U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22836146

Date: NOV. 02, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, a database 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 Nebraska Service Center denied the petition, concluding that while the record showed that the Petitioner qualified as a member of the professions holding an advanced degree, it did not establish that a waiver of the job offer requirement of that visa classification would be in the national interest. The Petitioner now appeals that decision.

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. . . . [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 definition:

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.[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,

[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.

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 database engineer with more than 20 years of experience in the IT field, and has also founded or co-founded three business in his native country. He proposes to work as a freelance database engineer in the United States while also founding an online school offering courses in database administration and business intelligence.

The Director determined that the Petitioner qualifies as a member of the professions holding an advanced degree through his Master of Business Administration degree from [redacted] University in 2017. Therefore the sole focus of this decision is whether he merits a national interest waiver of the job offer requirement and thus, a labor certification.

A. Substantial Merit and National Importance of the Proposed Endeavor

When reviewing evidence under the first prong of the *Dhanasar* framework, we focus on the potential prospective impact of the specific endeavor proposed by the Petitioner. As the Director noted, substantial merit may be found in areas such as business, entrepreneurialism and education, and in his decision he concluded without analysis that the Petitioner's proposed endeavor was of substantial merit. The record includes several articles and technical papers showing the value of information technology (IT) and IT workers to the national economy. We therefore agree with the Director's conclusion.

With respect to national importance, the Director first noted in his decision that the Petitioner's activities as a freelance database engineer would provide benefits to himself and his employer, but would not have national or global implications within the IT or business field. While the Petitioner asserts on appeal that his expertise will directly benefit commercial transactions in the U.S. and would thus "produce a significant national positive impact on the country," the record does not include evidence of the significance of his specific proposed work as a database engineer in terms of revenue

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

or job creation. On the contrary, the document entitled "Freelance Talent Agreement" indicates that he will work as an independent contractor for a freelancing portal and be assigned to clients, and that his employment of subcontractors would be restricted. This evidence does not demonstrate that this aspect of his proposed endeavor would have significant potential to employ U.S. workers or have other substantial positive economic effects,[4] or would otherwise be of national importance.

Turning to the other aspect of his proposed endeavor, the Director concluded that the Petitioner's inclusion of a business plan for his proposed online school in his response to the Director's request for evidence was an impermissible material change, and also that the benefits of the online school would not extend beyond students of the programs. Regarding the first of these conclusions, we agree that eligibility for an immigration benefit must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). However, for purposes of the first prong analysis, we note that the Petitioner initially mentioned his plans for an online school in his first statement submitted with the petition. His more detailed statement regarding these plans, as well as the business plan, were a response to the Director's request for additional information regarding this aspect of his endeavor, and thus were not an attempt to change the nature of his endeavor. This evidence will therefore be considered in our analysis of whether the Petitioner's proposal for an online school would be in the national interest.[5]

In arguing against the second of the Director's conclusions about the national interest of his proposed online school in his appeal brief, the Petitioner's representative refers to links to a survey which was not included in the record and states that it concluded that more than half of adults in the labor force indicated that it will be essential for them to receive training and develop new skills throughout their work life. He then asserts, without directly referencing a passage from this survey, that these skills "in the majority are related to computer use and software that facilitates their workload, areas where [the Petitioner] has a proven track record. However, assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

The Petitioner further asserts that because his IT school will be online and offer a platform or channel as a marketplace connecting companies with IT professionals, it will reach such professionals throughout the U.S. and in other countries, "which demonstrates the broad access his business will have and the extensive national importance of his business." But a school or business does not have national importance simply by virtue of its availability on the internet, and the impact of such an entity is limited to the number of students, clients or employees it has. Much like the petitioner in *Dhanasar*, the Petitioner's proposed endeavor in advancing vocational education in a STEM field has substantial merit in terms of providing individuals with new skills, but he has not shown that his specific proposed activities as the founder and leader of an online school would impact either STEM education or the workforce more broadly.

---

[4] See *Dhanasar*, 26 I&N Dec. at 890.

[5] The Director considered the amount of the Petitioner's investment into this proposed endeavor in assessing whether it was of national importance. Because this aspect of the evidence is more relevant to the determination of whether he is well placed to advance his endeavor, we will only consider it in our second prong analysis.

For the reasons given above, we conclude that the Petitioner has not established that either aspect of his proposed endeavor is of national importance, and he has therefore not met the first prong of the *Dhanasar* analysis.

B. Well Positioned to Advance the Proposed Endeavor

In the second prong of the *Dhanasar* framework, the focus shifts from the proposed endeavor to the petitioner and their positioning to advance the endeavor they propose. We look to several factors in making this determination which relate to the petitioner's qualifications, support and commitment to advancing their proposed endeavor. Here, looking first to the Petitioner's proposal to work as a freelance database engineer, the record includes evidence showing that he possesses the necessary education, skills, and experience to advance this aspect of his endeavor. This includes letters from former business partners and co-workers, attesting to his IT and project management experience. In addition, the record includes a contract the Petitioner signed with a freelance network to work for assigned clients, as well as a confirmation letter from that network. Although he has not shown that this work would be in the national interest, we conclude that the evidence shows that he would be well-positioned to advance this part of his endeavor.

The other aspect of the Petitioner's proposed endeavor is his creation and leadership of an online school and employment portal similar to the one with which he has signed a contract. As with the endeavor discussed above, the reference and employment letters from former partners and co-workers show that he has business experience and has been involved with the startup of three companies in his native country, showing a record of success in similar ventures. For instance, [redacted] one of the Petitioner's co-partners in the company [redacted] describes the Petitioner's role in creating the company's financial education portal and later taking a larger role in project management and marketing. However, as noted by the Director in his decision, the record does not include evidence of interest from investors or potential clients, two types of evidence specifically identified in the USCIS Policy Manual as important to demonstrate that a petitioner is well positioned to advance such an endeavor. Also, although the Petitioner included documentation showing the formation of a company as well as a business plan with projections of revenue and employment, all created in response to the Director's RFE, this evidence does not show sufficient progress towards achieving this proposed endeavor. While we acknowledge that our decision in *Dhansar* states that entrepreneurs such as the Petitioner are not required to show that their endeavors are more likely than not to ultimately succeed, here the lack of evidence of sufficient funding, progress and potential clients offset the Petitioner's experience as an IT professional and entrepreneur. We therefore conclude that he is not well positioned to advance this aspect of his proposed endeavor.

C. Whether on Balance it Would be Beneficial to the United States to Grant a Waiver

As explained above, the third prong of the *Dhanasar* framework 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. The *Dhanasar* decision spells out possible factors to be weighed under this prong, including the impracticality of obtaining a labor certification and the urgency of the national interest in an individual's contributions. While the Petitioner does not address this prong on appeal, in his RFE response he suggested that he could help to address a shortage of IT workers in the

U.S. through both aspects of his proposed endeavor, and that the need for IT workers is so great that a waiver is justified to avoid delays inherent in the labor certification process.

Initially, we note that a labor certification shows that the U.S. Department of Labor has determined that there are insufficient workers who are able, willing, qualified and available for a particular job opportunity, and is thus the appropriate means for qualification in the EB-2 classification for workers in fields where a labor shortage exists. Accordingly, a labor shortage in the Petitioner's field alone does not tilt the balance between protection of the domestic labor force and any national interest in his proposed endeavor in his favor. As for this second argument, he has not shown that the reports and articles he submitted focus on a national urgency in the employment of database engineers or vocational training in database engineering or business intelligence. Further, since he has not shown that his proposed endeavor would be of national importance, or that he is well positioned to advance his proposal for an online school, we conclude that it would not be in the national interest of the United States to grant him a waiver of the job offer requirement.

III. CONCLUSION

The evidence of record establishes that the Petitioner qualifies as a member of the professions holding an advanced degree, and he is therefore eligible for the underlying EB-2 visa classification. But it does not show that his endeavor is of national importance, or that he is well positioned to advance his proposal of an online school. Accordingly he has not demonstrated that a waiver of the job offer requirement, and thus of a labor certification, would be in the national interest.

ORDER: The appeal is dismissed.