U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF C-K-D-

DATE: AUG. 22, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a teacher and autism spectrum disorder (ASD) education researcher, 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). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she had not established that a waiver of a job offer, and thus of a labor certification, would be in the national interest. The Petitioner appealed the matter to us, and we dismissed the appeal and a subsequent motion to reconsider. [1]

The matter is now before us on a combined motion to reopen and reconsider. On motion, the Petitioner submits a brief stating that she is providing new facts to establish eligibility and that our previous motion decision was incorrect based on the previous record.

Upon review, we will deny the motion.

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[1] In adjudicating the motion to reconsider, we noted that in December 2016, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*) and set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884. Accordingly, in January 2017, we issued a request for evidence (RFE) asking the Petitioner to provide evidence satisfying the three-part framework set forth in *Dhanasar*. In response, the Petitioner submitted a brief and additional documentation, asserting that she is eligible for a national interest waiver under the *Dhanasar* framework. We denied the motion. *See Matter of C-K-D-*, ID# 220146 (AAO May 2, 2017).

## I. LAW

A motion to reopen is based on documentary evidence of new facts, and a motion to reconsider is based on an incorrect application of law or policy. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3).

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. *See* section 203(b)(2) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[2] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the below prongs are met.

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,

[2] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

the factor(s) 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.[3]

## II. ANALYSIS

In denying the Petitioner's previous motion, we found that she had met the first prong of the framework set forth in *Dhanasar* based on her proposed research,[4] but that she had not satisfied the second or third prong. The Petitioner filed the current combined motion to reopen and reconsider contending that our previous motion decision was erroneous. She claims that the current motion includes new facts relevant to her application and supported by documentary evidence establishing that she has met the second and third prongs of the *Dhanasar* framework, that the we based our decision on an incorrect application of law or policy, and that the decision was incorrect based upon the evidence in the record at the time of the decision.

### A. Well Positioned to Advance the Proposed Endeavor

Under the second prong of the *Dhanasar* framework, a petitioner must establish that he or she is well positioned to advance the proposed endeavor. The first issue before us on motion is whether the information and evidence provided establishes that the Petitioner has met the requirements set forth under this prong. We previously determined that it does not.

Specifically, we examined whether the Petitioner demonstrated a record of success or progress in her field, or a degree of interest in her work from relevant parties, that rises to the level of rendering her well positioned to advance her proposed research endeavor of developing and expanding novel instructional and assessment methods to improve the verbal, cognitive, and behavioral skills of ASD students.[5] *See Dhanasar*, 26 I&N Dec. at 890. The Petitioner provided letters of support from her professors at [redacted] discussing her research in autism education. She also provided evidence of her authorship of journal articles and conference presentations; however, they were all published or presented after the filing date of the Form I-140. *See* 8 C.F.R. § 103.2(b)(1), (12). We noted that the Petitioner has not shown that her research has been frequently cited by independent educational scholars or otherwise served as an impetus for progress in the field, or that it has generated substantial positive discourse in the broader academic community. Nor does the record indicate that her findings have been implemented as part of ASD education initiatives, or that her work has affected special education practices.

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

[4] We noted that the record includes evidence that the Petitioner may work as a classroom teacher, an ASD education researcher, or both. We also determined that her proposed teaching activities would not satisfy the first prong of *Dhanasar*. Nonetheless, to the extent that she proposes to conduct ASD education research, we found the evidence sufficient to demonstrate that such research is of national importance because the Petitioner documented both the substantial merit and national importance of such research.

[5] Because the Petitioner's proposed teaching activities do not meet the "national importance" element of the *Dhanasar* framework's first prong, we will limit our analysis under this prong to her proposed research.

We further found that her advisory role in revising the [redacted] in 2016, peer review solicitations (2014 – 2017), and invitations to publish and present her research (2015 – 2017) also post-date the filing of the Form I-140 and that, even if we were to consider this evidence, she has not shown that advising [redacted] regarding its training program and receiving requests to perform peer review and to publish and present her work make her well positioned to advance her proposed research.

While the Petitioner states in the introductory portion of her brief that she is providing "new facts relevant to her application and supported by documentary evidence," she does not identify the new facts being asserted or provide any additional documentation. Rather, the remainder of the brief includes assertions as to how the previously submitted evidence establishes her eligibility. Accordingly, she has not demonstrated through her motion to reopen that she satisfies this prong.

In her motion to reconsider, the Petitioner asserts that our conclusion was based on an incorrect application of law or policy. However, she does not identify the law or policy she claims was incorrectly applied or provide evidence to support her assertion. She also contends that our previous decision was incorrect "based on the evidence in the record of proceedings at the time of the decision," and that the invitation for her to participate in the [redacted] is "solid evidence" that she is well position to advance her research endeavors. She claims that her work with the [redacted] program indicates that "her work has served as an impetus for progress in the field and that it has generated substantial positive discourse in the broader academic community." The Petitioner does not provide evidence in support of this claim, nor does she address our findings that her participation in this program post-dates the filing of the Form I-140 and therefore, does not establish her eligibility under the second prong.

For purposes of a motion to reconsider, the question is whether our decision was correct based on the record that existed at the time of adjudication. Here, arguments the Petitioner offers on motion do not establish that our previous findings were based on an incorrect application of the law, regulation, or USCIS policy, nor does the motion demonstrate that our latest decision was erroneous based on the evidence before us at the time of the decision. While the evidence relating to the [redacted] program, the peer review solicitations, and the invitations to publish and present her research were contained in the record at the time of our decision, they post-dated the date of filing. As stated before, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12). Therefore, the motion to reconsider is denied.

B. Balancing Factors to Determine Waiver's Benefit to the United States

As explained above, 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. Here, the Petitioner contends that we erred in finding that she had not shown an urgent national interest in her research, or demonstrated that she offers contributions of such value that, over all, they would benefit the nation even if other qualified U.S. workers were available. She does not,

however, provide evidence or information to support her claim that our previous determination was erroneous, nor did she identify new facts establishing her eligibility under this prong.

## III. CONCLUSION

The Petitioner has not offered new facts demonstrating her eligibility for the benefit sought, nor has she established that our previous decision was incorrect. As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that she has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

**ORDER:** The motion to reopen is denied.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of C-K-D-*, ID# 687588 (AAO Aug. 22, 2017)