U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23035410

Date: NOV. 18, 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 business administrator, 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 record supports her qualification for a 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.[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,

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[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 has held management roles in two Brazilian companies, including one that she co-founded, [redacted] She holds a bachelor's degree in administration, and has submitted evidence documenting more than five years of progressive post-degree experience with her company. As she has established her eligibility for the EB-2 visa classification as a member of the professions holding an advanced degree, the sole issue on appeal is whether a waiver of that classification's job offer requirement, and thus a labor certification, would be in the national interest of the United States.[4]

The Petitioner proposes to serve as the administrator of three [redacted] franchises in the [redacted] Florida area owned by [redacted] a company which the evidence indicates is or was partially owned by her husband and of which she now claims to be a partial owner. [redacted] was created for the purposes of securing EB-5 immigrant investor visas. She states that in this role, she will run the day-to-day operations of these facilities, including managing marketing, mail distribution, facilities maintenance, record keeping, office budgets, and supplies, and that she will provide these services through her own company.[5]

We first note that the record lacks evidence of this administration arrangement between the Petitioner or her company and [redacted] Although a letter from the owners of [redacted] was submitted with the initial filing, this letter is in a foreign language and is not accompanied by a certified English translation as required per 8 C.F.R. § 103.2(b)(3). While we acknowledge that a petition for a national interest waiver by its very nature does not require a job offer, evidence (or lack of evidence) regarding how a

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

[4] Although the Petitioner also claimed eligibility for the EB-2 immigrant visa classification as an individual of exceptional ability, since we agree with the Director's determination that she qualifies as a member of the professions holding an advanced degree, we need not further address her eligibility for the EB-2 classification.

[5] Although the Petitioner submitted evidence that she is a member of [redacted] along with her son, she refers to the company through which she will provide services to the [redacted] franchises in the future tense and does not state that this endeavor will be performed through [redacted]

petitioner intends to advance their proposed endeavor may affect the determination of whether their endeavor is of substantial merit and national importance, as well as whether they are well positioned to advance that endeavor. Nevertheless, we will analyze the remaining evidence in the record under the three prongs of the *Dhanasar* framework below.

A. Substantial Merit and National Importance

As stated above, in the first prong of the *Dhansar* framework, we focus on the prospective potential impact of the specific endeavor that the individual proposes to advance. In his decision, the Director acknowledged the Petitioner's statement that she would administer three [redacted] franchises, but then focused on the varying descriptions of these franchises as either daycare facilities or pre-schools, finding that this led to a deficient description of her proposed endeavor. However, the evidence indicates that these franchises will offer services to children from infants through pre-kindergarten, and tailor educational programs to the specific age of the children. We therefore disagree with the Director's conclusion that the differing terms used to describe these facilities in the record detract from the Petitioner's description of her endeavor, and find that they are not material to the determination of her proposed endeavor's substantial merit and national importance.

The Director also concluded that the Petitioner had not provided a detailed description of her proposed endeavor, or evidence showing that her endeavor has substantial merit in business, entrepreneurialism, science, technology, culture, health, education, the arts, or social science. However, as noted above, the Petitioner described several functions of these facilities which she would administer, including marketing, facilities maintenance, and budgeting. In addition, the record includes descriptions of the facilities and projected staff members, providing context for the environment in which the Petitioner would conduct her proposed endeavor.

In support of the substantial merit of her proposed endeavor, the Petitioner submitted materials related to the duties of educational administrators and school district superintendents, as well as the importance of early childhood education. But unlike the general descriptions of the duties of an educational administrator or school district superintendent, the Petitioner does not indicate that her specific role would involve the provision or planning of childhood education. Thus the record does not support the substantial merit of her proposed endeavor in the field of education.

The Petitioner also submitted evidence regarding the importance of management for a business. We find the record sufficient to support the substantial merit of her proposed endeavor in the field of business.

Turning to the national importance of the Petitioner's propose endeavor, the Petitioner criticizes a few aspects of the Director's decision in her appeal brief. For example, she states that it does not discuss the evidence of her knowledge and experience in the field. In addition, she asserts that the Director's statement about the relevance of the specific endeavor versus the importance of the industry in which the Petitioner proposes to work "ignores the specific relevance of the early childhood education itself." However, regarding the latter, the *Dhanasar* decision clearly states that it is the specific endeavor that the individual proposes to undertake which is the focus under the first prong. *Dhanasar*, 26 I&N Dec. at 889. And the Petitioner's argument that evidence of her education and experience should have been

considered here is incorrect, as we review that evidence under the second prong to determine whether a petitioner is well positioned to advance their proposed endeavor.

The Petitioner refers to an article about the deficit of child care in the United States, and another which notes that the closure of schools and child care centers due to the COVID-19 pandemic "drove mothers out of the work force, increasing stress on them and creating economic uncertainty for children." While we acknowledge the importance of the availability of child care, the Petitioner has not articulated or presented evidence to show that her administration of three child care facilities in the [redacted] area will have national or even global implications within the field of early childhood education. In addition, although we stated in *Dhanasar* that even endeavors focused in one geographic area may be considered to have national importance, such as those that would have a significant potential to employ U.S. workers or have other substantial positive economic effects, particularly in an economically depressed area,[6] the Petitioner has not established that her endeavor has the potential to have such effects. Importantly, the evidence indicates that it is [redacted] which will (or has) constructed these facilities and will employ the staff, whereas the Petitioner has not shown that her specific proposed endeavor in administering those facilities will employ anyone other than herself. To the extent that her administration of these child care facilities will enable others to employ workers and provide services that will be of benefit to children and their parents, the Petitioner has not demonstrated that those benefits will extend beyond those employees and clients of the specific facilities to be of national importance.

Although the record establishes that the Petitioner's proposed endeavor is of substantial merit, for the reasons discussed above it does not show that it would be of national importance. Accordingly, the Petitioner has not established that she meets the first prong of the *Dhanasar* framework.

B. Well Positioned to Advance the Proposed Endeavor

In the second prong of the *Dhanasar* framework, the focus shifts to the individual and whether they are well positioned to advance the endeavor they propose. As noted, we consider a variety of factors in making this determination. Here, the Director's decision considered the reference letters in the record which describe the Petitioner's previous management experience with the company she co-founded in 1995, and concluded that they showed respect from her peers. However, he determined that they were insufficient to establish that she is well positioned to advance her endeavor, as they did not show "a record of past achievements beyond the normal expectations of an administrator and entrepreneur…"

On appeal, the Petitioner asserts that the Director went beyond the regulations and the precedent decision in *Dhanasar* in concluding that the reference letters show she "has played a significant role in the work of others in the field" and "were not accompanied by corroborative evidence of the impact" of her work. However, as we noted in our footnote above, our decision in *Dhanasar* indicated that a petitioner for a national interest waiver cannot qualify just by demonstrating a degree of expertise significantly above that ordinarily encountered in their field of expertise.[7] The Director's statements regarding the Petitioner's impact and role in the work of others led directly to his ultimate conclusion

[6] *Id.* at 889-890.
[7] *Id.* at 886.

that she did not exceed this level of expertise, and was thus in keeping with the requirements of *Dhanasar*'s second prong.

In support of her positioning to advance her proposed endeavor, the Petitioner points to her experience in business management, first with her family's company and then with [redacted] Her experience with [redacted] is documented by those reference letters, especially the letter from her business partner. She also refers to the letter from [redacted] asserting that this demonstrates the interest of relevant parties in her proposed endeavor. Again, that letter was not accompanied by a certified English translation as required. However, even assuming that her statements about the content of the letter are accurate, [redacted] business plan lists her husband as one of the members of [redacted] and she claims to now be a partial owner of the company. This agreement between [redacted] and the Petitioner therefore represents not the interest of clients, investors, or other relevant parties in her endeavor, but her own self interest.

We further note that while the evidence shows that the Petitioner has relevant education and years of experience in managing a business involved in the import and sale of dental equipment, she does not have experience in education administration, let alone a record of success in this area. The materials she submitted relating to this position also indicate that an advanced degree in a field related to education is recommended, which the evidence does not indicate the Petitioner possesses.

After review of the record and for the reasons stated above, we conclude that the Petitioner has not established that she is well positioned to advance her endeavor, and therefore does not meet the second prong of the *Dhanasar* framework.

C. Whether on Balance a Waiver of the Job Offer Requirement Would be in the National Interest

In the third prong of the *Dhanasar* framework, we balance the national interest in protecting the domestic labor supply against the national interest in the benefits of an individual's proposed endeavor. Here, per the discussion above, the Petitioner has not established that her proposed endeavor is of national importance, or that she is well-positioned to advance that endeavor. She has therefore not shown that there is a strong national interest in granting her a waiver of the job offer requirement.

On appeal, the Petitioner first asserts that a labor certification would be impractical in her case, since her experience and education allow her to work in various positions within a company, whereas a labor certification requires that job positions be specifically defined. However, the Petitioner specifically proposes to work in a single occupation, as an administrator for three [redacted] franchises, so it is not apparent how her ability to work in different occupations would make a labor certification impractical.

She also asserts that due to "the national shortage of educators," the risk of her taking the job of a qualified U.S. worker is low. We first note that the Petitioner does not propose to be an educator, so any shortage of workers in that field is irrelevant to her endeavor. In addition, the purpose of the labor certification process is to test the labor market to ensure that there are no qualified, willing, and available U.S. workers for a particular position, and that process is therefore ideally suited to identifying occupations and locations where a labor shortage may exist. The Petitioner also has not demonstrated that there is an urgent need for her services such that a waiver of the job offer requirement is warranted in the national interest to avoid any delays inherent to the labor certification

process. Accordingly, we conclude that he has not established that, on balance, a waiver of the job offer requirement would be in the national interest.

III. CONCLUSION

The Petitioner has established that she qualifies for the underlying EB-2 visa classification as a member of the professions holding an advanced degree, but she has not shown that a waiver of the job offer requirement would be in the national interest of the United States. Her petition will remain denied.

ORDER: The appeal is dismissed.