U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10066460

Date: JAN. 19, 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 pianist, 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).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she had not 1) established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest and 2) submitted a properly completed Form ETA 750B, Application for Alien Employment Certification, or parts J, K, and L of Form ETA 9089, Application for Permanent Employment Certification, as required by 8 C.F.R. § 204.5(k)(4)(ii).

On appeal, the Petitioner submits additional documentation and a brief asserting that the Beneficiary is eligible 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 withdraw the Director's decision and remand the matter for further review of the record and issuance of a new decision.

I. LAW

To establish eligibility for a national interest waiver, *a petitioner must first demonstrate qualification for the underlying EB-2 visa classification* (emphasis added), 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.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

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

> *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.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
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> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition, to demonstrate eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

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* (emphasis added), U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion,[2] grant a national interest waiver if a 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.[3]

II. ANALYSIS

The Petitioner is a pianist and her proposed endeavor is [redacted] music concert performance." In this matter, the Director determined that the Beneficiary qualifies as a member of the professions holding an advanced degree and that her proposed endeavor has substantial merit, but concluded that she did not meet any of three prongs set forth in the *Dhanasar* analytical framework.

As an initial matter, we must address three issues. First, after the initial filing was rejected, the Petitioner did submit a signed Form ETA 9089 with Parts J, K, and L completed. 8 C.F.R. § 204.5(k)(4)(ii). Accordingly, we withdraw the Director's finding on this issue. Second, while we agree with the Director that "the submission of a single translation certification that does not specifically identify the document or documents it purportedly accompanies does not meet the requirements of the regulation at 8 C.F.R. § 103.2(b)(3)," we note that even if we were to consider these two awards,[4] they would not alter our ultimate conclusion. Third, the Petitioner has the burden of proof to establish eligibility for the requested benefit at the time of filing. *See* 8 C.F.R. § 103.2(b)(1); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (providing that "Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts."). Therefore, we will not consider evidence, such as the Beneficiary's job offer to be an accompanist for her alma mater, that occurred after the date of filing.

As noted above, the Director concluded that the Petitioner qualifies for EB-2 classification as a member of the professions holding an advanced degree. However, the Petitioner must establish that she not only holds a qualifying advanced degree (or the equivalent), but also that she is a member of the professions as defined by section 101(a)(32) of the Act and 8 C.F.R. § 204.5(k)(2). Here, section 101(a)(32) of the Act does not include pianists or musicians in the list of professions, and the Petitioner has not established that a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation, as required by 8 C.F.R. § 204.5(k)(2). Accordingly, we withdraw the Director's finding on this issue and remand the matter to the Director to determine anew whether the Petitioner qualifies for EB-2 classification.

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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*).

[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).

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

[4] The awards were from 2010 (Piano – [redacted] Category – 2nd Prize – [redacted] Music Competition) and 2011 (Piano – [redacted] University – [redacted] – 1st prize – [redacted] Music Competition).

Regarding the Petitioner's remaining claim of eligibility under *Dhanasar*'s first prong, national importance, we agree with the Director's conclusion. The relevant question is not the importance of the field, 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 explained 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.* We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890.

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement, we look to evidence documenting the "potential prospective impact" of her work. Although the Petitioner's statements reflect her intention to promote a valuable cultural art form in the United States, she has not offered sufficient information and evidence to demonstrate that the prospective impact of her proposed endeavor rises to the level of national importance. In *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893. Similarly, the record in this matter does not demonstrate that the Petitioner's proposed endeavor stands to sufficiently extend beyond her immediate audience such that it would impact U.S. cultural interests or our country's [redacted] music industry more broadly at a level commensurate with national importance.

Furthermore, while the Petitioner asserted that her [redacted] music works can be applied to increase the competitiveness of the American economy by producing and exporting more intellectual property products to the world," she has not provided sufficient evidence to support such a conclusory statement. In addition, she has not demonstrated that her specific proposed endeavor has significant potential to employ U.S. workers or otherwise offer substantial positive economic effects for our nation. Without sufficient information or evidence regarding any projected U.S. economic impact or job creation attributable to her future work, the record does not show that benefits to the U.S. regional or national economy resulting from the Petitioner's projects would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890. Accordingly, the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework.

For the reasons discussed above, we are remanding the petition for the Director to consider whether the Petitioner qualifies for EB-2 classification, the threshold determination in national interest waiver cases. The Director may request any additional evidence considered pertinent to the new determination.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and entry of a new decision.