U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17960545

Date: AUG. 23, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a physical therapist, seeks second preference immigrant classification as a member of the professions holding an advanced degree and as an individual of exceptional ability, 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 Nebraska Service Center denied the petition, concluding that the Petitioner had not established his eligibility as a member of the professions holding an advanced degree, as an individual of exceptional ability, and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that he is eligible as a member of the professions holding an advanced degree and for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

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. –

(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.

(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.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *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[2], 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.

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,

[1] 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*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

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) 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 order to show that a petitioner holds a qualifying advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, a petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Director determined that the Petitioner received the foreign equivalent of a United States baccalaureate degree. However, the Director concluded that the Petitioner did not demonstrate at least five years of post-baccalaureate experience. On appeal, the Petitioner does not contest the Director's determination relating to his degree but argues that he has at least five years of experience.

At initial filing, the Petitioner provided the following three employer letters:

- [redacted] – Physical Therapist – July 1, 2016 to Present (letter dated December 19, 2018) – 30 hours per week
- [redacted] – Physical Therapist – February 1, 2011 to February 28, 2013 – 10 sessions per week
- [redacted] – Physical Therapist Aid and Assistant – March 5, 2007 to January 31, 2011 – 30 hours per week

The Petitioner also submitted the following four letters from individuals who received physical therapy treatment:

- [redacted] – January 2011 to March 2015 – "2 to 3 sessions a week"

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

- [redacted] – July 2011 to February 2019 – "[t]he frequency of treatment started as 3 times a week but during 2016 and 2017 it was 5 times a week" and "[s]ince the beginning of 2018 we returned to the session to 3 times a week"
- [redacted] – March 2013 – February 2019 – "2 sessions a week"
- [redacted] – March 2013 – February 2019 – "one session a week"

The Director stated in the request for evidence (RFE):

> According to the evidence you submitted, you have not had five years of full-time progressive, post-baccalaureate experience in your specialty. You received your degree on June 26, 2012. Since June 26, 2012, you have worked part-time in two different clinics. You have also provided some in-home physical therapy sessions to a variety of clients as a self-employed individual. The letter from [redacted] establishes you had approximately 2 years and 172 days of part-time employment. The letter from [redacted] establishes you had approximately two years and 29 days of part-time employment. Even if these two positions were full-time positions, they do not establish you have the required five years of progressive experience as a physical therapist. However, they are not full-time positions, so the calculated time would be even less.
>
> The letter from [redacted] discusses your work experience prior to your degree conferral and in the role of an aide/assistant. It cannot be used to calculate your progressive, post-baccaulareate experience. The various letters from individuals establish that you have provided various levels of in-home care to patients as a self-employed physical therapist during the years between January 2011 and February 2019. However, the evidence you submitted does not establish that you worked full-time in a progressive manner during your self-employment. Thus, it does not appear that you can qualify for the classification as a member of the professions holding an advanced degree.

In response, the Petitioner submitted a revised letter from [redacted] claiming that the Petitioner worked as "a Full-time Physical Therapist" "with an average of 40 hours a week." In denying the petition, the Director concluded:

> The Petitioner received his degree on June 26, 2012. Subsequent to June 26, 2012, he worked in two different clinics prior to the filing date of this petition. He also provided some in-home physical therapy sessions to a variety of clients as a self-employed individual. The two letters from [redacted] indicate he worked from February 1, 2011 to February 28, 2013. The letter submitted in response to the RFE letter clarifies that this work was considered full-time employment. However, he didn't graduate until June 26, 2012. Thus, the amont of time he gained experience with this employer after he graduated equates to approximately 8 months of full-time, progressive, post-baccalaureate experience (June 26, 2012 through February 28, 2013). The letter from [redacted] establishes he had approximately 2 years and 172 days of part-time employment (at 30 hours/week) or the equivalent of 1 year and 10 months of full-time experience. Thus, his work with these two clinics equates to approximately 2 years and 6 months of full-time, progressive, post-baccalaureate experience.

> The four letters from individuals attesting to his work as a self-employed physical therapist during the years between January 2011 and February 2019 establish that the petitioner provided various levels of in-home care to patients. However, the letters the petitioner submitted do not establish that he worked full-time in a progressive manner during the entire period of his self-employment. In fact, during a portion of the time frame in which he indicated he was self-employed (March 2013 to January 2019), he was working part-time for [redacted] (July 2016 to January 2019). The four letters from his patients do not establish he had full-time experience as a self-employed physical therapist and the petitioner did not submit any other evidence of his self-employment . . . .

On appeal, the Petitioner argues:

> We would like to point that for 5 years and 10 months, [the Petitioner] worked concurrently at [redacted], which was a part-time job and as a home care physical therapist in the remaining hours. This means that during all these years, [the Petitioner] worked both as a part-time employee for [redacted] as well as providing home care during the other part of the day. In total, when adding the time [the Petitioner] worked part-time for [redacted] and providing home care for private patients, from March 2013 to January 2019, he demonstrates a total of 5 years, 10 months of full-time experience working as a physical therapist.

The record, however, does not support the Petitioner's claim that he "worked concurrently" at [redacted] and as a home care physical therapist for 5 years and 10 months. As indicated above, the letter from [redacted]s states that the Petitioner worked from July 1, 2016 to Present (letter dated December 19, 2018), a period of approximately 3 years and 5 months, not 5 years and 10 months. Furthermore, the letters from the private individuals do not provide sufficient information to determine the number of hours he worked. While the letters indicate the number of weekly sessions, they do not specify the length of those sessions to determine how much he worked on a part-time basis.

The Petitioner further contends:

> When adding the time worked previously at [redacted], from the date of his graduation in May 2012 to February 2013, we can add another 8 months of progressive full-time experience working as a physical therapist, for a grand amount of 5 years and 9 months of progressive full-time experience working as a physical therapist post his graduation.

As discussed above, the Petitioner claims to have 5 years and 10 months of combined [redacted]/self-employment and then adds 8 months of [redacted] employment, for a "grand amount of 5 years and 9 months." The Petitioner has not sufficiently explained how he goes from 5 years and 10 months, adds 8 months, and comes up with 5 years and 9 months – one month less from his [redacted]/self-employment employment claim.

Furthermore, the Petitioner has not established how working full-time to working part-time jobs demonstrates progressive post-baccalaureate experience in the specialty consistent with the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). The Petitioner has not shown that he has advanced, through employment, in his physical therapy profession.

Without further information and evidence from his employers, the Petitioner has not established that he has at least five years of progressive post-baccalaureate experience in physical therapy to constitute the equivalent to an advanced degree in that specialty. *See* 8 C.F.R. § 204.5(k)(2) and 8 C.F.R. § 204.5(k)(3)(i)(B).[4]

III. CONCLUSION

The Petitioner has not established that he satisfies the regulatory requirements for classification as a member of the professions holding an advanced degree. In addition, we need not reach a decision whether, as a matter of discretion, he is eligible for or otherwise merits a national interest waiver under the *Dhanasar* analytical framework. Accordingly, we reserve this issue.[5] 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.

[4] The Petitioner does not address the Director's determination regarding his eligibility as an individual of exceptional ability, nor does he argue his eligibility for such classification on appeal. Accordingly, we deem this previous claim to be waived. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived).

[5] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *see also Matter of L-A-C-*, 26 I&N Dec. 516, n.7 (declining to reach alternate issues on appeal where an applicant is otherwise ineligible).