U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20604521

Date: JUL. 27, 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 software developer, 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 although the record shows that the Petitioner's proposed endeavor has substantial merit and he is well positioned to advance that endeavor, it did not establish that his proposed endeavor was of national importance or that, on balance, it would be beneficial to the United States to waive the requirement of a job offer, and thus a labor certification, in the Petitioner's case.

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.

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.[1] *Dhanasar* states that after EB-2 eligibility has been established, 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.[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.

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

[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*).

[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.

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 software developer. Although not discussed by the Director in his decision, the record shows that he qualifies as a member of the professions with an advanced degree or equivalent.[4] He initially indicated his intent to work as a software developer for a U.S. company, but in response to the Director's request for evidence (RFE) he stated that he would establish an information technology consulting firm to serve large companies and government agencies.

In his decision, the Director concluded that while the evidence established the substantial merit of the Petitioner's proposed endeavor, it did not show that it would be of national interest. Therefore, the Petitioner did not meet the first prong of the *Dhanasar* framework. In addition, the Director concluded that the Petitioner's experience working for [redacted] in Brazil made him well-positioned to advance his proposed endeavor. However, in his analysis of the third prong in the *Dhansar* framework, the Director determined that the Petitioner's assertions regarding occupational shortages in the IT industry are best addressed through the labor certification process, and thus did not show any national interest factors that would outweigh the benefits inherent in that process. Because he concluded that the Petitioner did not meet the first and third prongs of the *Dhanasar* analysis, the Director found that the Petitioner did not merit a national interest waiver as a matter of discretion.

On appeal, the Petitioner asserts that his proposed endeavor would have substantial economic impact in helping to build a skilled workforce in an industry with a shortage of talent. He also asserts that these economic benefits and supply of talent to the workforce that would result from his endeavor would, on balance, outweigh the national interest in the protection of the domestic workforce through the labor certification process. After reviewing the record, we agree with the Director's conclusion that the Petitioner does not merit a national interest waiver.

A. Substantial Merit and National Importance of the Proposed Endeavor

The Petitioner initially indicated that he planned to work for a U.S. company as a software developer, but in response to the Director's RFE he stated that he would start his own IT consulting firm, and included a business plan with that response. This business plan includes projections that the Petitioner's business will have nine employees, including himself, by it's fifth year, and will be earning

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

[4] The record includes a copy of a "Titulo de Licenciado" diploma from [redacted] University in Brazil, and a "Latu Sensu" diploma from the [redacted], as well as transcripts from both institutions which show that he completed a four-year "complete" program in Mathematics. In addition, employment letters verify his progressive work experience in programmer and systems analyst positions for more than five years after completing his four-year degree.

revenues of more than $1.3 million at that point. Based upon these projections, the Petitioner asserts on appeal that his proposed endeavor will have a significant economic impact by "building [a] new skilled workforce and creating jobs," and will therefore be of national importance. He also refers to industry reports of a shortage of workers in the IT industry in the United States, and asserts that his knowledge and skills will "fill a void in the U.S. market."

As noted above, in the first prong we focus on the specific endeavor proposed by a petitioner. Here, based upon our review of the record, we agree with the Director's conclusion that the Petitioner's proposed endeavor as a consultant and entrepreneur in the IT industry is of substantial merit in the area of business.

Turning to national importance, we note that 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 Dhanasar,* 26 I&N Dec. at 889. Here, the Petitioner must demonstrate the national importance of his work in the IT industry, rather than the national importance of the industry overall. In *Dhanasar,* we noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Id.* We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890.

We will first consider the Petitioner's assertion that his creation of a new business will have significant potential to employ U.S. workers. While his business plan projects the employment of eight additional workers within five years of creation, the record is absent of documentary evidence to show that the proposed business has significant potential to do so. More importantly, the evidence does not demonstrate that even if the business was able to employ eight workers in five years, this would have substantial positive economic effects. Although the business plan doesn't mention a specific location for the proposed company, it includes a comparison to IT consulting companies in the [redacted] Florida area. But the record lacks evidence that [redacted] is an economically depressed area, the example provided in *Dhanasar*, or that the employment of eight workers at a projected median salary of $61,800 would otherwise have substantial positive economic effects for the region.

The Petitioner also places great emphasis on the shortage of IT workers in the United States, particularly in the area of [redacted] in which he specializes, and asserts that both his work and the work of the employees that he will train will help to address this shortage. The record includes media and government reports which support the shortage of IT workers in general. However, as noted above, the first prong of the *Dhanasar* framework focuses on the Petitioner's specific proposed endeavor. The evidence does not show that the proposed employment of eight IT workers would have broader implications in the IT industry.

Upon review, we agree with the Director that the Petitioner has not established that his proposed endeavor of starting an IT consulting firm is of national importance, and that he therefore has not met the first prong of the *Dhanasar* framework.

B. Well Positioned to Advance the Proposed Endeavor

In the second prong of the *Dhanasar* framework, we shift our focus from the proposed endeavor to the petitioner. The Director determined, based primarily on his review of two letters from the Petitioner's former colleagues at [redacted] bank in Brazil, that the Petitioner's experience in software development projects for that employer made him well positioned to advance his proposed endeavor.

However, we note that the bulk of the proposed endeavor focuses not on the Petitioner's own software development activities, but upon his creation of a new company with employees engaged in that work. While we agree that his credentials and experience as a software developer are sufficient to allow him to continue to be employed in that field in the United States, which was the essence of his initial proposed endeavor, the record does not demonstrate that he is well-positioned to advance as an entrepreneur.

As noted above, the *Dhanasar* decision spelled out several factors which can be considered in determining whether a petitioner is well-positioned to advance their proposed endeavor, including several which are pertinent to entrepreneurial endeavors. These include a record of success in similar efforts, any progress towards achieving the proposed endeavor, and the interest of potential customers, users, investors, or other relevant entities or individuals. In this case, the record lacks evidence which supports any of these factors. Specifically, although the evidence includes the Petitioner's resume and several experience letters from former employers, there is no evidence that he has previously attempted or succeeded in starting a new business. In addition, the record lacks documentation of any progress towards achieving this endeavor, which might include the establishment of the business as a legal entity, registration of the business, securing any necessary funding, renting or purchasing physical space for the business, and the hiring of employees and contractors. Further, there is no indication in the record that the Petitioner has successfully gathered interest from potential investors or customers. While "we do not ... require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed," *Dhanasar* at 890, here the record does not show that the Petitioner has made any preparations for starting his new business beyond writing a business plan which includes more information about his achievements as a software developer than about the prospects of his proposed business. Accordingly, we disagree with the Director and conclude that the Petitioner has not established that he meets the second prong of the *Dhanasar* framework.

C. Whether on Balance it Would be in the National Interest to Grant a Waiver

As discussed above, we conclude that the Petitioner has not met the first and second prongs of the *Dhanasar* framework, and he has therefore not established that he should be granted a national interest waiver as a matter of discretion. We therefore need not determine under the third prong whether on balance it would be in the national interest to grant a waiver of the job offer requirement of the requested classification. However, we will briefly note that the Petitioner's argument based upon the labor shortage in the IT industry are not persuasive, as the purpose of the labor certification process is to identify jobs where there are no qualified, willing and available U.S. workers. Further, although the Petitioner argues that the labor certification process is lengthy and can cost companies money in terms of delays in hiring, he has not demonstrated that there is an urgent need for his services.

III. CONCLUSION

The Petitioner has established his eligibility as a member of the professions holding an advanced degree or equivalent. However, he has not shown that he is eligible for or otherwise merits a national interest waiver of the job offer requirement as a matter of discretion.

ORDER: The appeal is dismissed.