U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26401398

Date: APR. 05, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (National Interest Waiver)

The Petitioner, a software developer, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and/or an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this 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 record did not establish that the Petitioner was eligible for or otherwise merited a national interest waiver. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[3], grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

II. ANALYSIS

The Petitioner is a software engineer who earned the foreign equivalent of a United States bachelor's degree in computer science in April 2020 and has since worked in this field for employers and as a freelancer.

A. EB-2 Immigrant Classification

As stated above, a petitioner must establish eligibility for the EB-2 classification in order to be eligible for a national interest waiver. Here, the Director's decision does not include a determination regarding the Petitioner's eligibility as either an advanced degree professional or an individual of exceptional ability. Because we agree with the Director's conclusion regarding the Petitioner's eligibility for a national interest waiver, as will be explained below, we reserve the issue of his eligibility for the underlying EB-2 immigrant classification.[4]

B. National Interest Waiver

The first prong of the *Dhanasar* analytical framework, substantial merit and national importance, focuses on the specific endeavor that the individual 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. *Dhanasar*, 26 I&N Dec. at 889.

Here, the Petitioner did not initially provide a detailed proposed endeavor. He stated that he wished to "make [himself] available for future work" in his cover letter, but also stated in his "personal plan" that his intention was to "work in a large multinational company." The Petitioner also included job

[3] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[4] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).

listings for software engineer positions posted on social media, as well as printouts of messages he had received from recruiters regarding positions in the IT field.

In responding to the Director's request for evidence (RFE), the Petitioner stated that his proposed endeavor would be to act as the CEO and founder of [redacted], a company to be based in the United States. The Director concluded that this change in the proposed endeavor was an impermissible material change to the petition per *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998), and after review we agree. Rather then expanding upon his original proposed endeavor of employment as a software developer or engineer with a company in the United States, he proposed a new endeavor as an entrepreneur and leader of a startup company. The Director therefore properly declined to consider this new proposed endeavor, and instead focused on the vagueness and lack of evidence submitted in support of the original endeavor which were insufficient to establish its substantial merit.

On appeal, the Petitioner does not specifically challenge any of the Director's conclusions, but only states his belief that the Director did not properly evaluate his petition since the decision did not consider the evidence under all three prongs of the *Dhanasar* framework. However, since a petitioner must qualify under all three prongs to establish eligibility for a national interest waiver, once the Director determined that the Petitioner had not met the first prong, there was no need to proceed with an analysis of the two remaining prongs.[5]

We agree with the Director's conclusion that the Petitioner has not sufficiently established how his proposed endeavor of working as a software developer or engineer for a United States company would be of substantial merit. In addition, the evidence also does not demonstrate that his proposed endeavor to work for a United States company as a software engineer or developer would be of national importance. Notably, while the Petitioner submitted evidence about the shortage of professionals in the IT industry, he did not explain how his employment would prospectively have potentially broader implications for the industry or field. Based upon his brief description of the proposed endeavor, there is no indication that it would have potential impacts beyond his employer and their clients.

For all of the reasons discussed above, we conclude that the Petitioner does not meet the first prong of the *Dhanasar* analytical framework.

III. CONCLUSION

As the Petitioner has not met the first prong of the *Dhansar* analysis, he is not eligible for, and does not otherwise merit, a national interest waiver of the job offer requirement, and thus of a labor certification. We therefore need not consider his eligibility under the second and third prongs of the framework. For the same reason, we reserve our determination of his eligibility for the underlying EB-2 classification. The petition will remain denied.

ORDER: The appeal is dismissed.

[5] *See INS v. Bagamasbad,* 429 U.S. 24, 25-26 (1976)