U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10270824

Date: SEP. 15, 2021

Appeal of Texas Service Center Decision

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

The Petitioner, a structural engineer, seeks second preference immigrant classification 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 Texas Service Center denied the petition, concluding that the Petitioner qualified for classification as a member of the professions holding an advanced degree but that the Petitioner 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 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. . . . the 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 (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 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.

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)

[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*).

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.[2]

II. ANALYSIS

The Petitioner initially described the endeavor as "[relying] on significant experience and [utilizing his] independent judgement in planning and accomplishing goals" as a "structural engineer." In response to the Director's request for evidence (RFE), the Petitioner asserted that he is a structural engineer and researcher working as an assistant professor at [redacted] University. In the decision denying the petition, the Director stated that "the evidence of record establishes that the [P]etitioner's proposed endeavor . . . has substantial merit." However, the Director began the analysis of the second aspect of the first *Dhanasar* prong by stating that "the evidence of record does not support that the [P]etitioner's proposed endeavor has national importance." The Director then elaborated on the basis for that conclusion in the following paragraphs, which we omit for brevity.

We note that the Director's analysis of the first *Dhanasar* prong ends with a paragraph, qualified by: "[t]o the extent that the [P]etitioner proposes to conduct research in the field of structural engineering, USCIS finds the evidence of record sufficient to demonstrate that such research is of national importance," which is inconsistent with the Director's initial statement to the contrary.

Later in the decision, the Director reiterated the initial finding that the record does not support the conclusion that the endeavor has national importance. After concluding that the record does not establish the Petitioner is well positioned to advance the proposed endeavor, and further concluding that "[t]he evidence does not show that the [P]etitioner's qualifications, skills, and past history of influence in the field are such that his benefit to the nation outweighs going through the labor certification process," the Director restated: "[a]s previously discussed, USCIS does not find that the [P]etitioner's proposed endeavor has national importance." The Director further stated that "[the Petitioner] has not shown an urgent national interest in his own efforts." Those repeated conclusions clarify that the qualified statement regarding research did not overcome the initial conclusion to the contrary regarding the endeavor as a whole.

Upon *de novo* review, we withdraw the Director's statement that, "[t]o the extent that the [P]etitioner proposes to conduct research in the field of structural engineering, USCIS finds the evidence of record sufficient to demonstrate that such research is of national importance" because the record—and the remainder of the decision—does not support that conclusion.

On appeal, the Petitioner asserts that "[t]he denial notice acknowledged that the Petitioner has met the first prong, thus meeting the requirements that the Petitioner's endeavor has substantial merit and national importance (page 5) as set forth in *In re: Matter of Dhanasar*." The Petitioner does not further address the Director's numerous, express conclusions that "USCIS does not find that the [P]etitioner's proposed endeavor has national importance." The Petitioner's assertion on appeal regarding one paragraph, prefaced with the qualification that it applies only "[t]o the extent that the [P]etitioner proposes to conduct research in the field of structural engineering" while also working full-time as a

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

teaching professor, mischaracterizes the totality of the decision's analysis regarding the issue of national importance.

The Petitioner does not address on appeal how the Director erred by concluding that the record does not satisfy the national importance requirement of the first Dhanasar prong, which is dispositive. Furthermore, we note that the proposed endeavor materially changed after the time of filing. As the Director noted in the decision, the Petitioner initially described the proposed endeavor as working as a structural engineering researcher at [redacted] through the [redacted] staffing agency. However, as noted above, in response to the Director's RFE, the Petitioner stated instead that the proposed endeavor involved working as an associate professor at [redacted] University and as a consulting engineer at [redacted] At the time of filing, the proposed endeavor made no reference to working as a university professor.

A visa petition may not be approved after a petitioner or beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). 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).

Because the proposed endeavor materially changed after the time of filing and because the Petitioner does not assert on appeal how the Director erred in concluding that the endeavor does not have national importance, the record does not establish eligibility under the first *Dhanasar* prong. We reserve our opinion regarding whether the record satisfies either the second or third *Dhanasar* prongs.

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.