U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23101866

Date: DEC. 1, 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 tax compliance manager, 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 qualifies as a member of the professions holding an advanced degree, but that the record did not establish that a waiver of that visa classification's job offer requirement would be in the national interest. On appeal, the Petitioner asserts that the Director abused his discretion by not issuing a request for evidence (RFE) before denying the petition, and that the record supports the grant of a national interest waiver.

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. –
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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.

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.

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. *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion,[1] 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.[2]

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.

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[1] *See Poursina v. USCIS*, 936 F.3d. 868 (9th Cir. 2019), finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature.

[2] To establish that it would be in the national interest to waive the job offer requirement, a petitioner must go beyond showing their expertise in a particular field. The regulation at 8 C.F.R. § 204.5(k)(2) defines ·'exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute. individuals of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given petitioner seeks classification as an individual of exceptional ability, or as a member of the professions holding an advanced degree, they must go beyond demonstrating a degree of expertise significantly above that ordinarily encountered in their field of expertise to establish eligibility for a national interest waiver. *See Dhanasar,* 26 I&N Dec. at 886 n.3.

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 is a tax compliance manager for a large [redacted] services company who proposes to continue her employment with this company in the United States. The record includes a copy of her licentiate degree in public accounting from [redacted] University in Venezuela, and a letter confirming her employment with her current employer in Venezuela from January 2009 to May 2014, and in the United States from May 2014 to December 2019. We agree with the Director that this evidence establishes that she is a member of the professions holding an advanced degree.

A. The Director's Discretion to Deny Without First Issuing an RFE

The Director determined that the Petitioner had not established that she met any of the prongs in the *Dhanasar* analytical framework. On appeal, the Petitioner asserts that the Director's denial of her petition without first issuing an RFE or notice of intent to deny (NOID) constituted an abuse of discretion, which should lead to her appeal being sustained. She bases this assertion on sections of the USCIS Policy Manual which provide guidance to officers regarding the issuance of RFEs and NOIDs,[4] but also on USCIS policy memoranda that have been incorporated into or superseded by the Policy Manual.[5]

The regulation at 8 C.F.R. § 103.2(b)(8)(iii) sets out three options for an officer when a benefit request has been submitted with all required initial evidence but does not establish eligibility:

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

[4] See 1 *USCIS Policy Manual* E.6(F) and E.9, https://www.uscis.gov/policy-manual.

[5] The website of the USCIS Policy Manual includes the following note under "Adjudicator's Field Manual Transition": "To the extent that a provision in the Policy Manual conflicts with remaining AFM content or Policy Memoranda, the updated information in the Policy Manual prevails."

> ***Other evidence.*** If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the benefit request for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the benefit request and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

In this case, as the Director's decision indicated, the initial evidence established the Petitioner's eligibility for the underlying EB-2 immigrant visa classification as a member of the professions holding an advanced degree, but the Director determined that it did not show that she merited a national interest waiver. The regulation provides for three options in that instance, and the Director chose to deny the petition without issuing either an RFE or a NOID.

As noted by the Petitioner, the USCIS Policy Manual provides additional guidance to officers concerning the appropriate issuance of RFEs and NOIDs, stating that officers have the discretion in some instances to issue a denial without first issuing an RFE or NOID.[6] It further states that where evidence in the record does not establish eligibility, an RFE *should* be issued unless the officer determines that there is no legal basis for the benefit request and no possibility that additional information or explanation will establish a legal basis for approval.[7] The Petitioner asserts that the record demonstrated a legal basis for meeting each of the three prongs of the *Dhanasar* analytic framework, but she does not attempt to supplement the record with additional evidence in support of her eligibility for a national interest waiver or assert that the Director's decision regarding her eligibility was in error. More importantly regarding her argument on appeal, she does not identify the type or nature of additional evidence or explanation that might possibly have established her eligibility for a national interest waiver. She has therefore not shown by a preponderance of the evidence that the Director erred in not issuing an RFE prior to denying her petition.

B. Substantial Merit and National Importance of the Proposed Endeavor

As stated above, in the first prong of the *Dhanasar* framework, we focus on the prospective potential impact of the specific endeavor that the individual proposes to advance. Here, the Petitioner indicated that she intends to continue her employment as a tax compliance manager with her current employer, and provided an experience letter from that employer which also includes a list of her responsibilities in this position. These included oversight of a team of 13 employees, the creation and analysis of financial reports, and the standardization of processes across various countries.

In support of the substantial merit of her proposed endeavor, the Petitioner submitted information about her employer and the importance of accounting professionals in general. This evidence is sufficient to show that her continued employment in this field with this company would be of substantial merit.

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[6] 1 *USCIS Policy Manual* E.6(F)
[7] 1 *USCIS Policy Manual* E.6(F)(3)

Turning to the national importance aspect of the first prong, the Petitioner submitted several documents relating to the U.S. government's actions to promote education in the science, technology, engineering and mathematics (STEM) fields. One of these was a single page from a website, stemdegreelist.com, which included the subtitle "DHS STEM Designated Degree Programs." While the term "STEM" is not defined in the regulations pertaining to national interest waivers, the regulations at 8 C.F.R. § 214.2(f)(10)(ii)(C)(2)(i) define it for purposes of optional practical training for students, and refer to the STEM Designated Degree Program List on the website of the Student and Exchange Visitor Program (SEVIS) at www.ice.gov/sevis. At the time of this decision, that list does not include the Petitioner's field of accounting, nor does the record indicate that it included accounting at the time the petition was filed. Although changes to the USCIS Policy Manual since the filing of the petition highlight specific evidentiary considerations relating to STEM degrees and fields,[8] the record does not show that those considerations should be applied in evaluating the Petitioner and her proposed endeavor.

The Petitioner also referred to the evidence about the importance of accounting and information about her employer in support of the national importance of her proposed endeavor. She asserts that the functions performed by accounting professionals as a group "are of national importance for a thriving economy." The Petitioner repeats this argument on appeal, quoting one of the submitted articles as stating that the "accounting profession is linked to economic development and better living standards." However, as noted at the outset, when performing the analysis under the first prong of the *Dhanasar* framework, we look to the specific endeavor proposed by considering its potential prospective impact. Generalizations about the impact of an entire industry or profession are therefore not relevant to this analysis. The evidence does not show that the Petitioner's work for her current employer would have national or global implications within the field of accountancy, would have significant potential to employ U.S. workers, or would have other substantial positive economic effects.

The Petitioner also asserted that she plays an important role for her employer, a company which she claimed helps the U.S. to maintain energy independence, and cited Enron as an example of an energy company "plagued by criminal and negligent accounting." But neither of these assertions are supported by documentary evidence in the record. The Petitioner has not shown that her work with her employer would have a broader effect on either the field of accounting or, as she suggests, on national energy usage or policy.

For the reasons discussed above, we conclude that the Petitioner has not established that her proposed endeavor is of national importance, and she does not therefore satisfy the first prong of the *Dhanasar* analytic framework. While she also asserted to meet the second and third prongs, we need not reach these additional grounds. As the Petitioner cannot meet all three prongs of the Dhanasar framework, she cannot establish eligibility for a national interest waiver, and we reserve the issues of whether she is well positioned to advance her endeavor and whether, on balance, it would benefit the United States to waive the job offer requirement of the EB-2 classification.[9]

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[8] 6 *USCIS Policy Manual* F.5(D)(2)

[9] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).

III. CONCLUSION

The Petitioner has demonstrated that she qualifies as a member of the professions holding an advanced degree, but has not established that a waiver of the job offer requirement would be in the national interest. Accordingly, her petition will remain denied.

ORDER: The appeal is dismissed.