U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22727254

Date: SEP. 28, 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 industrial 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 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.

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.

(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.

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 a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the noncitizen's proposed endeavor has both substantial merit and national importance; (2) that the noncitizen 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 noncitizen 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 noncitizen. 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 noncitizen's qualifications or the proposed endeavor, it would be impractical either for the noncitizen 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 noncitizen's contributions; and whether the national interest in the noncitizen's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together,

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

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

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. For the reasons discussed below, the Petitioner has not established that a waiver of the requirement of a job offer is warranted.

Initially, the Petitioner generally described the proposed endeavor as:

> [a] plan . . . to continue working as an [i]ndustrial [e]ngineer with multi-national companies in the U.S., providing indispensable guidance regarding cross-border transactions involving the development of different projects in Brazil. I intend to continue using my unique expertise and extensive knowledge in the field of automotive engineering, where I can provide expert managerial and technical services to U.S. companies. I will bring optimal results to any company that chooses to hire me in the future.

The Petitioner further asserted that his endeavor would have potential results as follows:

- Increase U.S. GDP;
- Create jobs for Americans;
- Generate tax revenue for the U.S.;
- Facilitate cross-border transactions between U.S. automotive companies and international automotive parts manufacturers;
- Navigate Brazil's automotive regulations and standards;
- Lead cross-functional groups in large and highly complex industrial engineering projects; and
- Advance the proposed endeavor of applying my expertise and skills in the field of industrial engineering to seize market and investment opportunities for U.S. companies in lucrative markets in countries such as Brazil.

A brief submitted in support of the petition reiterated that the Petitioner's "career plan in the United States is to work as an [i]ndustrial [e]ngineer for multi-national companies in the U.S." and that the Petitioner "will bring optimal results to any company that chooses to hire him in the future."

The Petitioner substantially altered his proposed endeavor in response to the Director's request for evidence (RFE). Instead of seeking to continue working as an industrial engineer for "any company that chooses to hire him," the Petitioner submitted a business plan, dated May 2021, in response to the RFE, indicating that "[t]he endeavor proposed by [the Petitioner] relies on developing . . . a [m]anagement [c]onsulting [s]ervice firm that provides [m]anagement [c]onsulting [s]ervices, planned

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

to be headquartered in California, with offices in Alabama, Michigan, and Oregon." The business plan further states that the Petitioner's consulting company will "generat[e] (26) direct jobs for U.S. workers, helping the U.S citizens improve their daily quality of life and safety." Publicly available information provided by the California Secretary of State indicates that the Petitioner filed the articles of organization for his consulting company in June 2021, after the filing date of the Form I-140, Immigrant Petition for Alien Workers, in January 2019.

A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). A petition may not be approved at a future date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm'r 1971). Because the business plan submitted in response to the RFE substantially alters the proposed endeavor from the Petitioner continuing to work as an industrial engineer for "any company that chooses to hire [him]" to developing his own consulting company, incorporated after the petition filing date, with its own staff, the business plan presents a new set of facts that did not exist at the time of filing. Therefore, the business plan may not establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45.

The Director noted that "USCIS cannot consider any evidence of the beneficiary's eligibility after the petitioner filed [the] Form I-140" and found that the record does not establish that the proposed endeavor will have national importance. Even if the business plan could establish eligibility, which it cannot, the Director found that "the record does not show that the prospective impact of [the Petitioner's] proposed endeavor has implications beyond the company's clients, rising to the level of national importance." The Director also noted:

> while the business plan reflects that the company will hire several workers, the record does not contain evidence to reflect that the area where it will operate is economically depressed, that it would employ a significant population of workers in the area, or that the specific proposed endeavor would offer the region or its population a substantial economic benefit through employment levels, business activity, or trade.

On appeal, the Petitioner asserts that his "proposed endeavor is national in scope and will have broad implications, as his work functions will produce substantially positive economic opportunities for the nation, due to the ripple effects of his professional activities." The Petitioner adds that, "although [he] may work for one company, his proposed endeavor will result in the development of more efficient production capacities in the United States, and help to increase the competitiveness of the nation's manufacturers." The Petitioner also asserts that, "with his extensive IT knowledge and practical experience in using computer modeling and simulation tools, [he] can immediately support U.S. manufacturing businesses in pursuing, adapting, and implementing ever growing technology-based innovations in production ... ensuring the productivity and profitability of the nation's manufacturers." The Petitioner also addresses his prior career experience and industry reports and articles in the record regarding the automotive manufacturing industry.

In determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. *Dhanasar* provided examples of endeavors that may have national importance, as required by the first prong, having "national or even global implications within a particular field, such as those resulting

from certain improved manufacturing processes or medical advances" and endeavors that have broader implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

As the Director noted, even if the business plan could establish eligibility, which it cannot, it indicates that the consulting company's operations would benefit the Petitioner, as its owner, and its clients; however, the record does not establish how the consulting company's operations would have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" or have broader implications, such as "significant potential to employ U.S. workers or . . . other substantial positive economic effects, particularly in an economically depressed area." *See Dhanasar* at 889-90. As the Director noted, the record does not contain evidence to reflect that the area where the consulting company will operate is economically depressed, that it would employ a significant population of workers in the area, or that the specific proposed endeavor would offer the region or its population a substantial economic benefit through employment levels, business activity, or trade.

Similarly, the record does not establish how the Petitioner's proposed endeavor as initially described will have national importance. The proposed endeavor of continuing to work as an industrial engineer for "any company that chooses to hire [him]" will benefit the Petitioner's employer and its clients; however, the record does not establish that the Petitioner's work as an industrial engineer would have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" or have broader implications, such as "significant potential to employ U.S. workers or . . . other substantial positive economic effects, particularly in an economically depressed area." *See id.* at 889-90.

The Petitioner's focus on appeal on his prior career experience and industry reports and articles in the record regarding the automotive manufacturing industry is misplaced. The Petitioner's prior career experience is relevant to the second *Dhanasar* prong, whether the Petitioner is well-positioned to advance the proposed endeavor, but not to the first *Dhanasar* prong, whether the proposed endeavor has both substantial merit and national importance. *See id.* As explained above, in determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See id.* at 889. The generalized industry reports and articles in the record regarding the automotive manufacturing industry do not address the specific endeavor the Petitioner proposes to undertake and how it may have national importance.

In summation, the Petitioner has not established that the proposed endeavor has national importance, as required by the first *Dhanasar* prong; therefore, he is not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or third *Dhanasar* prong. *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).

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.