U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23069538

Appeal of Texas Service Center Decision

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

The Petitioner, a fitness instructor and entrepreneur, 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 determined that the Petitioner qualifies for the underlying classification, that her proposed endeavor has substantial merit, and that she is well positioned to advance her proposed endeavor. Nevertheless, the Director denied the petition, concluding that the evidence did not establish the national importance of the proposed endeavor or that a waiver of the requirement of a job offer would be in the national interest. Accordingly, the Director determined that the Petitioner had not established eligibility for a national interest waiver.

The matter is now before us on appeal. The Petitioner reasserts her eligibility, arguing that the Director erred in the 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. LEGAL FRAMEWORK

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.

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.
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> Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
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> 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).

Furthermore, 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

The Director determined that the Petitioner qualifies for the underlying EB-2 classification. The remaining issue is whether the Petitioner has established that she is eligible for a national interest waiver. While we may not discuss each piece of evidence individually, we have reviewed and considered each one. The Petitioner proposes to continue operating her Florida-based fitness business, [redacted] In so doing, she will offer Pilates classes, fitness programs, and in-house instructor training.

Regarding the national importance of the proposed endeavor, the Petitioner offered numerous examples of how exercise and fitness improve physical and mental health. The Petitioner explained that the COVID-19 pandemic raised awareness of health-related issues and that as a result, the demand for fitness instructors and related services have increased. In particular, the Petitioner noted statistics concerning the economic impact and growth potential of the fitness industry and research findings that predict a future workforce shortage in the industry. She claimed that her proposed endeavor will improve the U.S. economy, as [redacted] will pay operational costs, income taxes, and wages to employees. To support her arguments, she provided a business plan that explained her company's business model, finances, growth potential, and revenue plans. In the business plan, the Petitioner claimed that her proposed endeavor will offer sustainable business practices, reduce unemployment, and fill a demand for physical fitness services. The Petitioner also explained that teaching and training others to work as fitness instructors will transfer important knowledge to them and create a talent pool upon which her business and the industry may rely. The Petitioner emphasized that her proposed endeavor promotes the standards the federal government set forth in the Occupational Safety and Health Act (OSHA). Specifically, she explained that health and physical fitness combats disease and disability, thereby enhancing workplace safety. In addition, the Petitioner referenced the importance of small businesses and immigrant entrepreneurs in the United States.

In our de novo review of the record, we conclude that the Petitioner has not offered sufficient evidence to establish the national importance of her proposed endeavor. We acknowledge and agree that exercise and the fitness industry are important; however, this is not necessarily sufficient to establish the national importance of the proposed endeavor. As the Director explained in the decision, 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. Although the Petitioner offered numerous examples of how exercise and physical fitness services are nationally important, this does not sufficiently support a finding that her specific proposed endeavor has national importance.

In addition to providing instruction to those engaging in a fitness program, the Petitioner proposes to offer classes to those interested in understanding more about physical health and exercise, as well as in-house training to fitness instructors. However, the Petitioner has not demonstrated that her proposed endeavor will impact the fitness industry as a whole, nor has she suggested that her services would be available on a scale that rises to the level of national importance. 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. While she may impact her individual clients and students, the Petitioner has not provided sufficient evidence to establish that her services will be broadly available. Rather, it appears that her proposed endeavor will operate on a scale affecting only those who pay for her services. 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. Id. at 893. Likewise, while the Petitioner's services have value, she has not established how her activities would impact the exercise industry or the nation more broadly.

The Petitioner predicted that she would create $1,434,647.50 in revenue, as well as 13.2 direct and indirect jobs by year five of her business. While we acknowledge these figures, the Petitioner does not adequately explain how she calculated them and as such, they appear to be little more than conjecture. Even if the Petitioner had provided a foundation for her projections, she would still need to establish how such figures represent economic activity that would rise to the level of national importance. Although she provided rural poverty statistics from a study conducted in the [redacted] and [redacted] regions of Florida, she has not provided sufficient evidence to establish that the [redacted] and [redacted] regions are economically depressed. Even if she had, this would still not establish how her proposed endeavor would operate on such a scale as to positively impact the economic condition of the region. As the Director explained, the Petitioner has not demonstrated that her company's staffing levels, support of local contractors, and volume of activity will provide substantial economic benefits to the United States. Without sufficient evidence of projected U.S. economic impact or job creation attributable to her future work, the record does not show that benefits to the U.S. regional or national economy resulting from the Petitioner's business would reach the level of "substantial positive economic effects" contemplated by Dhanasar. Id. at 890.

We examined the advisory opinion from [redacted], an adjunct professor of business, entrepreneurship, and sports management at [redacted]. He provided his opinion on the Petitioner's eligibility for a national interest waiver under the Dhanasar framework. [redacted] emphasized the shortage of physical educators and therapists, as well as the importance of physical education and the demand for it. He also concluded that the Petitioner's education, experience, and skills will enable her to meet this demand. However, [redacted] has not offered a sufficient explanation for how the proposed endeavor will address or resolve workforce shortages in this area. In addition, the Petitioner's expertise acquired through her education and employment relates to the second prong of the Dhanasar framework, which "shifts the focus from the proposed endeavor to the

foreign national." Id. The issue here is whether the specific endeavor that the Petitioner proposes to undertake has substantial merit and national importance under *Dhanasar's* first prong.

As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. Matter of Ca*ron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we will reject an opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. Id. We are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. Id. Here, [redacted] opinion focuses on the importance of the industry rather than the national importance of the specific proposed endeavor. Further, he focuses on the Petitioner's qualifications, which do not directly pertain to the national importance of the proposed endeavor. As such, his opinion is of little probative value in this matter.

We reviewed the letters of recommendation from the Petitioner's clients, students, and professional colleagues. The authors of the letters praised the Petitioner's personal and professional qualities, the services she offered, her experience, and the results she achieved for those who worked with her. Some of the authors also praised her franchise success in Brazil. However, none of the authors demonstrated detailed knowledge of the proposed endeavor, nor did they demonstrate how it has national importance. Generalized conclusory statements that do not identify a specific impact in the field have little probative value. *See 1756, Inc. v. U.S. Att'y Gen.*, 745 F. Supp. 9, 15 (D.D.C. 1990) (holding that an agency need not credit conclusory assertions in immigration benefits adjudications). The submission of reference letters supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters so as to determine whether they support the petitioner's eligibility. Id. See also Matter of V-K-, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Because the authors did not meaningfully address the national importance of the proposed endeavor, their letters are of limited probative value in this matter.

On appeal, the Petitioner requests that we reach a different conclusion based upon the evidence and arguments already provided. While we acknowledge the importance of physical exercise in general, in addition to the Petitioner plans to offer valuable services in the fitness industry, the evidence provided does not sufficiently establish the national importance of the proposed endeavor. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012). The Petitioner has not met her burden.

III. CONCLUSION

The documentation in the record does not 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 Dhanasar framework 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 second and third Dhanasar prongs. 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).

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 reason.

ORDER: The appeal is dismissed.