U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30107431

Date: SEP. 30, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a music teacher and entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this 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 the Petitioner was an individual of exceptional ability, and did not show 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 dismiss the appeal.

I. LAW

To qualify for the underlying EB-2 visa classification, a petitioner must establish they are an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act. 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 the requisite degree of expertise and will substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

[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 individuals of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate 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 U.S. Citizenship and Immigration Services (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.

Id.

II. ANALYSIS

The Petitioner, a music teacher and entrepreneur, seeks an employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. The Director denied the underlying petition, concluding that the Petitioner had not established his qualification for the underlying EB-2 classification as an individual of exceptional ability. The Director further determined that while the Petitioner had established that his proposed endeavor had substantial merit, he had not established its national importance, that he was well positioned to advance the proposed endeavor, and that it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. For these reasons the Director concluded that the Petitioner had not established his eligibility for a national interest waiver as a matter of discretion.

As a preliminary matter, the Petitioner asserts on appeal that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, to [his] detriment." Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing benefit requests. *See Matter of Chawathe*, 25 I&N Dec. at 375*; see also Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions. *See* 1 *USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-manual. While the Petitioner asserts that he has provided evidence sufficient to demonstrate his eligibility for the EB-2 classification and a national interest waiver, he does not further explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

The Petitioner further contends that the record established his qualification for the underlying EB-2 classification as an individual of exceptional ability.[4] He argues that the proposed endeavor has both

[3] *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).

substantial merit and national importance, as required under the first prong of the *Dhanasar* framework. As discussed in the following analysis, upon de novo review of the record in its entirety, the Petitioner has not sufficiently demonstrated that his proposed endeavor has national importance under the first prong of *Dhanasar*. As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that he has not provided adequate reasons or evidence on appeal to overcome the Director's determination that he is eligible for a national interest waiver as a matter of discretion. Since this basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the issue regarding whether the Petitioner qualifies for the underlying EB-2 classification; we additionally decline to reach and hereby reserve remaining arguments concerning his eligibility under the second and third prongs of the *Dhanasar* framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of D-L-S-*, 28 I&N Dec. 568, 576–77 n.10 (BIA 2022) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

Regarding his proposed endeavor, the Petitioner indicated in his professional plan, the Petitioner explained that he intends to "continue developing a project that has already begun, disseminating and teaching rhythms for children and adults in schools, gyms or specific workshops in the country." The Petitioner also proposes to "work in nationally important artistic projects as well as to contribute to the educational standards of music students." The Petitioner submitted a personal plan with his initial application, explaining that he "will offer music therapy and music education courses" through [redacted] his current business, located in [redacted], FL.[5] Per the Petitioner, [redacted] will focus on the following:

- Creation of both an e-commerce store and a physical store, so as to sell musical instruments throughout the United States; the company will also promote music workshops and will also sell teaching materials for study (books and handouts);
- Music therapy (online + in-person);
- Music classes (online + in-person); and
- Music concerts

The Director found that this proposed endeavor had substantial merit but concluded that the Petitioner had not established its national importance, and therefore had not established that it satisfied the first prong of the *Dhanasar* analytical framework. Upon de novo review of the record, we agree. While we do not discuss each piece of the evidence in the record individually, we have reviewed and considered the totality of the record.

The first prong of the *Dhanasar* analytical framework, substantial merit and national importance, focuses on the specific endeavor that the individual 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. *Matter of Dhanasar*, 26 I&N Dec. at 889.

[5] The record includes the business organization documents for [redacted] as well as U.S. Internal Revenue Service documentation establishing its Federal tax ID.

On appeal, the Petitioner contends that the Director's denial did not adequately consider his resume, business plan, letters of recommendation, evidence of his work in the field, and industry articles in the record. Upon review, the Petitioner's resume, letters of recommendation, business plan, and evidence of the Petitioner work both as a percussionist and as a music instructor, detail his skills and prior work in the field. The Petitioner's skills, knowledge, and prior work in his field, however, relate to the second prong of the *Dhanasar* framework, which "shifts the focus from the proposed endeavor to the foreign national." *Id.* at 890. The issue here is whether the specific endeavor that he proposes to undertake has national importance under *Dhanasar's* first prong.

Industry articles and reports in the record discuss the positive societal and economic impacts of arts and culture in the United States, while others note the important contributions that entrepreneurs and immigrants make to the American economy. The Petitioner contends that these articles demonstrate his proposed endeavor's national importance as well as its alignment with Federal initiatives. However, in determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on the "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we further noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Id.* Even if an industry is considered nationally important, the Petitioner must still demonstrate the implications of his specific proposed endeavor within that industry. We acknowledge the Petitioner's argument that musical therapy and education have numerous health and wellness benefits. However, the Petitioner does not offer evidence sufficient to demonstrate the impact of his proposed endeavor within the field of music education. Regarding the Petitioner's assertion that the endeavor aligns with Federal initiatives, he does not identify these initiatives, and it is unclear from the record how the endeavor does so. Further, while the alignment of a proposed endeavor may align with Federal initiatives, this is not sufficient to establish its national importance.

The Petitioner further asserts on appeal that the Director did not adequately consider his business plan, which "allows concrete projections of the benefits he may offer to the U.S." He contends that his proposed endeavor will create both indirect and direct employment opportunities, and through its growth, will create additional jobs for music therapists, educators, and other support staff. The Petitioner's business plan anticipates that his company will initially employ nine personnel and anticipates hiring a total of 20 additional employees over the next four years of operation — four in the second year of operation, seven in the third year, four in the fourth year, and five in the fifth year. Furthermore, the plan offers revenue projections of $1,098,562.50 in year one, $1,402,800.00 in year two, $1,888,425.00 in year three, $2,195,550.00 in year four, and $2,600,062.50 in year five. However, the revenue and the job creation estimates are based upon sales projections which are not supported by details showing their basis or an explanation of how they will be achieved. The Petitioner therefore has not shown that the specific endeavor he proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for our nation. Specifically, he has not demonstrated that his company's future staffing levels and business activity stand to provide substantial economic benefits in Florida or the United States. Further, while Petitioner claims that his company has growth potential, he has not presented evidence indicating that the benefits to the regional or national economy resulting from his undertaking would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *See Dhanasar*, 26 I&N Dec. at 890.

The Petitioner also indicates that the business will be located in a HUBZone designated by the U.S. Small Business Administration. However, he does not offer evidence to establish its participation in the SBA HUBZone program or otherwise demonstrate that his endeavor will have substantial positive economic effects, particularly in an economically depressed area. Finally, the Petitioner contends that he has "already proved his ability to generate benefits of significant importance in the United States, as explicitly shown by his field-related projects in the U.S.," and that his achievements demonstrate the "benefits he can continue to generate to the national economy and domestic job market." It is insufficient to claim an endeavor has national importance or would create a broad impact without providing evidence to substantiate such claims. Additionally, while any basic economic activity has the potential to positively affect the economy to some degree, the Petitioner has not demonstrated how the potential prospective impact of his proposed endeavor stands to offer broader implications in his industry or to generate substantial positive economic effects in the region where his company will operate or in other parts of the United States.

Finally, he contends that proposed endeavor has national importance due to the shortage of workers in his field. However, the Petitioner has not established that his proposed endeavor will create jobs in a manner that will stands to significantly reduce the claimed national shortage. Moreover, shortages of qualified workers are directly addressed by the U.S. Department of Labor through the labor certification process.

For the above stated reasons, the documentation in the record does not establish the national importance of his proposed endeavor as required by the first prong of the *Dhanasar* precedent decision. Therefore the Petitioner has not demonstrated eligibility for a national interest waiver as a matter of discretion.

III. CONCLUSION

The Petitioner has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.