U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22121257

Date: SEP. 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, a military officer in special and tactical operations, 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 qualified for classification as a member of the professions holding an advanced degree but 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 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 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. . . . the 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.

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).[1] *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,[2] 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

[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] *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).

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 Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus of a labor certification, would be in the national interest.

The Petitioner alleges on appeal that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, and erroneously applied the law, to [his] detriment." Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing immigration benefit requests.[4] Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions.[5] While the Petitioner asserts on appeal that he has provided evidence sufficient to demonstrate his eligibility for a national interest waiver, he does not further explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

For the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of his endeavor under the first prong of the *Dhanasar* analytical framework.[6] The Petitioner provided initial information about his proposed endeavor indicating that he "intends to provide U.S. companies, agencies and organizations with expert advice and managerial services in intelligence, tactical security operations, logistics tactics, self-defense, and weapons training." The Petitioner stated that he would seek employment with companies located in the United States, asserting, among other things:

> My experience acquired over a 23-year career will be of great importance for the companies where I will work in America, as I will certainly implement new logistics improvements to facilitate and maximize existing procedures which will bring cost savings. At the same time, I will develop proposals to improve the security measures for the personnel, material and facilities of these companies, providing greater protection for the employees and customers of these institutions. . . .

The Director issued a request for evidence (RFE), asking for more information and evidence to establish the national importance of the proposed endeavor. In response, the Petitioner submits a revised statement indicating that he will alternatively focus his endeavor on the creation and operation of his own company [redacted] [N-] in Florida, which "will provide services such as security person[nel] training,

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.
[4] *See Matter of Chawathe*, 25 I&N Dec. at 375 (AAO 2010); *see also Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965).
[5] *See 1 USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-manual.
[6] The Petitioner submitted evidence to establish his eligibility for the benefit sought. While we may not discuss every document submitted, we have reviewed and considered each one.

cyber security training, third-party companies consultation for security and stress training for the military or security person[nel]."

The Petitioner's initial description of the proposed endeavor did not include plans to form such a company; instead, the Petitioner initially indicated that he would seek employment with existing U.S. companies as the means to perform his military and security related services. Accordingly, we conclude that the focus of his endeavor has materially changed after the filing of the petition. If significant material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. 8 C.F.R. § 103.2(b)(1). It appears the Petitioner sought to address the Director's concerns regarding what organization would utilize his military and security related skills and how his services would rise to the level of national importance, but in so doing, he has significantly changed his proposed endeavor. A petitioner may not make material changes to a petition that has already been filed to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which requires that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

In denying the petition, the Director concluded that the Petitioner had not demonstrated the national importance of his particular proposed endeavor. The Director explained that the Petitioner's evidence did not show that his proposed work through the operation and management of his security consulting services firm would have broader implications at a level indicative of national importance. We agree.

On appeal, the Petitioner points to the business plan that he submitted in his response to the Director's request for evidence (RFE) asserting:

> Although [he] may work for his own organization, his proposed endeavor is linked to national actions, particularly due to the prevalence, and influence, of criminal activity such as mass shootings in the United States, or in any other nation for that matter. In fact, [the Petitioner's] proposed endeavor prioritizes a topic of national concern. His work directly addresses urgent matters regarding significant U.S. entities, such as the law enforcement sector and the criminal justice system – both of which are intertwined with national security tendencies. As a military officer in special and tactical operations, he can also train, evaluate and manage security personnel in strategic security measures, weapons, and marksmanship.

While the Petitioner asserts on appeal that he "will continue his career in the United States as a Military Officer in Special and Tactical Operations," the evidence in the record does not suggest that the Petitioner is currently a military officer, or that he has been offered employment in such a role in the United States.

Moreover, to evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement we look to evidence documenting the "potential prospective impact" of his work. Although the Petitioner's statements reflect his intention to provide valuable security-related services

to his clients through his yet-to-be established business,[7] he has not offered sufficient information and evidence to demonstrate that the prospective impact of his proposed endeavor rises to the level of national importance. 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. Here, we conclude the record does not show that the Petitioner's proposed endeavor stands to sufficiently extend beyond his business and future clientele to impact the security industry or U.S. economy more broadly at a level commensurate with national importance.

The Petitioner has also not demonstrated that the specific endeavor he proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for our nation. For example, the business plan asserts that the Petitioner will make an initial investment of $100,000 into N-. However, the Petitioner did not provide evidence of his $100,000 investment, nor has he provided an accounting of how this money will be allocated to cover N-'s start-up costs so that he may commence his firm's business operations.

Notably, the business plan largely discusses generic aspects of the security services industry, not the Petitioner's specific plans to establish and operate his business. While the Petitioner asserts therein that he "has extensively studied the market segments that [he] intends to pursue," the business plan does not sufficiently identify the specific market segments (customers) that he intends to market his company's services to. For instance, the business plan discusses a variety of potential services through which N- might generate revenues, e.g., "contracts for security guards and patrol services," "fees for bodyguard services," "contracts for cybersecurity penetration testing" and revenues generated "per individual for stress training for forces." However, the plan does not identify the categories of clients or the actual clients that will be the focus of N-'s marketing efforts.

Further, the business plan does not indicate when N- will commence operations, but forecasts that N- will generate revenues exceeding $5,446,000 by the end of its fifth year of operation. The Petitioner estimates his business will create at least 47 direct jobs within this five-year timeframe. However, the plan does not adequately identify the nature of the positions to be created or detail the basis for his revenue and staffing projections; nor does the business plan adequately explain how the revenue and staffing projections will be realized. He has not shown that his company's future staffing levels would provide substantial economic benefits in California - where he resides, in Florida - the location where he alleges his business will be created, or the United States. Here, the record does not contain sufficient evidence that the area where the company will operate is economically depressed, that he would employ a significant population of workers in that area, or that his endeavor would offer the region or its population a substantial economic benefit through employment levels or business activity. Without sufficient information or evidence regarding any projected U.S. economic impact or job creation attributable to his future work, the record does not show that benefits to the regional or national economy resulting from the Petitioner's services would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890. Accordingly, the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework.

[7] We observe that the Petitioner states in his October 2021 RFE response that he intends to establish N-, a limited liability corporation in Florida, but he has not provided evidence on appeal to show that he has done so, and that his business legally exists.

Because the documentation in the record does not establish the national importance of his proposed endeavor as required by the first prong of the *Dhanasar* precedent decision, the Petitioner has not demonstrated eligibility for a national interest waiver. Further analysis of his eligibility under the second and third prongs outlined in *Dhanasar*, therefore, would serve no meaningful purpose. It is unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976); *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).

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that he has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.