding whether the Petitioner is well positioned to advance his proposed endeavor, it is appropriate to withdraw the decision and remand the matter for the entry of a new decision consistent with the foregoing analysis.

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

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.