U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-D-

DATE: MAR. 20. 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a mechanical engineer, 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 meets a three-prong framework set forth in our precedent decision relating to such a waiver.

The Texas Service Center approved the Form I-140, Immigrant Petition for Alien Worker. However, the Director of the Texas Service Center subsequently issued a notice of intent to revoke (NOIR) and later revoked the approval of the immigrant petition, finding that U.S. Citizenship and Immigration Services (USCIS) had approved the petition in error. Specifically, the Director determined that although the Petitioner qualified for classification as a member of the professions holding an advanced degree, he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner submits a brief and contends that he is eligible for a national interest waiver.

Upon *de novo* review, we will remand the matter to the Director for further action and consideration.

I. LAW

The Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition . . . ." Section 205 of the Act, 8 U.S.C. § 1155. By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition. 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c). The Board of Immigration Appeals has discussed revocations on notice as follows:

> [A] notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.[1]

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 –
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> (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.

In 1998, under the legacy Immigration and Naturalization Service, we set forth an initial framework for adjudicating national interest waiver petitions in the precedent decision *Matter of New York State Dep't of Transp.* (*NYSDOT*), 22 I&N Dec. 215, 217-18 (Acting. Assoc. Comm'r 1998). Under *NYSDOT*, a petitioner must first demonstrate that the individual seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the individual

[1] *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

We vacated our *NYSDOT* precedent decision in December 2016 and set forth a new framework for adjudicating national interest waiver petitions in *Matter of Dhanasar*, 26 I&N Dec. at 884. The *Dhanasar* precedent decision states that 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. *Id.*

II. ANALYSIS

The Petitioner filed the Form I-140 in May 2016 and the Director approved that petition under the *NYSDOT* analytical framework in June 2016. In May 2018, the Director issued a NOIR indicating that the record did not establish the Petitioner satisfied the requirements of the *Dhanasar* framework. The Petitioner responded to the NOIR with arguments and evidence addressing the *Dhanasar* framework, but the Director determined that he did not meet any of the three prongs set forth in that precedent decision.

At issue in this matter is whether the Director had good and sufficient cause to issue the NOIR; specifically, whether "the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof." *Matter of Ho*, 19 I&N Dec. at 582 (citing *Matter of Estime*, 19 I&N Dec. at 450). Because the instant petition had been approved in June 2016 and therefore was not pending[2] with USCIS when *Dhanasa*r was issued on December 27, 2016, we are remanding for the Director to consider whether the Petitioner met his burden of proof with respect to the *NYSDOT* framework in place at the time the petition was approved. If after further review the Director intends to revoke the approval of the instant petition, he must issue a new NOIR based on the evidentiary requirements that applied under *NYSDOT* and provide the Petitioner an opportunity to offer evidence in response.

III. CONCLUSION

We are remanding the petition for the Director to apply the *NYSDOT* analytical framework to determine whether the Petitioner has established eligibility for the benefit sought, or whether there is good and sufficient cause to issue a new NOIR.

[2] Any subsequent petitions filed by the Petitioner under this classification that were pending when *Dhanasar* was issued in December 2016, or that were filed after that date, should be considered under the newer framework.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision which, if adverse, shall be certified to us for review.

Cite as *Matter of S-D-*, ID# 2106869 (AAO Mar. 20, 2019)