U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22642819

Date: OCT. 6, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in the medical device industry, seeks second preference immigrant classification as a member of the professions holding an advanced degree and as an individual of exceptional ability, 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 had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. On appeal, the Petitioner submits additional documentation and a brief asserting that he is eligible for a national interest waiver. In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further review of the record and issuance of a new decision.

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.
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> (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.

Section 101(a)(32) of the Act 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.
>
> *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 to the definition of "advanced degree" provided at 8 C.F.R. § 204.5(k)(2), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) provides that a petitioner present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

Also, 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). *Dhanasar* states that after a petitioner has

established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[1], 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.

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 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

A. Member of the Professions Holding an Advanced Degree

In denying the petition, the Director did not address the Petitioner's eligibility for classification as a member of the professions holding an advanced degree. To qualify as a member of the professions, an individual must meet "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 into the occupation." 8 C.F.R. 204.5(k)(2).[3] Further, in order to show an individual holds an advanced degree, the petition must be accompanied by "[a]n official academic

[1] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

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

[3] Section 101(a)(32) of the Act states "[t]he term 'profession' shall include but not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

The Director's decision did not indicate whether the Petitioner's occupation, entrepreneur in the medical device industry, qualifies as a member of the professions. In addition, the Director did not conclude whether the Petitioner's "Titulo de Bacharel" degree from [redacted] is a foreign equivalent of a U.S. baccalaureate degree followed by at least five years of progressive experience in the specialty.

On remand, the Director should first determine whether the Petitioner's occupation as an entrepreneur is a member of the professions. If so, the Director should consider whether the Petitioner's "Titulo de Bacharel" degree meets the foreign equivalent of a U.S. baccalaureate degree followed by at least five years of progressive experience in the specialty. If the Director concludes that the Petitioner is not an advanced degree professional, he should then determine whether the Petitioner qualifies as an individual of exceptional ability, discussed below.

B. Exceptional Ability

The Director's decision did not address the Petitioner's eligibility for classification as an individual of exceptional ability.[4] The Petitioner asserted eligibility and submitted documentation for five of the regulatory criteria under 8 C.F.R. § 204.5(k)(3)(ii)(A)–(F).[5] He also provided comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(k)(3)(iii).

On remand, the Director should review the evidence and determine if the Petitioner has met three of the above initial regulatory criteria for classification as an individual of exceptional ability. If so, the Director should then conduct a final merits determination to conclude whether the Petitioner has achieved the level of expertise significantly above that ordinarily encountered for exceptional ability classification.

C. National Interest Waiver

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. With respect to his proposed endeavor, the Petitioner submitted a signed statement at the time of filing indicating that he intends "to continue using my expertise and knowledge as a businessman in the medical device

[4] A petitioner seeking classification as an individual of exceptional ability must present documentation that satisfies at least three of the six categories of initial evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). However, meeting the minimum requirement by providing at least three types of initial evidence does not, in itself, establish that the Petitioner meets the requirements for exceptional ability classification. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. The officer must determine whether or not the petitioner, by a preponderance of the evidence, has demonstrated that she has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *See* 6 *USCIS Policy Manual* F.5(B), https://www.uscis.gov/policy-manual.

[5] The Petitioner did not claim eligibility for the license criterion under 8 C.F.R. § 204.5(k)(3)(ii)(C).

industry, particularly in the cleaning and sterilization of medical equipment, by working as an entrepreneur in the United States." He further stated: "The services I offer healthcare professionals provide the best quality care with the equipment they can count on is sterile and ready to use at a moment's notice." In addition, the Petitioner asserted:

> My career plan in the United States is to work with medical device companies, American clinics, and hospitals that require my specialized knowledge, years of experience, and significant have expertise. I intend to continue implementing ingenious strategies while maintaining positive relationships with my professional colleagues and identifying any opportunities for business . . . . In addition, my direct knowledge of the medical device industry in Brazil will be substantially beneficial to any U.S. health care company looking to form cross-border partnerships with companies in Brazil and throughout Latin America.

1. Substantial Merit and National Importance of the Proposed Endeavor

With regard to the first prong of *Dhanasar*, the Director issued a request for evidence (RFE) asking the Petitioner to provide further information and evidence regarding both the substantial merit and national importance of his proposed endeavor. In response, the Petitioner stated:

> Petitioner's endeavor is the creation of a healthcare and biotechnology company engaged in developing hardware and software technologies for medical equipment analysis and patient monitoring. Petitioner has founded, organized, and registered [redacted] in the State of Florida and is engaged in overseeing: (1) development and manufacturing of medical equipment hardware; (2) development of computerized maintenance management system software utilizing artificial intelligence for automated dynamic adjustments to medical equipment during patient care; (3) maintenance and calibration services of medical equipment hardware; and (4) medical data analytics for healthcare research. Petitioner is the chief executive officer of [redacted] and manages the operations of the company.

The Petitioner's response included documents indicating that that he formed [redacted] in January 2021. As the Petitioner's founding, organization, and registration of [redacted] materialized after the filing of the petition, and therefore would not establish his eligibility at the time of filing, it does not assist him in establishing that he meets the requirements set forth in the *Dhanasar* framework. The petition in this matter was filed on January 14, 2019, and the Petitioner has the burden of proof to establish eligibility for the requested benefit at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971) (providing that "Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts"). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

In denying the petition, the Director listed some of the Petitioner's documentation and stated that "[t]he evidence does not establish that the proposed endeavor is meritorious" and that the "endeavor does not

meet the national importance element of the first prong of the *Dhanasar* framework." The decision, however, did not contain a proper analysis of the Petitioner's evidence or a sufficient discussion explaining why the Petitioner had not demonstrated eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(1), (12). An officer must fully explain the reasons for denying a visa petition in order to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denial to allow the respondent a meaningful opportunity to challenge the determination on appeal). Here, the Director's decision did not adequately address the evidence submitted with the petition or in response to the RFE.

The Director should analyze the Petitioner's evidence to determine if his proposed endeavor has both substantial merit and national importance. If the Director concludes that the Petitioner's documentation does not meet the requirements of *Dhanasar*'s first prong, his decision should discuss the insufficiencies in the evidence and adequately explain the reasons for ineligibility.

2. Well Positioned to Advance the Proposed Endeavor

Relating to *Dhanasar*'s second prong, the Director concluded that "[b]ased on the evidence in the record, the Petitioner meets the prong." However, the decision did not identify the evidence and sufficiently explain the basis for this determination.

3. Balancing Factors to Determine Waiver's Benefit to the United States

With respect to prong three of the *Dhanasar* precedent decision, the Director's decision stated that the Petitioner's "lab documents, licensing agreements, and other company materials" had "not established 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 Director's decision, however, did not adequately address the Petitioner's arguments and evidence submitted at time of initial filing and in response to the RFE. Without a proper evaluation of the factors identified in *Dhanasar*'s third prong, the Director's determination for this prong was in error. If the Director determines that the Petitioner's documentation does not meet this prong, his decision should address all of the Petitioner's arguments and evidence, and explain the relative decisional weight given to each balancing factor.

III. CONCLUSION

To meet the requirements for a national interest waiver, an individual must first qualify for the underlying EB-2 visa classification. We are therefore remanding the petition for the Director to consider whether the Petitioner has satisfied the eligibility requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. In addition, the Director should properly apply all three prongs of the *Dhanasar* analytical framework to determine 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. As such, we will remand the matter for further consideration of the record (including the claims and documentation submitted on appeal), and entry of a new decision. The Director may request any additional evidence considered pertinent to the new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and entry of a new decision.