U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 23659641

Date: DEC. 23, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, a senior software developer, seeks second preference immigrant classification as an individual of exceptional ability in the sciences, arts, or business, and 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 record did not establish the Petitioner's eligibility for the national interest waiver. The matter is now before us on appeal under 8 C.F.R. § 103.3.

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

A petitioner seeking a national interest waiver 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. This classification ordinarily requires that the individual's services be sought by a U.S. employer. Section 203(b)(2)(A) of the Act. But U.S. Citizenship and Immigration Services (USCIS) may waive the job offer requirement if the petitioner shows the waiver to be in the national interest. Section 203(b)(2)(B)(i) of the Act.

There is no statutory or regulatory definition of the term "national interest." The precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), established a framework for adjudicating national interest waiver petitions. Under this framework, after a petitioner has established eligibility for EB-2 classification, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the individual's proposed endeavor has both substantial merit and national importance; (2) that the individual 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.[1]

The first prong, regarding substantial merit and national importance, focuses on the individual's specific proposed endeavor. The endeavor may show this merit 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) 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 Director determined that the Petitioner qualifies as an individual of exceptional ability. The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

From 2002 to 2018, the Petitioner worked as a software developer for a company in Brazil that provided services for client companies in "diverse industries, including shipping, manufacturing, as well as accounting and bookkeeping."[3] He entered the United States in April 2018 as a B-2 nonimmigrant. Shortly before he filed the petition in April 2019, the Petitioner established a company in [redacted] Florida, where he seeks to work as a senior software developer.

The Director issued a request for evidence in April 2021, and a notice of intent to deny the petition in November 2021. Each notice indicated that the Petitioner had not submitted sufficient evidence regarding national importance and the third *Dhanasar* prong. We have considered the entire record

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

[3] The Petitioner stated he "started [his] career in 1992," but he did not provide details or evidence regarding any employment during the 1990s.

of proceeding, including the Petitioner's responses to both of these notices, in the discussion that follows.

The Petitioner initially stated:

> I plan to be self-employed . . . as [a] Senior Software Developer. There, I plan to use my comprehensive education and extensive experience to give U.S. companies the competitive advantage of the next-generation software I have proven my capacity to develop. Throughout my career, I have developed comprehensive software solutions to meet the needs of businesses of all sizes, operating in all industries. . . .
>
> I would also like . . . to serve as a mentor for other IT [information technology] professionals. . . . I would like to transform the capabilities of U.S. companies to compete in the international market through the next-generation efficiency and productivity that innovative software can provide.

The Petitioner also submitted information about some of his past projects in Brazil, focusing on enterprise resource planning (ERP) systems. The Petitioner stated: "The ERP systems I developed, modified, and installed have enabled a diverse range of companies to analyze, monitor, and manage business operations from one unified system."

The Petitioner submitted background materials about software development and ERP systems. The submitted materials provide general information about the Petitioner's industry and field of work, but did not relate specifically to his proposed endeavor. The materials also identified various issues such as technical innovation and U.S. competitiveness in science, technology, engineering and mathematics (STEM) education, but the Petitioner did not provide specific details as to how his proposed endeavor would have national importance in these areas, rather than more limited effects such as benefit to individual clients.

The Director informed the Petitioner that the initial submission "is not sufficient to demonstrate the national importance of any particular software developer work proposed by the beneficiary," and stated: "the relevant question is not the importance of the field, industry, or profession in which the individual will work." General background information about the overall importance of an occupation or specialty does not establish the national importance of the work of any one worker in that occupation or specialty. The Director requested evidence to show the "potential prospective impact" of the Petitioner's work.

In response, the Petitioner submitted further information about the *collective* importance and impact of workers in his field, but general information about his occupation does not suffice to meet his burden of proof and establish the national importance of his specific endeavor. Regarding his proposed endeavor, the Petitioner stated:

> Through my work as the Senior Software Developer for my self-owned company, I would like to bring a competitive edge of technology solutions . . . to assist small, medium, and large U.S. companies with more efficient, agile, and integrated software that . . . allows them to earn more revenue and management of resources.

. . . .

> I am committed to improving my technical skills and knowledge and training other software developers and IT professionals to properly use ERP software, IT tools, and system implementation in the United States.

The Petitioner submitted a business plan, dated August 2021 and marked as having been prepared specifically for "EB-2 Visa Supporting Documentation." The Petitioner asserts that his "proposed endeavor has significant potential to employ U.S. workers." The business plan projects that the company would have ten employees by its fifth year of operations. The Petitioner does not show that this number is significant within the *Dhanasar* framework.

The business plan states that the Petitioner's "[c]ompany will create 142 indirect jobs by the end of year 5, according to the multipliers provided by the [Economic Policy Institute]." The plan then shows a table, showing the average number of indirect jobs created within various industries. The plan does not specify which figures in the table relate to the Petitioner's company, and it does not identify any industry that produces 142 indirect jobs for every 10 direct jobs. Instead, the table shows a considerably lower ratio, indicating between 122 and 958 indirect jobs for every *100* direct jobs, depending on the industry. The table does not specifically mention software development. It does indicate that "[p]rofessional, scientific and technical services" produce 418.3 indirect jobs for every 100 direct jobs, which would extrapolate to the Petitioner's 10-employee company producing about 42 indirect jobs, not 142. The Petitioner did not specify what indirect jobs his company would create or the wider economic significance of that level of employment.

The Petitioner asserted that his business plan "explained the national level impact of [his] work via his highly specialized IT business." The business plan relied on general information about the overall field of software development, without showing how the Petitioner's work, in particular, is and will be of national importance. The Petitioner's work to date in the United States has been with small, local businesses. General information about the collective, overall importance of small businesses does not show that the Petitioner's work with a small number of clients has national importance. His involvement within a much larger industry and a much larger economy does not demonstrate the national importance of his proposed endeavor.

The nature of the proposed endeavor has changed significantly over the course of this proceeding, shaped to some extent by the Petitioner's work for clients he secured after the filing date. The Petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). After-the-fact material changes to the proposed endeavor cannot establish eligibility as of the filing date. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) (requiring beneficiaries seeking employment-based immigrant classification to possess the necessary qualifications as of the filing date of the visa petition).

The Petitioner claimed a "shortage of software development experts in the U.S." The labor certification process exists specifically to address worker shortages, and the Petitioner has not

established that his proposed endeavor would address the asserted shortage at a level of national importance. The Petitioner submitted background materials about the importance of STEM education, but his proposed endeavor would not contribute to STEM education. Rather, the business plan in the record indicates that his company will "hire only highly qualified and experienced professionals," which will not add to the number of workers in the field. The Petitioner's documentation in insufficient to meet the requirements for a national interest waiver.

When he filed the petition, the Petitioner had just established his company and did not yet have employment authorization or clients. Later on, he undertook projects for three clients. For a swimming pool maintenance company, he developed "PoolManagement [sic] Software . . . [and] helped [the company] store important information related to the business financials, customers, and staff." For "a company that serves direct store delivery companies," the Petitioner helped to develop "software for optimizing wholesale distribution."

The Petitioner also worked for a company that "manufactures intelligent irrigation systems" that conserve water by shutting off automated sprinklers in rainy weather. Water conservation features heavily in revisions to the Petitioner's proposed endeavor, but only one of his clients, the irrigation company, operates in an industry relevant to water conservation. The Petitioner did not establish that the amount of water conserved by this customer's systems would be nationally important. Also, the managing director of the irrigation company did not indicate that the Petitioner played any role in conceiving or developing the sprinkler control technology. Rather, the company already has "patented technology [that] integrates calibrated precipitation data, sensor data, and future weather forecast data to provide an optimized sprinkler schedule." The Petitioner's role was to "create a software solution that both streamlines [the company's] processes and ensures that [it is] operating within the highest standards of saving water and money"; "[m]aintain and develop [its] web-based software for administration, monitoring customers on the appropriate scheduling of water usage . . . and usage history," and create a smartphone application to allow customers to control their systems.

In his recent work for the irrigation company, the Petitioner developed a smartphone application that is widely available through app stores. The Petitioner asserts on appeal that "millions of consumers . . . throughout the United States will continue to benefit from his innovative Irrigation Management Mobile Application." But the application is specific to systems installed by his client, which operates only in parts of Florida, which limits the application's reach. Speculation about the company's potential future growth does not establish national importance at the time of filing, and does not relate to the Petitioner's proposed endeavor as originally described in 2019. The Petitioner's initial statement did not include any mention of smartphone apps. Instead, it focused on the "efficiency and productivity that innovative software can provide" to businesses.

The letters from customers establish that the Petitioner's work is important for those businesses, but they do not show wider benefit at a level of national importance. In an effort to show that his "proposed endeavor in the United States has national and even global implications within the Software Development Industry," the Petitioner submitted expert opinion letters from three college faculty members in fields relating to computer science. These individuals primarily described the industry in which the Petitioner intends to work, without establishing how the Petitioner's work, in particular, would have national importance. The third and most recent letter includes general information about IT, small businesses, irrigation, and the effect of the COVID-19 pandemic (which occurred after the

petition's filing date, and therefore did not factor into the proposed endeavor as initially described). General assertions of this kind do not establish the national importance of the Petitioner's specific proposed endeavor.

The Petitioner submitted evidence of interest from potential employers, including a major online retailer. These companies inquired about the Petitioner's interest in applying for employment, rather than contracting the services of the Petitioner's company for specific projects. If the Petitioner were to abandon his own newly-formed company in favor of employment with one of these companies, then that would represent another major departure from his proposed endeavor. And if he does not intend to work for those companies, then the inquiries are not relevant to the proposed endeavor.

The Director denied the petition, concluding that the Petitioner had established the substantial merit of the proposed endeavor, and that he is well-positioned to advance it, but not its national importance or that, on balance, a waiver of the job offer requirement would benefit the United States.

Regarding national importance, the Director stated: "the evidence submitted does not . . . [show that the] proposed endeavor stands to have national or even global implications in the field, or . . . has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects contemplated by *Dhanasar*."

On appeal, the Petitioner asserts that he "has already delivered his specialized services to four (4) companies throughout the U.S.," but the Petitioner names only three clients, all based within 40 miles of his residence in [redacted] Florida. He also names two prospective clients in the same area. The Petitioner cites statistics relating to *all* small businesses and *all* software developers, without explaining the national importance of *his* work as a software developer, serving a limited number of small business clients.

The appellate brief consists mostly of quotations from record exhibits, such as letters and the 2021 business plan for the Petitioner's company. The Petitioner asserts that the Director "disregarded the probative and credible opinion [letters from] IT Industry Experts," but the Director discussed and quoted from the letters. In denying the petition, the Director did not disregard the letters and other materials, but rather found those materials to be insufficient to establish eligibility. The Petitioner's quotations from materials that the Director already considered does not establish error in the decision, or overcome any of the deficiencies that the Director identified.

The Petitioner also contends that the Director did not consider precedent decisions he had cited. Apart from *Matter of Dhanasar*, the cases that the Petitioner cited are unpublished appellate decisions that have no authority as precedent. Even then, the Director acknowledged the Petitioner's reliance on two of the unpublished decisions, and explained why they did not apply to this proceeding.

The Director also noted that the Petitioner's description of the proposed endeavor has changed significantly after the filing date, and cited regulations and case law requiring the Petitioner to establish eligibility at the time of filing. The Petitioner addresses this issue, but only in the context of his eligibility for the underlying EB-2 classification. The Petitioner asserts that his business information from 2021 was not intended "to establish [his] eligibility as an Alien of Exceptional Ability in Software Development – which was vastly established at the time of filing on April 4, 2019." The Petitioner,

however, must meet *all* eligibility requirements at the time of filing. 8 C.F.R. § 103.2(b)(1). The appeal relies heavily on the Petitioner's business plan, drafted two years after the filing date, and on circumstances that did not exist until after the filing of the petition. Assertions about water conservation, for instance, derive from a contract that the Petitioner did not secure until more than two years after he filed the petition.

In *Matter of 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. *Id.* at 893. Here, the Petitioner has not shown that his proposed endeavor will significantly extend beyond his customers to impact the industry more broadly at a level indicating national importance. He has not shown that the particular work he proposes to undertake offers original innovations that contribute to advancements throughout the industry, or otherwise has broader implications for his field. For all these reasons, the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework.

Because the record does not establish the national importance of his proposed endeavor, the Petitioner has not demonstrated eligibility for a national interest waiver. Because this issue determines the outcome of the Petitioner's appeal, we reserve the appellate arguments regarding the third *Dhanasar* prong.[4]

## III. CONCLUSION

Because the Petitioner has not met the "national importance" element of the first prong of the *Dhanasar* analytical framework, we conclude as a matter of discretion that he has not established eligibility for a national interest waiver. We will therefore dismiss the appeal.

**ORDER:** The appeal is dismissed.

[4] *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).