U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23692703

Date: DEC. 16, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (National Interest Waiver)

The Petitioner, a physical therapist, seeks second preference immigrant classification as either an advanced degree professional or 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 Texas Service Center denied the petition, concluding that the record did not establish the national importance of the proposed endeavor or that a waiver would be in the national interest. The matter is now before us on appeal. 8 C.F.R. § 103.3. The Petitioner reasserts her eligibility, arguing that the Director did not consider the evidence properly and erred in the decision.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's*, Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). 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. . . . [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, 8 USC § 1101(a)(32), 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.
>
> Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
>
> 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).

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

A. Proposed Endeavor

The Petitioner stated that her proposed endeavor is to work as a physical therapist "with a health care facility." After reviewing the evidence submitted with the petition, the Director issued a notice of intent to deny (NOID). The NOID notified the Petitioner that, among other deficiencies, the evidence did not establish the national importance of her proposed endeavor. In her NOID response, the Petitioner provided a business plan for opening and operating her own physiotherapy business in Florida. She stated that she will serve as the CEO of her own business, which involves "oversee[ing] and direct[ing] the activities of other employees." In the NOID response, the Petitioner discussed the medical device market and stated that she will work in physical therapy "with multi-national companies, providing indispensable guidance regarding national and cross-border contracts involving the development of different Healthcare ventures in the U.S. and Brazil." She further asserted that "Latin American countries have relevant investment opportunities and excellent shareholder returns and they are looking to expand such wealth in the U.S. My proposed endeavor will make this investment a reality, resulting in enhanced economic contributions in the United States."

We conclude that the Petitioner has not identified a specific or consistent proposed endeavor. As described in her initial filing, her proposed endeavor involves working with a healthcare facility as a physical therapist. In contrast, the NOID response shifted the focus of her endeavor to business ownership in Florida and working for multinational companies involved in cross-border contracts. Additionally, the Petitioner indicated that she intends to expand into the medical device and foreign investment markets. While these endeavors may be connected through physical therapy, their focus is quite different. In Dhanasar, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." Id. at 889. Here, the Petitioner has not clarified whether she intends to work with a health care facility as a physical therapist, run her own business, or work with multinational companies advising on cross-border contracts, nor has she adequately explained how she would allocate her time if she plans to pursue all these activities. Therefore, we conclude that the Petitioner has not identified a specific and consistent proposed endeavor.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, the Petitioner cannot materially change the proposed endeavor. USCIS regulations affirmatively require a petitioner to establish eligibility at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). Additionally, 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, 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 changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The record does not demonstrate that the Petitioner's business in Florida existed at the time of filing. As such, we conclude that it cannot serve as evidence to establish eligibility at the time of filing. We further conclude that the Petitioner has significantly and materially changed her initially described proposed endeavor. Therefore, she has not established eligibility for a national interest waiver.

B. National Importance

Even ignoring the changes and lack of specificity in the Petitioner's proposed endeavor and analyzing the Petitioner's eligibility based upon a proposed endeavor of operating a physical therapy business, we still conclude that the Petitioner has not established how the proposed endeavor would have national importance. In Dhanasar, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. Dhanasar, 26 I&N Dec. at 893. Similarly, we conclude that the Petitioner has not established how the proposed endeavor would impact the physical therapy field, reach beyond her clinic and patients, or rise to a level of national importance.

The Petitioner emphasized the importance of physical therapy for addressing work-related injuries, pain management, sports rehabilitation, and the quality-of-life issues. She noted various social factors, such as the aging work force, increased medical bills, missed workdays, hospital readmissions, and the COVID-19 pandemic. In addition, the Petitioner highlighted the economic importance of physical therapists by providing statistics on the industry's high potential for growth, as well as the demand for and shortage of physical therapists. We agree that the field of physical therapy is important; however, this does not necessarily establish the national importance of the proposed endeavor.

In determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on the "the specific endeavor that the foreign national proposes to undertake." See id. at 889. The record does not suggest that the Petitioner's patient care duties would meet the current demand for physical therapy, address the national physical therapist shortage, or otherwise operate on a scale rising to the level of national importance. Further, the Petitioner does not claim that her physical therapy methods are unavailable or different from those already offered in the United States. While we have considered the Petitioner's evidence, including statements, articles, reports, and [redacted] advisory opinion, it largely relates to the importance of the physical therapy profession or field, rather than the national importance of a specific proposed endeavor. Therefore, we conclude that the Petitioner has not sufficiently demonstrated how her proposed endeavor would impact the field of physical therapy or the nation.

Other evidence, such as the Petitioner's business plan, reference letters, and patient testimonial letters praise the Petitioner's education, experience, past success, personal qualities, and the results she achieved for patients. However, these factors relate to the second prong of the Dhanasar framework, which "shifts the focus from the proposed endeavor to the foreign national." Id. at 890. The issue here is whether the Petitioner's specific endeavor has national importance under *Dhanasar's* first prong.

The Petitioner emphasized the endeavor's "ripple" and "multiplier" effects. These effects represent how increased business activity creates direct and indirect jobs, which then boost household consumption and spending power, as well as federal and state tax revenue. The Petitioner projected that her business will create five jobs by the end of year three and generate $268,404 in payroll expenses by year five. While we agree that any basic business activity has the potential to positively impact the economy, we nevertheless conclude that the evidence does not demonstrate how five jobs and $268,404 in payroll expenses would confer benefits to the U.S. regional or national economy reaching the level of "substantial positive economic effects" contemplated by Dhanasar. See id. at 890. Accordingly, we conclude that the record does not support a finding that the proposed endeavor will impact the economy on a scale rising to the level of national importance.

On appeal, the Petitioner relies upon the evidence and arguments she previously submitted. To establish the proposed endeavor's national importance, she emphasizes the merits of the services she will provide, her personal and professional qualities, and the importance of the physical therapy field. While we agree that the field is important, as are issues of individual patient care and quality of life, it is not apparent from the evidence or arguments that the proposed endeavor has national importance. Therefore, for this additional reason, we conclude that the Petitioner has not met the requisite first prong of the Dhanasar framework.

III. CONCLUSION

The documentation in the record does not establish a specific and consistent proposed endeavor, nor does it establish the national importance of the proposed endeavor as required by the first prong of the Dhanasar precedent decision. Therefore, the Petitioner has not demonstrated eligibility for a national interest waiver. Further analysis of her eligibility under the remaining prongs outlined in Dhanasar would serve no meaningful purpose. Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the Dhanasar framework. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) (stating that "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).

As the Petitioner has not met the requisite first prong of the Dhanasar analytical framework, we conclude that she has not established she is eligible for or otherwise merits a national interest waiver. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.