U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26534953

Date: MAY 4, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a cellist, seeks classification as a member of the professions holding an advanced degree or as an individual of exceptional ability in the sciences, arts or business. *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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for the 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.

After a petitioner first shows eligibility for the underlying EB-2 visa classification, they must then demonstrate they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner shows 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.

The Director reviewed and analyzed the Petitioner's claims under the three prongs of *Dhanasar* and determined that he only established the substantial merit of his proposed endeavor. On appeal, the Petitioner asserts that he had submitted enough evidence to establish eligibility, and that, by failing to give that evidence sufficient weight, the Director imposed an improperly strict standard of proof.

We adopt and affirm the Director's decision with respect to the national interest waiver. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally

accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

The Petitioner initially described his proposed endeavor as continuing to perform with the [redacted] as he has done since 2015. The Petitioner stated that he also intends to teach music, "both on the private level as well as within an institution as applied faculty," and "to pursue the creation of a cello quartet . . . , composing and performing original music with an eye towards blending the folk music of [Uzbekistan] with American genres such as country, jazz, and ragtime." In response to a request for evidence (RFE), the Petitioner stated for the first time that he has "developed a model of improvisation" that "consists of rigorous combination of improvisation techniques from Western and Uzbek music performance traditions." The Petitioner's discussion of a new hybrid improvisation model appears to be a material change to his proposed endeavor, rather than a clarification of the proposed endeavor as originally described. His initial submission, which included several letters from other musicians, did not include any mention of this new model. A petitioner must meet all eligibility requirements at the time of filing the petition and continue to meet those requirements throughout the adjudication of the petition. *See* 8 C.F.R. § 103.2(b)(1). 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).

On appeal, the Petitioner asserts that he had cited "probative research" to establish the importance of his proposed endeavor. The only evidence that the Petitioner identifies on appeal relating to this argument is a five-year *Strategic Plan* from the National Endowment for the Arts. That document, by design, concerns the overall, collective importance of the arts. It contains no specific mention or discussion of the Petitioner's proposed endeavor, either as initially described or the substantial revision submitted after the RFE.

The Petitioner asserts that the Director should have given more weight to evidence that the Petitioner "has already come so far in advanc[ing]" his proposed endeavor. The Petitioner points to his prior statements, degrees, awards, letters from others, and membership in a local chapter of the American Federation of Musicians, and asserts that he has established that "he is a prestigious cellist." The record attests to the Petitioner's training and experience, but the proposed endeavor as described involves more than playing cello. Significantly, the Petitioner initially indicated that he intends to teach "within an institution as applied faculty." The Petitioner did not submit enough information and evidence to show that he is well-positioned for a faculty job. The Petitioner did not specify the type of institution where he seeks to teach, or establish that he holds the necessary credentials and training to qualify for such a position. The Petitioner also did not establish what progress, if any, he had made toward establishing the quartet he initially described.

The Director concluded that the Petitioner had not established that, on balance, the United States would benefit from waiving the statutory job offer requirement. The Petitioner responds with two somewhat contradictory arguments — first, that he works in a shortage occupation designated under Schedule A, Group II by the U.S. Department of Labor (DOL), and second, that his skills exceed those of U.S. workers, as shown by successfully auditioning for the [redacted] against 40 other musicians.

The requirements for a petition under Schedule A, Group II, are different from those for a national interest waiver petition. The two types of immigration benefit are mutually exclusive. Schedule A determination is not a national interest waiver of the job offer requirement; rather, it incorporates a job offer requirement, albeit one that does not involve applying for an individual labor certification from DOL. The claim that the Petitioner *would have* qualified under Schedule A does not imply eligibility for the different benefit he seeks in this proceeding. The Petitioner's claim is not only speculative, but it relies upon a misreading of the regulations. The Petitioner relies on the regulatory criteria for "exceptional ability" at 8 C.F.R. § 204.5(k)(3)(ii). But eligibility under Schedule A, Group II rests on a different set of criteria, found in DOL regulations at 20 C.F.R. § 656.15(d)(2), involving factors such as "widespread acclaim and international recognition." The Petitioner's evidence shows considerably more limited recognition, largely confined to parts of Florida. Before coming to the United States, the Petitioner won several awards as a child and as a student, but has not shown that these awards are available to established musicians who have completed their training.

Apart from the issue of the national interest waiver, the Director concluded that the Beneficiary qualifies for classification as a member of the professions holding an advanced degree (specifically a master's degree from [redacted] University in Florida). A profession requires at least a bachelor's degree for entry into the occupation. *See* 8 C.F.R. § 204.5(k)(2). The record does not establish that the Petitioner's occupation requires such a degree. Rather, the Director cited the DOL's *Occupational Outlook Handbook*, indicating: "There are no postsecondary education requirements for musicians or singers interested in performing popular music. However, many performers of classical music and opera have at least a bachelor's degree." A tendency of "many performers" to hold bachelor's degrees is not the same as a requirement for entry into the occupation. The Petitioner did not establish that his employer requires that its musicians hold bachelor's degrees. Furthermore, significant elements of the Petitioner's proposed endeavor involve performances outside of his work with the [redacted] The Petitioner did not explain how, or establish that, such work requires at least a bachelor's degree. A faculty position at a teaching institution may qualify as a profession, but when the Petitioner revised his proposed endeavor in response to the RFE, his "rigorous plan to progress in [the] endeavor" did not include any discussion of plans for a faculty position.

The Petitioner also initially indicated that he qualifies, in the alternative, for classification as an individual of exceptional ability, but although he cites the regulations relating to exceptional ability on appeal, he did not pursue that claim with further evidence after the Director issued the RFE.

The record is not sufficiently developed to establish that the Beneficiary qualifies for classification under section 203(b)(2) of the Act, either as a member of the professions holding an advanced degree or as an individual of exceptional ability in the arts. But because our conclusions regarding the national interest waiver are sufficient to determine the outcome of the appeal, we reserve the separate issue of the Petitioner's eligibility for the underlying classification. *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); *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).

ORDER: The appeal is dismissed.