U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21982996

Date: AUG. 22, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, a civil engineer, 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 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 noncitizen's proposed endeavor has both substantial merit and national importance; (2) that the noncitizen 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 noncitizen 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 noncitizen. 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 noncitizen's qualifications or the proposed endeavor, it would be impractical either for the noncitizen 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 noncitizen's contributions; and whether the national interest in the noncitizen's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together,

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

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 Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus of a labor certification, would be in the national interest. For the reasons discussed below, the Petitioner has not established that a waiver of the requirement of a job offer is warranted.

Initially, the Petitioner described the proposed endeavor as a plan "to offer consulting services to U.S. government striving to improve the overall state of infrastructure." The Petitioner elaborated:

> The goal is to open the branch of [redacted] in the U.S. in partnership with American companies to help develop the methodology and build on his business network to grow business in the U.S. He will offer his services to clients (residential business, and government) and also train other professionals to use his proprietary technology and assist clients in achieving maximum efficiency in their projects on roads and highways repair.

The Petitioner also described his recent business activities, including "a real estate investment company together with my brothers . . . that led us to acquire some properties in the USA"; founding another U.S.-based "company to start off my business plan," including "operat[ing] in other areas of civil engineering with commercial projects, new construction, and remodeling work in general," and a "partnership with [redacted] [that] is in final stages of elaboration of a business plan to release a start-up."

In response to the Director's request for evidence (RFE), the Petitioner specifically reiterated that his "endeavor is to open a branch of [redacted] in the U.S., with a focus on providing specialized diagnostic software and consulting services to private residential and business companies and government agencies in the [r]oads and [h]ighways [i]ndustry." The Petitioner also asserted that his "endeavor seeks to develop and result in the production of U.S. jobs, as construction, road maintenance and design drive important work and employment functions, as well as generate workforce dependability."

The Director acknowledged that the record established that "the improvement of U.S. roads and highways is of substantial merit and is the subject of national initiatives." However, the Director concluded that "the totality of the record does not address how the [P]etitioner's company would specifically affect the conditions of U.S. roads and highways broadly across the U.S., or the field of civil engineering as it concerned roads and highways." The Director further concluded, "The record establishes only that the [P]etitioner's company would have substantial merit to the improvement of roads and highways specific to the individual customers or clients that would choose to hire its

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

services. Therefore, the record does not demonstrate that the [P]etitioner's endeavor has national importance."

On appeal, the Petitioner asserts that the general "[r]oads and [h]ighway [c]onstruction [i]ndustry is incredibly important to the country, especially as the economy and interstate travel depend on the serviceability and safety of the roads and highways." The Petitioner also asserts that the "Biden Administration has made infrastructure a priority, with a $2 trillion infrastructure plan that involves partnerships with states and localities on clean-energy and transit projects." The Petitioner further asserts that the director "overlooked that the proposed endeavor would result in a process improvement that would have national or even global implications in the [r]oad and [h]ighway [c]onstruction industry." Additionally, the Petitioner asserts that the Director "overlooked that the proposed endeavor will have a significant potential to employ U.S. workers and other substantial economic effects." The Petitioner also asserts that the proposed endeavor "has national importance since it provides services to small to medium-sized businesses[,] helping them grow and succeed."

In determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. *Dhanasar* provided examples of endeavors that may have national importance, as required by the first prong, having "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" and endeavors that have broader implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

We first note that the Petitioner conflates the separate elements of the first *Dhanasar* prong: "that the [noncitizen's] proposed endeavor has both substantial merit and national importance." *Id.* at 889. We elaborated in *Dhanasar* that "an endeavor's merit may be established without immediate or quantifiable economic impact. For example, endeavors related to pure science and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States." *Id.* In contrast to an endeavor's merit—which may be determined without immediate or quantifiable economic impact—"[i]n determining whether the proposed endeavor has national importance, *we consider its potential prospective impact.*" *Id.* (emphasis added). Therefore, the Petitioner's observation that "the economy and interstate travel depend on the serviceability and safety of roads and highways," and that the "Biden Administration has made infrastructure a priority" are material to the proposed endeavor's merit, which the Director acknowledged exists in this case; however, without addressing the endeavor's prospective impact, they are not material to its national importance.

Next, the Petitioner asserts that an undated letter from a fellow civil engineer, submitted on appeal, establishes that "the proposed endeavor would result in process improvement that would have national or even global implications in the [r]oad and [h]ighway [c]onstruction industry." The Petitioner's reliance on the letter is misplaced. Although the letter's date cannot be determined, it references a project the Petitioner would undertake with the University [redacted] Department of Civil and Environmental Engineering. In response to the Director's RFE, the Petitioner submitted a letter from [redacted], a professor of civil and environmental engineering at the University [redacted], dated October 2021, in which the professor accepts the Petitioner's request to conduct a field test of

his technology "between February and March, 2022." The undated civil engineer's letter quotes the professor's letter, wherein the latter stated that the Petitioner's "technology is unique, the data collection and processing is very efficient and such can play a major part on maintenance on demand, hence saving funds and resources."

A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). A petition may not be approved at a future date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm'r 1971).

Contrary to the Petitioner's assertions on appeal, the Director did not "overlook" the letter from [redacted] Instead, the Director acknowledged the letter and described its contents in multiple paragraphs in the decision; however, the Director correctly explained that, because the letter is dated October 2021, after the petition filing date in April 2021, and because it addresses a project in 2022 which had yet to occur, it presents a new set of facts that did not exist at the time of filing and thus, it cannot establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45. Moreover, even if the undated letter and [redacted] letter could establish eligibility, which they cannot, they do not establish how "the proposed endeavor would result in process improvement that would have national or even global implications in the [r]oad and [h]ighway [c]onstruction industry," as the Petitioner asserts on appeal. [redacted] observation that the Petitioner's technology is "unique" does not establish how its uniqueness may have national or global implications. His observation that the data collection and processing is very efficient is made without context, such as comparing it to the efficiency of data collection and processing of any other commonly used methodologies, if any. Additionally, his observation that the Petitioner's technology could save "funds and resources" is a generalized statement that does not elaborate on the type of resources that could be saved, the volume of resources that could be saved, the amount of funds that could be saved, how the savings may vary depending on the size of a given project employing the technology, and other material details.

We also note that the Director addressed other information in the record that was determined to be insufficient in establishing the national importance of the proposed endeavor, including a PowerPoint presentation that "does not explain the technology but appears to be a visual guide to a more detailed in-person presentation." The Petitioner does not address this information on appeal.

Next, the record does not support the Petitioner's assertion on appeal that the Director "overlooked that the proposed endeavor will have a significant potential to employ U.S. workers and other substantial economic effects." The Director acknowledged that the Petitioner stated that his construction company "had 2 employees and 2 companies on its payroll and utilized 20 subcontractors" but she observed that the record did not establish whether "the [P]etitioner's business would have a significant potential to employ U.S. workers."

The Petitioner's business plan, dated March 2021, indicated that he projected that, in addition to employing himself, his endeavor would employ six civil engineers with distinct specialties, two "laboratory worker[s]," four "assistant worker[s]," two "senior technician[s]," four "assistant technician[s]," one driver, and one operator. Although the business plan indicated five "areas" in which the driver and operator would work, such as "defectrometric survey" and "irregularity survey," the plan did not establish whether the same pair of driver and operator would work in each of the five

areas, or if each area would have its own driver and operator, totaling five, not one, of each. In total, the business plan indicated that the Petitioner anticipated employing between 21 and 29 workers. However, although the business plan indicated that the Petitioner "plans to establish an [e]ngineering [c]onsulting company in the U.S." and that he "wants to open a branch of his family-owned successful Brazilian company[,] [redacted] operating in the highway engineering consulting sector," it does not indicate where he plans to establish that consulting company and whether that consulting company would be the U.S. branch of [redacted] referenced throughout the record. Moreover, the record in general, and the business plan in particular, does not specify the location where the Petitioner intends to pursue the proposed endeavor and the location where the 21 to 29 workers the Petitioner intends to employ would work. The record does not establish whether employing 21 to 29 workers—in any occupation, in general, or in the particular occupations identified in the business plan—in an unspecified location would have broader implications, such as "significant potential to employ U.S. workers or [have] other substantial positive economic effects, particularly in an economically depressed area." *See Dhanasar*, 26 I&N Dec. at. at 889-90.

Finally, the Petitioner's assertion on appeal that the proposed endeavor "has national importance since it provides services to small to medium-sized businesses[,] helping them grow and succeed" does not explain how the services the Petitioner would provide to those businesses would have broader implications, such as "significant potential to employ U.S. workers or [have] other substantial positive economic effects, particularly in an economically depressed area." *See id.* The Petitioner asserts on appeal that "the U.S. Small Business Administration Office of Advocacy has stated that small businesses are the lifeblood of the U.S. economy, accounting for 44% of U.S. economic activity." However, as addressed above, in determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See id.* at 889. The record does not establish that the U.S. Small Business Administration Office of Advocacy commented on the specific endeavor that the Petitioner proposed to undertake; therefore, its comments regarding U.S. economic activity in general do not establish that the proposed endeavor has national importance. The record does not otherwise establish that the unspecified services that the Petitioner would provide to unidentified "small to medium-sized businesses" would have substantial positive economic effects that would rise to the level of national importance. *See id.* at 889-90.

In summation, the Petitioner has not established that the proposed endeavor has national importance, as required by the first *Dhanasar* prong; therefore, he is not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or third *Dhanasar* prong. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

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.