U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25490445

Date: MAR. 3, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a pilot and flight instructor, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and as an individual of exceptional ability, 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 Nebraska Service Center denied the petition, concluding that the Petitioner had not properly applied for a national interest waiver because he did not submit either the Form ETA 750B or Form ETA 9089.[1] The matter is now before us on appeal. On appeal, the Petitioner presents a completed copy of Form ETA 9089 parts J, K, and L and asserts that the Director did not afford him an opportunity to provide this document before denying the petition.[2]

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 conclude that the Petitioner's submission of Form ETA 9089 overcomes the Director's sole basis for denial. We will therefore withdraw the Director's finding that the Petitioner has not properly applied for a national interest waiver. However, because the Director did not render a determination on the Petitioner's eligibility for the underlying EB-2 visa classification and on the merits of his request for a national interest waiver, we will remand the matter for entry of a new decision consistent with the following analysis.

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

[1] The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA 750B, Statement of Qualifications of Alien, in duplicate." Alternatively, USCIS will accept parts J, K, and L of Form ETA 9089, Application for Permanent Employment Certification. *See* 6 *USCIS Policy Manual* F.5(D), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

[2] The record indicates that the Director did not issue a request for evidence (RFE) or a notice of intent to deny (NOID) prior to denying the petition.

of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act. 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

A. Member of the Professions Holding an Advanced Degree

The Director's decision did not address if the Petitioner qualifies as a member of the professions holding an advanced degree. To qualify as a member of the professions, an individual must meet "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. 204.5(k)(2).[4] The Petitioner has not demonstrated that his occupation of pilot or flight instructor qualifies as a member of the professions. The position is not one of the occupations listed in section 101(a)(32) of the Act and the Petitioner has not presented evidence that a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in his occupation. Further, in order to show an individual holds an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B). On remand, the Director should consider if the Petitioner qualifies as a member of the professions and if he meets either of the regulatory requirements for holding an advanced degree set forth at 8 C.F.R. § 204.5(k)(3)(i)(A) and (B).

B. Exceptional Ability

The Director's decision did not render a determination as to whether the Petitioner satisfies at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification. On remand, the Director should consider the Petitioner's arguments and evidence to determine if he has met three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). If so, the Director should then conduct a final merits determination to conclude whether

[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] Section 101(a)(32) of the Act states "[t]he term 'profession' shall include but not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

the Petitioner has achieved the level of expertise significantly above that ordinarily encountered for exceptional ability classification. *See* 8 C.F.R. § 204.5(k)(2).

C. National Interest Waiver

The Director's decision did not consider if the Petitioner meets the requirements for a national interest waiver set forth in the *Dhanasar* precedent decision. The Director should properly apply all three prongs of the *Dhanasar* analytical framework to determine whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

III. CONCLUSION

Because the Petitioner has overcome the Director's sole basis for denial, we are remanding the matter for the Director to determine if the Petitioner has established eligibility for the underlying EB-2 visa classification and for a national interest waiver of the job offer requirement under the *Dhanasar* framework. The Director should afford the Petitioner a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

ORDER: The Director's decision is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.