U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25887258

Date: APR. 14, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a construction tradesman, seeks classification as a member of the professions holding an advanced degree or of exceptional ability, Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this employment based second preference (EB-2) classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so. *See 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).

The Director of the Texas Service Center had initially granted the petition on the Petitioner's representation of their proposed endeavor to provide industrial engineering consulting in the area of occupational health and safety for a wide range of industries. But the Director revoked the approval of the petition after receiving a response to their notice of intent to revoke because of the Petitioner's repeated material misrepresentations in subsequent immigration proceedings. The Petitioner's repeated material misrepresentations of relevant facts and circumstances vitiated the Director's decision of the Petitioner's eligibility for a discretionary waiver of the required job offer, and thus of a labor certification. 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

USCIS may, at any time after granting a petition, revoke that approval for "good and sufficient cause" upon notice on any ground not specified in 8 C.F.R. § 205.1 when the necessity for revocation comes to USCIS' attention. Section 205 of the Act, 8 U.S.C. § 1155, 8 C.F.R. § 205.2. We evaluate the unrebutted and unexplained evidence supporting revocation in the record at the time a notice of intent to revoke (NOIR) is issued to determine whether "good and sufficient cause" for the revocation

existed. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987); *see also Matter of Ho*, 19 I&N Dec. at 590 ("The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial."). The discovery of material facts and circumstances showing a petition was approved when it should not have been is good and sufficient cause for revoking the approval. *See id*, 19 I&N Dec. at 590.

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.

Whilst 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 USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) 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 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 the noncitizen 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, progress towards achieving the proposed endeavor, and the interest of potential customers, users, investors, or other relevant entities or individuals are also key considerations.

The third prong requires the petitioner to demonstrate that, on balance of applicable factors, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. USCIS may evaluate factors such as whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen to secure a job offer or for the petition to obtain a labor certification; whether, in light of the nature of the noncitizen's qualification 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. Each of the factors 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.

II. ANALYSIS

A. Willful Misrepresentation of a Material Fact

The Director revoked the petition's approval because the Petitioner willfully made material misrepresentations of their present professional activities.[1] This material misrepresentation casts doubt on the Petitioner's proposed endeavor of providing industrial engineer consulting services in the area of occupational health and safety for a wide range of industries. "Willful" means knowingly and intentionally, with awareness that the opposite of what is represented is the truth. *See Matter of Tijam*, 22 I&N Dec. 408, 425 (BIA 1998); *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material misrepresentation is a willful material misstatement by an individual to a government official for the purpose of obtaining an immigration benefit for which they would otherwise be ineligible. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). When it occurs, a material misrepresentation shuts off a line of inquiry which is relevant to determining the eligibility for the benefit.

In the petition, the Petitioner proposed that their endeavor was to perform industrial engineering consulting in the area of occupational health and safety for a wide range of industries. To that end they had established a company, [redacted] (company). Evidence of the company's operations are contained in the record in the form of invoices for professional services rendered.

The Director issued a NOIR upon referral by the local USCIS office because of facts uncovered during the Petitioner's adjustment of status interview as well as at an administrative site visit conducted in connection with a Form I-129 filed by the Petitioner's company on behalf of the Petitioner's father-in-law on which they were the signatory and primary contact.[2] During each encounter with USCIS the Petitioner falsely represented their current business activities. During an administrative site visit conducted in connection with a Form I-129 their company filed and upon which they were a signatory, the Petitioner misrepresented their professional activities. The record contains discrepant evidence reflecting that the Petitioner's sole client engages them approximately three to four days a week from 20 to 40 hours for construction trades such as apartment demolition, plumbing and cabinetry work. They continued misrepresenting their current activities at their adjustment of status interview. The Petitioner stated at the adjustment of status interview that they were performing the services of an industrial engineering consultant in the area of occupational health and safety for a wide range of industries. But as stated before they had been performing the services of a construction tradesman performing apartment demolition, plumbing and cabinetry work.

The Petitioner was informed by the Director in the NOIR that it appeared that they had misrepresented the duties and services they were providing their client. In response to the NOIR, the Petitioner

[1] The record does not support the Director's conclusion that the Petitioner misrepresented their previous experience. But the Petitioner's repeated misrepresentations about their present professional activities cast doubt on all their representations. *See Ho*, 19 I&N Dec. at 591 ("Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.")

[2] The Director's NOIR and decision mistakenly state that the Department of State returned the Form I-140 for possible revocation.

maintained that they provided industrial engineer consulting services despite the contrary evidence in the record. In support they submitted:

- Ownership documents for their company, [redacted]
- The Petitioner's sworn affidavit consisting of written testimony to rebut the allegations of misrepresentation contained in the NOIR;
- An unsworn business relationship confirmation letter from the petitioner's sole client; and
- Photos purporting to show the Petitioner conducting "on-site inspections."[3]

At appeal, the Petitioner contends that the decision is erroneous with a vague reference to "improper 'fact-finding'." But the Petitioner does not specifically identify any specific impropriety for us to evaluate. And the presumption of regularity supports the official acts that have taken place here such as administrative site visits and adjustment of status interviews by public personnel such as USCIS officers. *See United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). The records made by public officials in the ordinary course of their duties, such as the ones generated here during the administrative site visit and the adjustment of status interview, have a "strong indicia of reliability." *See Yanez-Marquez v. Lynch*, 789 F.3d 434, n.4 (citing *Felzcerek v. I.N.S.*, 75 F.3d 112, 116 (2d Cir. 1996)).

The Petitioner also states at appeal that the petition's revocation stemmed from an incorrect application of the standard of proof. Whilst the standard of proof in these proceedings is the preponderance of the evidence, the burden is always on a petitioner to provide reliable, probative, and material evidence adhering to that standard. *See* section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); also see the definition of burden of proof from Black's Law Dictionary (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). A petitioner must satisfy the burden of production. This burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres to the governing statutory, regulatory, and policy provisions by a preponderance of the evidence sufficient to have the issue decided on the merits.

It is unclear how the Petitioner's ownership of their company rebuts the misrepresentations the Petitioner has made regarding their activities. Their mere ownership of a company with "engineering consultants" in the company name is not reliable or probative to whether the Petitioner misrepresented their activities at numerous junctures in connection with their pursuit of permanent immigration benefits. And the fact that the company has billed the Petitioner's sole client for services reflects that the Petitioner is conducting their true business activities of construction trades such as apartment demolition, carpentry, and plumbing under the auspices of their business. This casts doubt on whether the Petitioner's intention at inception and true endeavor was to perform construction trades and not the industrial engineering consulting that they presented as a proposed endeavor.

The Petitioner's sworn affidavit attests that his work activities are that of an industrial engineering consultant in the area of occupational health and safety for a wide range of industries. A self-serving statement or affidavit such as the Petitioner's sworn affidavit should be accompanied by corroborative

[3] At appeal, the Petitioner re-submits the documentation listed above.

testimony and documentary evidence. *See Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000). And where the testimonial evidence such as the Petitioner's sworn affidavit lacks detail, specificity, or credibility, the need for corroborative testimony and documentary evidence increases. *See Y-B-*, 21 I&N Dec. at 1136. The Petitioner's sworn affidavit does not refer to any other evidence or documentation to support its contentions. It is wholly unsupported. So it is not credible, material, or probative evidence to rebut the Petitioner's misrepresentations of their business activities and ultimately their proposed endeavor.

The unsworn business relationship confirmation letter from the Petitioner's sole client is similarly problematic because of its unexplained inconsistencies with evidence in the record. The business relationship confirmation letter describes the client has engaged the Petitioner for industrial engineering consultation in the area of occupational health and safety for a wide range of industries. The business confirmation letter addresses its previous statements regarding the Petitioner's true construction trade activities with a conclusory declaration stating that the Petitioner "has never performed 'construction trades' or any other services not related those within the Occupational Health and Safety Industrial Engineering field." But the business confirmation letter does not clarify or explain why the Petitioner's sole client expressed to official conducting an administrative site visit that the Petitioner was performing construction trades such as apartment demolition, cabinetry and plumbing 3 to 4 days for about 20 to 40 hours a week. And this omission looms large when combined with the Petitioner's repeated misrepresentations in these proceedings as well as at their adjustment of status interview. The business confirmation letter does not credibly or reliably resolve the Petitioner's misrepresentation of their current business activities. So this casts a pall on whether their proposed endeavor was ever the true intention of their petition for immigrant classification.

And the pictures the Petitioner submits purporting to demonstrate them providing industrial engineering consultation in the area of occupational health and safety for a wide range of industries are unconvincing. There is no evidence in the record that would reflect that "action shots" are common in carrying out the duties of an industrial engineering consultant in the area of occupation health and safety for a wide range of industries. So this tends to lead us to conclude that the photos may have been composed and staged in order to support the Petitioner's arguments at appeal and their response to the NOIR. Moreover, the pictures are presented without context. So it is not possible to evaluate them in support of any legal conclusion to the benefit or detriment of the Petitioner.

In sum, the Petitioner essentially states at appeal that they have provided truthful information by resubmitting previously submitted evidence citing the standard of proof in an attempt to demonstrate eligibility for the immigrant petition. But this does not meet the Petitioner's burden of proof to present documentation rebutting or explaining the misrepresentation of which the Director notified them in the NOIR. The Petitioner has not provided relevant, material, or probative evidence to rebut this evidence of their misrepresentation in the record of proceeding. Without such evidence and in maintaining those false representations during sworn testimony with government officials the Petitioner has sought to procure a benefit under the Act through a willful misrepresentation of materials facts. So the Petitioner has not demonstrated that they did not willfully make misrepresentations of materials facts regarding their proposed endeavor.

B. Eligibility for a National Interest Waiver under *Dhanasar* Framework

The Petitioner's misrepresentations directly undercut their eligibility for a waiver of the job offer requirement, and thus of a labor certification. In the first instance, waiving the job offer requirement is an act of discretion. *See Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019). Repeated material misrepresentations heavily weigh against an act of favorable discretion such as waiving the job offer requirement. Moreover, all three prongs of the analytical framework in the *Dhanasar* analysis depend on an accurate and reliable description of a petitioner's proposed endeavor. It is not clear in the record that the Petitioner's proposed endeavor is that which they described in the petition, i.e. industrial engineering consulting in the area of occupational health and safety for a wide range of industries. The Petitioner's misrepresentations raise considerable questions about whether the Petitioner's true intention was to function as a construction tradesman and not as an industrial engineering consultant in the area of occupational health and safety for a wide range of industries.

However, putting the dispositive issue and considerably negative factor of the Petitioner's repeated misrepresentations to the side, we still have doubts that the Petitioner proposed endeavor would fit the *Dhanasar* framework.[4] In other words, even if we were to withdraw the Director's decision, we would not approve the petition because the record as it currently stands does not satisfy *Dhanasar's* analytical framework.

1. Substantial Merit and National Importance of the Proposed Endeavor

In *Dhanasar* we focused the first prong of our analysis on the potential impact of a Petitioner's specific proposed endeavor to consider its substantial merit and national importance. The substantial merit of an endeavor can be shown in any number of areas such as business, entrepreneurialism, science, technology, culture, health, education, arts, or the social sciences. The furtherance of human knowledge, potential economic impact on, and economic benefits for the United States can also be evaluated to determine the substantial merit of a proposed endeavor.

At the time of filing, the Petitioner stated on their ETA 750 Part B that they proposed to perform industrial engineering consulting in the area of occupational health and safety for a wide range of industries. The Petitioner intended to work in this field as the principal of their own engineering consulting firm/company. The Petitioner attested that the occupational health and safety consulting in a wide range of industries is of substantial merit due to the potential economic benefits of improving the workplace safety of the U.S. workforce by helping increase productivity and reducing employers' costs in medical leave and workers compensation.

But *Dhanasar* also requires us to consider the potential prospective impact of the proposed endeavor to determine its national importance. The national importance of an endeavor is rooted in its potential impact and whether it has national or global implications within the field of endeavor. The broader implications, national and/or international, can inform us of the proposed endeavor's national importance. That is not to say that the implications are viewed solely through a geographical lens. Broader implications can reach beyond a particular proposed endeavor's geographical locus and focus.

[4] The Director previously determined that the Petitioner met the threshold requirement for eligibility for the EB-2 category as an advanced degree professional.

The relevant inquiry is whether the broader implications apply beyond just narrowly conferring the proposed endeavor's benefit. It is not clear in the record how, even if the Petitioner's representations of the activities had been truthful, the Petitioner's industrial engineering consulting could have had potential prospective impact beyond the Petitioner's sole client. And without a potential prospective impact beyond the Petitioner's sole client, the national importance of the Petitioner's proposed endeavor could not be determined.

2. Well Positioned to Advance the Proposed Endeavor

And even if we were to be able to turn our analysis to the Petitioner's eligibility under the second prong. it would still not be evident in the record how the Petitioner is well positioned to advance their proposed endeavor. In evaluating whether a petitioner is well positioned to advance their proposed endeavor, we review the following and any other relevant factors:

- A petitioner's education, skill, knowledge, and record of success in related or similar efforts;
- A petitioner's model or plan for future activities related to the proposed endeavor that the individual developed, or played a significant role in developing;
- Any progress towards achieving the proposed endeavor; and
- The interest or support garnered by the individual from potential customers, users, investor, or other relevant entities or persons.

It is not clear how an individualized consideration of the multifactorial analysis under *Dhanasar's* second prong would demonstrate how well positioned the Petitioner is to advance their proposed endeavor. The Petitioner's attestations about their education and experience are cast in significant doubt due to their misrepresentations. But, even if we were to take the attestations at face value, the record would not reflect how the Petitioner's prior performance of the duties described in the experience letters is either a similar effort as that of their proposed endeavor or how it constitutes a record of success. They similarly do not demonstrate the development of a plan or model for future activities that the Petitioner has developed or played a significant role in developing. The record does not reflect any progress to achieving the proposed endeavor other than establishing their company. The establishment of their company alone is not strong evidence of progress and it dims considerably when examined in light of the Petitioner's use of their company to perform duties in the construction trades of apartment demolition, cabinetry, and plumbing. Finally, apart from a letter from one client, there is no evidence in the record of interest or support in the endeavor the Petitioner proposed in their petition. So the evidence in the record raises questions about how well situated the Petitioner would have been to advance their petition's proposed endeavor.

3. Balancing Factors to Determine Benefit to the United States of Granting Waiver of the Job Offer Requirement so that the Petitioner can Undertake the Proposed Endeavor.

If the Director had found that the Petitioner met the eligibility requirements contained in the first and second prongs of the *Dhanasar* framework they would have moved to evaluating whether, on balance, the Petitioner had demonstrated 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.

When evaluating the third prong and if present in the record, USCIS can consider the following combination of facts to be a strong positive factor in favor of waiving the requirement of a job offer and thus a labor certification:

- The person possesses an advanced STEM degree, particularly a Ph.D.;
- The person will be engaged in work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness; and
- The person is well positioned to advance the proposed STEM endeavor of national importance.

The Director could have considered the impracticality of a labor certification, the benefit to the U.S. of a petitioner's contributions, the urgency of a petitioner's contributions to the national interest, the capacity for job creation, and any adverse effects on U.S. workers when conducting the balancing of the national interests of waiving the requirements of a job offer and therefore a labor certification.

But the record as initially presented here is not entirely clear as to the Petitioner's eligibility under the first two prongs of the *Dhanasar* framework. The lack of clarity is significantly more pronounced when combined with the Petitioner's repeated and unrebutted misrepresentations in their pursuit of permanent immigrant benefits. So it is not evident in the record, on balance, that the requirement of a job offer, and thus a labor certification, should be waived for the Petitioner. Thus, even if the first two prongs had been met, the petition could not have been approved because the record does not satisfy the third.

III. CONCLUSION

Based on the foregoing, the Director properly revoked the petition's approval. The Petitioner has not met their burden of proof to provide competent, credible, or probative evidence to rebut the finding of willful misrepresentation of a material fact. So we will leave the finding of willful misrepresentation of a material fact undisturbed. This finding may be considered in any future proceeding to determine that the Petitioner is inadmissible to the United States. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

ORDER: The appeal is dismissed.