U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26480808

Date: APR. 27, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a computer software engineer, seeks classification as a member of the professions holding an advanced degree. *See* 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 EB-2 immigrant 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.

The Director of the Nebraska 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. 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

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.

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

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 summarized her academic and employment history, she asserted that she currently worked as a software quality assurance (QA) engineer, and she described the endeavor as follows:

> For the next years, my goals are:
>
> - Obtain a certification on advanced technique of automation testing provided by UltimateQA;
> - Get the ISTQB certification;
> - Become an instructor at [and]
> - Become a Senior QA Engineer.

In a request for evidence (RFE), the Director acknowledged the Petitioner's initial submission but informed her, in relevant part, that she did not provide a detailed description of the proposed endeavor and why it is of substantial merit and national importance. The Director further informed the Petitioner that the record did not satisfy any of the *Dhanasar* prongs and requested additional evidence that addresses each prong.

In response to the Director's RFE, the Petitioner submitted, in relevant part, a letter dated July 21, 2022, after the 2021 petition filing date. The letter includes a five-year professional plan that differs substantially from the Petitioner's initial description of the proposed endeavor. A summary of the Petitioner's five-year plan submitted in response to the RFE is as follows:

- Year 1: Senior QA Engineer at and Instructor/Mentor at
- Year 2: Certified Scrum Master
- Year 3: Project Manager
- Year 4: MBA

- Year 5: Senior Director, [redacted] Digital Product Management & Agile Delivery

The Petitioner also stated in response to the Director's RFE, "I already achieve the first step of my 5 years Professional becoming a Senior QA Engineer (my actual job at [redacted]) and being an Instructor/Mentor at [redacted] [sic]."

A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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).

The Petitioner did not initially indicate that her proposed endeavor included becoming a certified Scrum Master and project manager, earning a Master of Business Administration degree, and becoming a senior director. Instead, she stated that her endeavor entailed obtaining certain certifications and becoming an instructor at [redacted] and a senior QA engineer. Because the Petitioner stated, for the first time in response to the RFE, that her proposed endeavor would include those additional pursuits, they constitute a new set of facts. That new set of facts is material to the first *Dhanasar* prong because it implicates the merit of the proposed endeavor and its potential prospective impact. *See Dhanasar*, 26 I&N Dec. at 888-90. Because the new set of facts presented in response to the RFE constitute a material change to the petition, they cannot and do not establish eligibility, and we need not address them further. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176.

Setting aside the new set of facts submitted in response to the RFE that cannot establish eligibility for the reasons discussed above, the Petitioner asserted, in response to the RFE, that becoming "Senior QA Engineer at [redacted] and Instructor/Mentor at [redacted] has substantial merit because:

> As [redacted] is willing to grow in European countries, my knowledge of multiple European languages and habits is very helpful for the development of the software and the establishment of the biggest points of interest in software testing (client expectations are different from country to country); deliver unmatched exposure to the European Market, continued innovation to drive engagement, loyalty, and results in new markets.

The Petitioner further asserted in the RFE response that "it is very important for the US economy to have delivered in time good working applications/software and for that to happen the testing part is very important; this will assure that the applications/software will work as expected and that it is safe to use it." The Petitioner also stated in response to the RFE:

> My work will sustain the growth of this field and help to create more jobs directly and indirectly. Directly because the company where I work will continue to growth and so will need more workers and indirectly because the applications/software that we

> develop will help other professionals to work, so to develop their business and create jobs [sic].

The Director concluded, in relevant part, "The evidence does not establish that the [Petitioner's] proposed endeavor has substantial merit and national importance." The Director acknowledged the Petitioner's submissions in response to the RFE but noted that they are "insufficient because this professional plan was completed after the initial date of filing and does not indicate how the proposed endeavor has substantial merit." The Director further noted that "no further evidence was submitted to establish that [she] meets this requirement." Similarly, the Director observed that the Petitioner "also did not submit evidence to show how [her] endeavor would be of national importance to the United States," such as "an explanation or evidence of how the proposed endeavor has significant potential to employ U.S. workers or has other substantial positive economic effects, particular [sic] in an economically depressed area."

On appeal, the Petitioner asserts, in relevant part, the following:

> The officer states that the proposed endeavor's substantial merit requirement is not meet because the professional plan where all those requirements are described was only submitted with the RFE and not at the time of first filing. But the intend of an RFE is to give more information and explain better the requirements. So we have here an erroneous conclusion on the first prong.
>
> The officer states that the proposed endeavor's national importance requirement is not meet because I didn't submit the necessary evidences. Again, we have an erroneous conclusion, because in my case, you can find the detailed explanation of why my work is of national importance and why it will create directly and indirectly new jobs even in economically depressed areas [sic].

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.

The Petitioner's assertion on appeal that the Director erred by concluding that her statements made for the first time in response to the RFE cannot establish eligibility is misplaced. USCIS may, as a matter of discretion, request more information or evidence from a petitioner if "all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility" or if "all required initial evidence has been submitted but the evidence does not establish eligibility." 8 C.F.R. § 103.2(b)(8)(ii)-(iii). However, "[a] benefit request shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the benefit request was filed." 8 C.F.R. § 103.2(b)(12); *see also* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. Although a petitioner may "give more information

and explain better" in response to an RFE as the Petitioner asserts on appeal, the record must nevertheless establish eligibility at the time of filing, not based on a new set of facts that did not exist at the time of filing. *See id.* Therefore, the Director did not err by concluding that the Petitioner's statements made for the first time in response to the RFE, presenting a new set of facts, cannot establish eligibility. *See id.*

The record does not establish that the Petitioner's proposed endeavor of obtaining certain certifications and becoming an instructor at [redacted] and a senior QA engineer has both substantial merit and national importance, as required by the first *Dhanasar* prong. *See Dhanasar*, 26 I&N Dec. at 889-90. The Petitioner's work—either as a QA engineer or as an instructor—appears to benefit her employers and clients. However, the record does not establish how the Petitioner's work as either a senior QA engineer or instructor will have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" or 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. For example, the Petitioner generally asserted that her employer will grow "and so will need more workers" and that her employer's clients using the software will indirectly "create jobs." However, the Petitioner does not establish in the record the types of jobs she believes her endeavor will create, either directly or indirectly; the number of workers filling the jobs she believes her endeavor will create; the locations in which the workers filling the jobs she believes her endeavor will create would work; whether those locations are economically depressed areas; and other details that may establish whether the proposed endeavor has "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* Similarly, although the Petitioner generally states that her "knowledge of multiple European languages and habits is very helpful for the development of the software and the establishment of the biggest points of interest in software testing," the record does not establish how her cultural knowledge will have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances," rather than merely benefitting her employer and its clients for particular projects. *Id.*

In summation, the Petitioner has not established that the proposed endeavor has both substantial merit and national importance, as required by the first *Dhanasar* prong; therefore, she 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.