U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 15942439

Date: JULY 15, 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 flight simulator engineer, 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).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner qualifies for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

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 withdraw the Director's decision and remand the matter for further consideration and the entry of a new decision consistent with the following analysis.

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 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.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating 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). This, however, is only the first step, and the successful submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for this classification.[1] When a petitioner submits sufficient evidence at the first step, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the beneficiary is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(i)(3)(i).

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.[2] *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

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*, PM-602-0005.1 (Dec. 22, 2010).

[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 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, 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

The Petitioner was previously employed as a flight simulator maintenance technician in his home country and is currently employed in the United States in the position of "simulator lead engineer." Although the Petitioner initially claimed eligibility for the EB-2 classification claims to be eligible as an individual of exceptional ability, he altered that claim in his response to the Director's request for evidence (RFE), claiming that he is eligible as both a member of the professions holding an advanced degree and as an individual of exceptional ability and that he merits a national interest waiver of the job offer requirement.

A. Eligibility for the Underlying EB-2 Classification

In his initial submission, the Petitioner provided his educational credentials and an educational evaluation report stating that he earned "the equivalent of an associate's degree in electrical engineering technology from a regionally accredited institution in the United States." At the time of filing, the Petitioner did not claim or provide evidence showing that he was eligible for the EB-2

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

classification as a member of the professions holding an advanced degree and instead, based his EB-2 eligibility on the claim that he has exceptional ability. In the RFE, the Director pointed to multiple evidentiary deficiencies, which led to the determination that the Petitioner did not meet at least three of the criteria required to qualify for the EB-2 classification as an individual possessing exceptional ability. Although the RFE response included additional evidence that the Petitioner provided to address the evidentiary deficiencies noted in the RFE, the Director did not evaluate the evidence that pertained to the Beneficiary's claimed exceptional ability and instead concluded that the Petitioner qualifies as a member of the professions holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(2). Despite the Petitioner's claim that he "actually holds the equivalent of a U.S. Bachelor's Degree," the record lacks corroborating evidence to that claim. In fact, the record shows that the Petitioner earned an associate's degree, which falls short of the U.S. bachelor's degree or a foreign equivalent degree required to qualify as a member of the professions holding an advanced degree. Furthermore, the decision does not include an analysis showing that the Petitioner's education included the theoretical and practical application of specialized knowledge required at the professional level of the occupation that, combined with professional experience and achievements, could be considered equivalent to a bachelor's degree. *See Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

In light of the above, we disagree with the Director's determination that the Petitioner established eligibility for the EB-2 classification as a member of the professions holding an advanced degree. Further, although the Petitioner provided additional evidence to show that he merits EB-2 visa classification as an individual of exceptional ability, it is unclear whether the Director considered that evidence and if so, whether that the evidence was sufficient to support the Petitioner's claim.

As previously noted, the Petitioner's request for a national interest waiver cannot be approved unless he first demonstrates qualification for the underlying EB-2 visa classification. Therefore, the Director should consider whether, in support of his qualification as a member of the professions holding an advanced degree, the Petitioner has submitted sufficient evidence demonstrating that he has the required educational credentials, which cannot be substituted by years of work experience. Alternatively, if the Petitioner has not established his qualification as a member of the professions holding an advanced degree, the Director should consider whether the Petitioner has submitted sufficient evidence to establish that he is an individual of exceptional ability and that he merits EB-2 visa classification on that basis.

B. Eligibility for a National Interest Waiver

In response to the RFE, the Petitioner provided a personal statement in which he stated that he is a flight simulator engineer with 24 years of professional experience, which commenced after he earned an associate's degree in "electrical technology." The Petitioner described the positions he held since earning his associate's degree and provided the following information about his proposed endeavor:

> My goal in having a permanent visa to live and work in the USA is to continue to develop my technical skills, improve my knowledge and share my experience with flight simulator maintenance, being able to teach and train new technicians and engineers in independent training centers or aviation maintenance schools, as well as teaching at colleges that want to open courses for this untapped sector.

In the denial, however, the Director determined that the Petitioner did not explain his "specific undertaking," thereby precluding a comprehensive analysis of the Petitioner's endeavor within the *Dhanasar* three-prong framework. We disagree. Although the Director correctly highlighted the Petitioner's burden to identify a "specific undertaking," we conclude that the Petitioner in this instance met that burden, stating that his proposed endeavor would be comprised of multiple components, including flight simulator maintenance and sharing his knowledge on this subject matter by teaching and training new technicians in a variety of venues. Whether this endeavor merits a national interest waiver is a matter that should be determined by applying the *Dhanasar* framework within the context of a comprehensive analysis of the Petitioner's supporting evidence. Because the denial did not include such an analysis, it cannot be affirmed.

In sum, the Director did not adequately explain the deficiencies in the evidence. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). Therefore, on remand, the Director should consider the Petitioner's proposed endeavor and then analyze the evidence submitted in support of that endeavor under the *Dhanasar* framework to determine whether he is eligible for a national interest waiver.

ORDER: The Director's decision is withdrawn and the matter is remanded for further consideration and the entry of a new decision consistent with the above analysis.