U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18967925

Date: OCT. 29, 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 marketing manager, seeks second preference immigrant classification as an individual of exceptional ability in the sciences, arts or business, 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 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. Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center determined that the Petitioner qualifies for the underlying classification and that her proposed endeavor has substantial merit. Nevertheless, the Director denied the petition, concluding that the evidence did not establish that the proposed endeavor is of national importance, that she is well positioned to advance her endeavor, or that a waiver of the requirement of a job offer would be in the national interest. Accordingly, the Director determined that the Petitioner had not established eligibility for a national interest waiver.

The matter is now before us on appeal. The Petitioner reasserts her eligibility, arguing that the Director did not properly weigh the evidence and erred in the decision.

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. LEGAL FRAMEWORK

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 –
>
> (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, 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).

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). 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). Dhanasar states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may grant a national interest waiver as matter of discretion. See also Poursina v. USCIS, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature). As a matter of discretion, the national interest waiver may be granted 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. See Dhanasar, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

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 [individual] 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 [individual] 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 [individual] 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 concluded that the Petitioner qualifies for the underlying classification. The record contains evidence that the Petitioner earned a four-year foreign degree in social communition in 2006. In support of the U.S. equivalency of this foreign education, the Petitioner submitted an evaluation from [redacted] evaluator, [redacted] Because USCIS does not accept equivalency evaluations of work experience, we examine the evaluation for the academic equivalency portion of the evaluation only. The evaulation largely contains templated language found in numerous evaluations provided by other evaluation service providers and submitted on behalf of other petitioners. The only information specific to the Petitioner's education is a bulleted list of several courses from the Petitioner's transcript. This list and the evaluator's conclusions following it are alone insufficient to establish the U.S. equivalency of the Petitioner's education. To illustrate, the evaluator lists some of the Petitioner's courses including "introduction to journalism," "introduction to radio and television," and "history of advertising in Brazil." The evaluator then concludes that these courses are requisite components of a bachelor's degree education in the United States. It is not apparent how the evaluator arrived at the conclusion that "history of advertising in Brazil," for example, is a general studies course or that it is a requisite component of U.S. bachelor's degree programs. Accordingly, we conclude that this evaluation is of little probative value in this matter.

We may, in our discretion, use an evaluation of a person's foreign education as an advisory opinion. Matter of Sea, Inc., 19 I&N Dec. 817, 820 (Comm'r 1988). However, where an opinion is not in

accord with other information or is in any way questionable, we may discount or give less weight to that evaluation. Id. Here, the evaluator does not demonstrate specific knowledge of the Petitioner's foreign university or how her credit hours, grades, and the content of her courses translate to a U.S. education, nor does the evaulator offer sufficient analysis or support for the conclusions contained in the evaluation. As such, we conclude that this evaluation is insufficient to establish the academic equivalency of the Petitioner's foreign education.

We acknowlege an advisory opinion of the Petitioner's eligibility under the national interest waiver framework, which the Petitioner obtained from [redacted] a professor at [redacted] University. This advisory opinion does not not analyze the Petitioner's foreign education and therefore is not probative of its U.S. equivalency. While the Petitioner also submitted evidence of two U.S. professional certificates, one in business management with an emphasis in marketing and the other in marketing, both of which she earned in 2007, the record does not reflect that this education rises to the level of any U.S. degree.

Based on the information contained in the record, the Petitioner has not met her burden to establish the U.S. equivalency of her foreign education in accordance with 8 C.F.R. § 204.5(k)(3)(i)(B). The Petitioner should be prepared to address this evidentiary shortcoming in any of her future filings. Nevertheless, we reviewed the AACRAO EDGE database to determine whether the Petitioner's foreign education is comparable to any U.S. degree. The AACRAO EDGE database is a reliable resource concerning the U.S. equivalencies of foreign education. For more information, visit https://www.aacrao.org/edge (last visited Oct. 29, 2021). The database indicated that the Petitioner's four-year "Título de Bacharel" in social communication is the equivalent of a U.S. bachelor's degree. While the Petitioner has not provided sufficient evidence to support a finding that her foreign degree is the equivalent of U.S. bachelor's degree, we accept and rely upon the information found in the AACRAO EDGE database to conclude that she holds the equivalent of a U.S. bachelor's degree.

The record additionally contains letters from former employers describing the Petitioner's work experience in the marketing field of endeavor. Collectively the letters evidence that the Petitioner has at least five years of post-baccalaureate experience in her field. Accordingly, we conclude that the Petitioner qualifies for the underlying classification as a member of the professions holding an advanced degree. The remaining issue to be determined is whether she qualifies for a national interest waiver. For the following reasons, we agree with the Director that the evidence does not establish that the Petitioner qualifies for a national interest waiver.

On the Form I-140, Immigrant Petition for Alien Worker, which the Petitioner filed in June 2019, she provided the following information:

Part 5 - Additional Information About the Petitioner
Section 11. Occupation: Marketing Manager

Part 6 - Basic Information About the Proposed Employment
Section 1. Job Title: Marketing Manager
Section 2. SOC Code: 11-2021
Section 3. Nontechnical Job Description: Plan, direct, or coordinate marketing policies and programs, such as determining the demand for products and services offered by a firm.

The Petitioner also stated that her career plan in the United States is to "continue working as a Marketing Manager with multi-national companies, providing indispensable guidance regarding national projects and cross-border contracts involving the development of different projects in the U.S., Latin America and Brazil." She plans to "contribute to the development of companies by helping them to achieve their sales targets, providing increased infrastructure standards, designing new strategies for marketing development, and improving their turnover and profitability." She will also "plan, procure, direct, coordinate and execute sales within her field."

In the professional plan and statement that she submitted with the initial filing, she described her proposed endeavor as:

> [W]orking in the fields of market research management, marketing strategy for specific demographics, marketing in the digital content sector, advertising and brand design as a Marketing Manager . . . implementing ingenious marketing strategies, designing marketing plans, maintaining positive relationships with my professional colleagues, and identifying many opportunities for business development through extensive research.

The Director issued a request for evidence (RFE) which informed the Petitioner that she did not state which organization plans to utilize her marketing skills. Specifically, the Director noted that without knowing exactly where the Petitioner would be working, USCIS was unable to determine the impact of the Petitioner's contribution and whether the benefits of her claimed endeavor would be of national importance.

In her RFE response, the Petitioner stated that she would continue her career as a "marketing manager and entrepreneur" and that she founded two U.S. companies, [redacted] and [redacted] where she "crafts and manages strategic, commercial, and marketing strategies for the development of new business clients, serving U.S. individuals with Autism Spectrum Disorder" (ASD). She indicated that her marketing activities stem from operating her two U.S. companies for which she has "organized all departments, including planning, administration, human resources, and finance . . . developed, and managed, all marketing initiatives, including the expansion of the company's portfolio of services, as well as the acquisition of new contributors. . . ."

The Petitioner further described her proposed endeavor as operating her U.S. businesses as well as shaping and restructuring the way individuals, business, and organizations view ASD. Specifically, the Petitioner will help Americans with ASD needing help to improve their daily functions and response to daily functions, and she will reach these clients through innovative branding, sales, and marketing tactics. Her endeavor includes identifying viable opportunities for business development via cross-border contracts, developing her own business' sales, marketing, and business development plans, as well as advising her businesses on highly specific services, such as consumer analysis digital tactics and brand development, among others. She stated that her companies are necessary to assist with the growing numbers of individuals affected by ASD and that she can proactively respond to nationwide disparities between the cost and quality of healthcare by streamlining services, maximizing efficiency, and employing innovative approaches and techniques.

The Petitioner provided an updated professional plan and statement in her RFE response, which contained the following description of her proposed endeavor:

> [O]ffer my expertise as a Marketing Manager to assist U.S. companies in need of branding, re-organization, and management to optimize and increase profit through growth within their industry market or expand into other markets. More specifically, I have created two companies for which I am branding, organizing, and managing for further market penetration to assist with a nationally important issue . . . I propose to . . . provide guidance and direction in the areas of marketing, advertisement, business management, negotiation, sales forecasting, market analysis, and establishment of marketing policies and programs for my U.S. companies within the Mental Health Industry.

The Director noted that the Petitioner repeatedly referred to herself in the initial filing as a "marketing manager" and then in her RFE response, she added "entrepreneur," which shifted the focus of her proposed endeavor. We agree. The Petitioner described her proposed endeavor in the initial filing as continuing to work as a marketing manager for multi-national companies and in her RFE response, she added work pertaining to the ownership and operations of her local South Florida businesses that assist children with ASD. To further confuse the focus, the Petitioner also stated that while operating her U.S. businesses, she also intends to shape and restructure the way other individuals, businesses, and organizations "view and tackle" ASD. In Dhanasar, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." Id. at 889. We conclude that the Petitioner has not identified her specific endeavor.

In addition to not identifying her specific endeavor, the Petitioner's businesses were not in existence at the time of her initial filing in June 2019. The record reflects that the Petitioner formed [redacted] in [redacted] 2020 and while the record does not contain evidence to suggest that the [redacted] is an official business operating in the United States, the Petitioner stated that she formed this company in 2020. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. See Matter of Michelin Tire Corp., 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Furthermore, as the Director noted, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

On appeal, the Petitioner relies upon the evidence she previously submitted to assert that the proposed endeavor has not materially changed and that she has not deviated from her original plan. Although we acknowledge this claim, the Petitioner has not provided sufficient or consistent evidence to support it. Upon our de novo review, we conclude that the Petitioner has changed her focus from marketing management to business ownership and operations, entrepreneurship, streamlining healthcare for people on the autism spectrum, autism awareness, and autism-related customer service. While marketing might assist her in these pursuits, it appears ancillary to them. We cannot ascertain how much of the Petitioner's time will be spent on marketing management and how much time she will devote to the ownership and operations of her business. As the Petitioner has not identified any other organizations to which she will provide her marketing services, it is further unclear whether the

Petitioner intends to continue helping multi-national companies as originally stated and how much time, if any, she will devote to such external activities. Accordingly, we conclude that both the focus of her endeavor as well as her field of endeavor has materially changed.

To illustrate further, the evidence in the record supports a finding that the Petitioner founded her U.S. businesses with the goal of addressing ASD, not working as a marketing manager. As already noted, her businesses did not exist at the time of filing and therefore working as a marketing manager for them could not have been the focus of her initially described endeavor. Further support for this conclusion can be found in her professional plan and statement, which included her goal of delivering the most effective evidence-based therapy for families impacted by ASD living in the [redacted] Florida region and providing widespread access to quality treatment for individuals on the autism spectrum. Upon our examination of the Petitioner's business plan, which she submitted in her RFE response, we conclude that the Petitioner devoted a significant portion of her plan to providing background on ASD rather than on her marketing plan for her businesses and/or other organizations. Her RFE response also contained articles and reports on the healthcare industry and ASD, which shifted the focus away from the marketing and business sectors that she emphasized in the initial filing. Finally, two of the Petitioner's four recommendation letters submitted in her RFE response discuss the Petitioner's proposed endeavor in terms of treatment for individuals on the autism spectrum rather than in terms of marketing management for her businesses or other organizations.

The RFE response presented a new set of facts regarding the proposed endeavor, which is material to eligibility for a national interest waiver. See Matter of Michelin Tire Corp., 17 I&N Dec. 248 (Reg'l Comm'r 1978); see also Dhanasar, 26 I&N Dec. at 889-90. It appears as though the Petitioner sought to address the Director's concerns regarding what organization would utilize her marketing skills, but in so doing, she has significantly changed her proposed endeavor. As stated, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See Matter of Izummi, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). If significant, material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

In determining whether an individual qualifies for a national interest waiver, we must rely on the specific proposed endeavor to determine whether (1) it has both substantial merit and national importance and (2) the foreign national is well positioned to advance it under the Dhanasar analysis. Because the Petitioner has not provided consistent information regarding her proposed endeavor, we cannot conclude that she meets either the first or second prong, or that she has established eligibility for a national interest waiver.

III. CONCLUSION

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.