U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 14759499

Date: DEC. 01, 2021

Appeal of Texas Service Center Decision

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

The Petitioner, an industrial designer, seeks second preference immigrant classification as a member of the professions holding an advanced degree and/or 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).

After initially approving the petition, the Director of the Texas Service Center revoked the approval, concluding that the petition had been approved in error and that the record did not establish that the Petitioner was eligible for and otherwise merited a national interest waiver of the classification's job offer requirement. In addition, the Director found that the Petitioner made a willful misrepresentation of a material fact. On appeal, the Petitioner asserts that she is eligible for a national interest waiver, and disputes the finding of fraud or willful misrepresentation.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. 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. –
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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.

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.[1] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a 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.[2]

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.

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[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*). Although the Petitioner filed her petition prior to our issuance of the *Dhanasar* precedent decision, since it was pending at the time that the *Dhanasar* decision was issued, the Director issued a Request for Evidence (RFE) and provided her with an opportunity to submit additional evidence under this new standard. The Petitioner timely responded to this RFE with additional evidence.

[2] To establish that it would be in the national interest to waive the job offer requirement, a petitioner must go beyond showing their expertise in a particular field. The regulation at 8 C.F.R. § 204.5(k)(2) defines ·'exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute. individuals of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given petitioner seeks classification as an individual of exceptional ability, or as a member of the professions holding an advanced degree, they must go beyond demonstrating a degree of expertise significantly above that ordinarily encountered in their field of expertise to establish eligibility for a national interest waiver. *See Dhanasar,* 26 I&N Dec. at 886 n.3.

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]

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 intent to revoke, would warrant such a denial.[4]

II. ANALYSIS

The Petitioner is an industrial designer who has specialized in the area of exhibition booth design. She earned a bachelor of fine arts degree in industrial design from [redacted] University in 1997, and a master of business administration degree in marketing from [redacted] University in 2003. The Director concluded that she qualifies as a member of the professions holding an advanced degree, and we agree.[5] The remaining issues therefore concern her eligibility for a national interest waiver and the Director's finding of willful misrepresentation of a material fact.[6]

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

[4] *Matter of Ho*, 19 I&N Dec. 592, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). Upon the proper issuance of a notice of intent to revoke for good and sufficient cause, the petitioner bears the burden of proving eligibility for the requested immigration benefit. *Id.* at 589.

[5] Since the Petitioner has established that she is a member of the professions with an advanced degree, we need not analyze her claim to qualify as an individual of exceptional ability.

[6] We note that the Petitioner filed her petition on January 20, 2015 under the previous *NYSDOT* standard for national interest waivers. However, the Director issued a second request for evidence (RFE) on May 15, 2017 to advise the Petitioner of the new *Dhanasar* standard and allow her an opportunity to respond and provide additional evidence.

A. Substantial Merit and National Importance of the Proposed Endeavor

Initially, the Petitioner described her endeavor as "involved in the design, deployment and strategic utilization of marketing booths for different types of business in a variety of trade shows and exhibitions..." She confirmed her proposed focus on exhibition booth designs in response to the Director's initial RFE, which sought further evidence in support of the previous *NYSDOT* standard for national interest waivers, and did not provide further information regarding her prosed endeavor in response to the second RFE under the *Dhanasar* standard. The Director initially approved her petition based upon this proposed endeavor.

In his notice of intent to revoke (NOIR), the Director stated that, after review, the substantial merit of this proposed endeavor had been established. However, he went on to state that the Petitioner did not show how her proposed endeavor would benefit the industry or field or have broader implications, as much like the petitioner's teaching activities in the *Dhanasar* decision, her work would only directly benefit her employer and clients. This conclusion was based upon the Petitioner's description of her proposed endeavor at the time of filing, and in response to the Director's initial RFE. We note that in response to the Director's second RFE, which was issued to allow the Petitioner to respond and provide further evidence under the new *Dhanasar* framework, she did not submit new evidence or address her eligibility under this new framework. The Director therefore issued the NOIR for good and sufficient cause.

The Petitioner stated for the first time in her response to the Director's NOIR that her proposed endeavor "is to revitalize public marketplaces throughout the United States." She included a section from a book on farmer's markets in the United States in her response, which touts the positive public opinion regarding farmer's markets and concludes that public spaces should be designed with these markets in mind. The Director noted in his decision that although this evidence shows the positive effects of the revitalization of public markets, the Petitioner's description of her proposed endeavor was not sufficiently detailed to show that her work would have the same effect. Further, the Director concluded that the evidence submitted in response to the NOIR did not demonstrate that the Petitioner's proposed endeavor would have national or even global implications in the industrial design field, or that it would offer substantial positive economic effects, and thus failed to show the endeavor's national importance.

On appeal, the Petitioner includes the same evidence she presented in response to the NOIR regarding public markets, a copy of which also comprises the majority of the section of her brief concerning the first prong, and again concludes by stating that "because revitalizing public markets creates positive effects in urban design and public health, my proposed endeavor has national importance for the United States." However, as stated in *Dhanasar*, 26 I&N Dec. at 889, the first prong of the framework focuses on the specific endeavor that a petitioner proposes to undertake. Therefore, broad statements such as this about the national importance of a particular field are insufficient to demonstrate that a petitioner's specific proposed endeavor meets the first prong.

In addition, because the Petitioner's proposed endeavor lacks sufficient detail, such as specifics about design projects she would undertake, we are unable to determine that this work would be of national importance. We note that she submits on appeal an email from an executive at a design firm in

which provides "branding strategy and customer experience as well as architecture and interior design for various type of projects." The executive thanks her for applying for a position with the firm, but does not name a specific position or type of work that the Petitioner would potentially perform for this employer. Although a job offer is not required in conjunction with a petition for a national interest waiver, this email serves as an additional example of the lack of specificity in the record regarding the Petitioner's proposed endeavor. Accordingly, she has not established that she meets the first prong of the *Dhanasar* framework.

B. Whether the Petitioner is Well Positioned to Advance the Proposed Endeavor

In the second prong of the *Dhanasar* framework, we determine whether the petitioner has established that they are well positioned to advance the endeavor, in terms of a number of factors including education, experience, record of success, plan for future activities, and the interest of relevant entities or individuals in the proposed endeavor. As stated above, the record shows that the Petitioner holds an advanced degree with a specialization in marketing, as well as a degree in industrial design, and thus meets the educational requirements as a member of the professions with an advanced degree. However, this education by itself is not sufficient to demonstrate that she is well positioned, as a petitioner seeking a national interest waiver must go beyond establishing that they possess a degree of expertise significantly above that ordinarily encountered in the field.[7]

In reviewing her experience in his revocation notice, the Director stated that the record lacks evidence of the Petitioner's specific roles in projects listed on her curriculum vitae, and thus does not demonstrate a record of success in her field. He also noted that the evidence from the Petitioner's portfolio did not provide objective information about the success of the exhibition projects on which she worked, and concluded that the record did not show that she was well-positioned to advance her endeavor.

On appeal, the Petitioner submits additional evidence, some of which includes photographs of exhibition booths similar to those previously submitted in her portfolio. These photographs provide further information about some of the Petitioner's projects represented in her portfolio. According to a previously submitted a certificate of employment from she was employed as director of the company's design planning team from March 1, 2000 to August 8, 2014.[8] We note that several of the photographs in the Petitioner's portfolio show this company's logo.

The record also includes copies of articles written by the Petitioner in 2012, in which she identifies herself as the department head for and describes several exhibition projects she lead, including one for the Korean Navy. Although she writes that these projects were successful in that her clients were satisfied with the booths, the record does not include independent verification of the projects' success from those clients. We also note that the record does not include information concerning *Juil News*, the periodical in which these articles were published, such as its circulation or whether it is a professional publication in the Petitioner's field. This evidence does not therefore demonstrate that others in her field considered these projects to be successful.

[7] *See Dhanasar,* 26 I&N Dec. at 886 n.3.

[8] We note that the CEO of the company as listed on the certificate is the Petitioner's husband.

Other evidence in the record regarding the Petitioner's work as an industrial designer includes a reference letter from [redacted] who writes that he served as CEO for [redacted], "which was an environmental design company," during the time the Petitioner was employed there. His letter does not specify the dates of the Petitioner's employment, which the Petitioner's curriculum vitae indicates was 1998-2000. He describes three projects completed by her, including the design of a logo for a university's anniversary, the design of "street furniture," and as "one of the main designers of '[redacted]' Although he concludes the letter by stating that the Petitioner is "one of the most talented individuals who are capable of balancing art and science," he does not elaborate on whether these projects were successful.

The evidence discussed above serves to demonstrate the Petitioner's experience in the design of exhibition booths and related physical space design and branding, but does not show a record of success in her updated and slightly related endeavor of revitalizing public spaces such as markets. Although she highlights projects in her portfolio which she states involved "the revitalization of traditional markets," the evidence relating to these projects consists only of a few photographs and very brief descriptions, and does not include details concerning the scope of the projects or her role in them.

Regarding her plan for future activities, we again refer to the previously discussed email from a [redacted] design firm. As we stated above, this evidence provides no detail regarding the position for which she applied or any other positions the firm indicates it may be willing to offer her. As such, the email does not show interest from potential employers in her pursuit of the revitalization of traditional marketplaces, nor is there additional evidence in the record regarding her plans to advance that endeavor.

Upon consideration of the evidence as detailed above, we conclude that the Petitioner has not established that she is well-positioned to advance her endeavor, and therefore does not meet the second prong of the *Dhanasar* framework.

Since the Petitioner has not established that she meets the first and second prong of the *Dhanasar* framework, she is not eligible for a national interest waiver and we need not consider whether, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

III. WILLFUL MISREPRESENTATION OF A MATERIAL FACT

Noncitizens who fraudulently or willfully misrepresent material facts in immigration proceedings render themselves inadmissible to the United States. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Misrepresentations are willful if they are "deliberately made with knowledge of their falsity." *Matter of Valdez*, 29 I&N Dec. 496, 498 (BIA 2018) (citations omitted). A misrepresentation is material when it has a "natural tendency to influence, or [be] capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* (citation omitted).

In making a finding of inadmissibility under section 212(a)(6)(C)(i) of the Act, there must be evidence in the record showing that a reasonable person would find that a noncitizen used fraud or that he or

she willfully misrepresented a material fact in an attempt to obtain a visa, other documentation, admission into the United States, or any other immigration benefit. 8 USCIS Policy Manual J.3(A)(1), https://www.uscis.gov/policymanual.

Here, the record includes a reference letter purportedly from [redacted] of [redacted] University in which he describes several of the Petitioner's exhibition projects and their success. However, when [redacted] was contacted by the U.S. Embassy in Seoul, Korea regarding the letter, he stated in a telephone interview that he did not write a recommendation letter for the Petitioner and did not know which exhibitions or events she had worked on, including those described in detail in the letter. He also stated that he got to know the Petitioner through a college friend in the mid-1990s and that they only briefly worked together. Based on this information, and on the review of the national importance of her proposed endeavor discussed above, the Director issued a NOIR.

In responding to the NOIR, the Petitioner provided a statement from [redacted] in which he wrote that he did write the initial letter but was caught by surprise when contacted by the consular officer and could not remember writing the letter or the details due to the passage of time. However, the Director noted in his decision to revoke approval of the petition that this statement did not reaffirm the professor's description of exhibition booth projects described in the initial letter, and therefore found that the initial letter was fraudulent.

On review, we note that [redacted] also indicates in his statement submitted in response to the NOIR that he "let [the Petitioner] teach the students" at [redacted] University from 2006 to 2011 based upon his knowledge of her work when their employers collaborated on projects in the late 1990s. He further states that he explained during the call from the U.S. Embassy in Seoul that he did not clearly remember writing the recommendation letter at the time of the call and was distracted by students, and that the officer must have misunderstood that he did not write the letter. However, this statement conflicts with the responses he gave to the U.S. Department of State. There, the officer's report clearly reflects that [redacted] stated during the call that the Petitioner never approached him about a recommendation letter, that he never wrote such a letter, that he was unaware of the Petitioner's intention to immigrate to the United States (specifically mentioned in the letter), and that he was unaware of details in the letter regarding specific projects undertaken by the Petitioner. *See United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). Also, records made by public officials in the ordinary course of their duties are generally deemed to evince "strong indicia of reliability." *See Felzcerek v. I.N.S.*, 75 F.3d 112, 116 (2d Cir. 1996). Accordingly, absent evidence to the contrary, we must presume that as public officials, the U.S. Department of State officer properly discharged their duties in writing the report, and accurately recorded [redacted]s statements during the telephone interview.

In addition, in his new statement, [redacted] does not explain the contradictions between the two statements. He does not contest the consular officer's report of other statements he made during the telephone call, including that he was unaware of the Petitioner's intent to immigrate to the United States and was not familiar with her projects, despite the letter's statements that it was because of his knowledge of her work that he hired or recommended her as an instructor at [redacted] University. Moreover, he does not verify his knowledge of much of the detailed information provided

in the recommendation letter concerning specific projects undertaken by the Petitioner, nor does he explain his statement in the interview that he and the Petitioner "only briefly worked together" in the 1990s despite more recently having hired or recommended her as an instructor at [redacted] University for five years. The unresolved inconsistencies between the information in the letters and [redacted]'s interview with consular officers do not support a finding that the letter and its contents are authentic.

On appeal, the Petitioner asserts that she "did not forge [redacted]'s letter," and refers to his statement submitted in response to the Director's NOIR, which has been discussed above. She also refers to the additional photographs she submits on appeal, noting that they are sufficient to show that statements in the initial letter describing her projects are accurate. However, while other evidence in the record is sufficient to establish that the Petitioner was involved in the projects described in the letter, this evidence does not explain [redacted]'s lack of knowledge about the projects when asked, or the other inconsistencies noted above.

The "Penalties" section at page 9 of the "Instructions for Petition for Alien Worker" corresponding to the instant petition includes this warning:

> If you knowingly and willfully falsify or conceal a material fact or submit a false document with your Form I-140, we will deny your Form I-140 and may deny any other immigration benefit. In addition, you will face severe penalties provided by law and may be subject to criminal prosecution.

Further, the "USCIS Compliance Review and Monitoring" section on page 9 of the instructions for Form I-140 states, in part:

> By signing this form, you have stated under penalty of perjury (28 U.S.C. 1746) that all information and documentation submitted with this form are complete, true, and correct. You also authorize the release of any information from your records that USCIS may need to determine eligibility for the benefit you are seeking and consent to USCIS verifying such information.

In submitting the initial letter purportedly from [redacted] with her petition, the Petitioner knowingly submitted a false document, and therefore willfully misrepresented a fact. Since the contents of that letter were meant to not only confirm that she completed certain exhibition projects, but that an expert in her field considered those projects to be successful and placed her as "one of the most talented individuals in South Korea," it was material to whether she was well positioned to advance her proposed endeavor under the second prong of the *Dhanasar* framework.[9] We therefore agree with the Director and conclude that [redacted]'s statement is insufficient to overcome the finding that the Petitioner submitted with her petition a document which she knew to be false and, as it was intended to support her claim to a record of success in her field, was material to her eligibility for a national interest waiver.

[9] We note that it was also material to her eligibility under the previous *NYSDOT* framework in support of which it was initially submitted.

IV. CONCLUSION

The Petitioner has established that she qualifies as a member of the professions holding an advanced degree. However, she has not shown that her proposed endeavor is of national importance, and that she is well-positioned to advance her proposed endeavor. She has not therefore established that she is eligible for or otherwise merits a national interest waiver as a matter of discretion. In addition, she has not overcome the Director's finding that she fraudulently or willfully misrepresented a material fact in submitting the letter claimed to be written and signed by [redacted].

ORDER: The appeal is dismissed.