U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25803207

Date: MAY 08, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a physical therapist, 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 denied the petition, concluding that the record did not establish 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.

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

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.

The Petitioner's proposed endeavor as described in their initial and updated business plan in the United States is to continue their career as a physical therapist helping mainly children with special needs from low-income families in economically depressed areas. The Petitioner described their intended services and vaguely referred to a nascent intention to work towards having their "degree validated" in order "to be allowed to practice as a physiotherapist." The Petitioner contended that the size of the demand in the physical therapy industry's market in combination with a shortage of physical therapists in the United States had a larger impact on children and thus demonstrated a national importance for more physiotherapists in the United States. The Petitioner also submitted an expert opinion letter from [redacted] an associate professor of health and sport sciences at [redacted] University. [redacted] opinion also rooted the national importance of the Petitioner's proposed endeavor in terms

of the demand for physical therapist services in the United States, the shortage of qualified personnel, and the benefits to children of physical therapy services.

A. Substantial Merit and National Importance

Whilst the Director recognized the substantial merit of the Petitioner's proposed endeavor, they nevertheless found that the Petitioner did not demonstrate that their proposed endeavor was of national importance. Specifically the Director concluded that the Petitioner's emphasis on the availability of the Schedule A pre-certification for physical therapists as evidence of a recognized basis for a finding of national importance was incorrect. Additionally, the Director found that the Petitioner had not established that their proposed endeavor is of national importance because they did not demonstrate the broader implications to the national interest arising from their intended work with individuals with disabilities (particularly children) or a potential positive economic effect by seeking to focus their services on low-income families in economically depressed areas. For the below reasons, we agree.

Although the evidentiary standard in immigration proceedings is the lowest preponderance of the evidence standard, the burden is on the Petitioner alone to provide material, relevant, and probative evidence to meet that standard. Section 291 of the Act, 8 U.S.C. § 1361. 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). First, a petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits.

On appeal, the Petitioner's argument mistakenly equates the first prong of the *Dhanasar* framework requiring that the proposed endeavor have national importance to the Department of Labor's (DOL) Schedule A designation of physical therapists under their regulation at 20 C.F.R. § 656.15. The Petitioner's argument fundamentally misunderstands the Schedule A designation's goal. Schedule A designation is available to U.S. employers petitioning for noncitizen workers to fill occupations identified as having a recognized shortage of able, available, and qualified U.S. workers. As there is a recognized shortage, those employers are not required to take the mandatory regulatorily prescribed steps to test the labor market prior to filing an application for permanent employment certification. *See* 20 C.F.R. § 656.17. By regulation, a petition seeking to designate a noncitizen under Schedule A must be filed by an employer with a qualifying job offer. *See* 8 C.F.R. § 204.5(k)(4)(*i*) and (*ii*). Consequently, the noncitizen's work is sought by the petitioning employer for their benefit and not necessarily for the broader national interest.

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirements, we look to evidence documenting the "potential prospective impact" of their work. And it is here where the Petitioner's conflation of designation of the physical therapist occupation under Schedule A of the DOL regulations with national importance fails. In determining national importance under *Dhanasar*, the relevant question is not the importance of the field, industry, or profession in which the individual will work; instead, we focus on "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we noted that "we look

for broader implications" of the proposed endeavor and that "[a]n undertaking may have a national importance for example, because it has national or even global implications within a particular field." *Id.* We also noted that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id* at 890. So what is critical in determining the national importance under *Dhanasar* is whether the proposed endeavor has a potential prospective impact with broader implications which rise to the level of national importance. Thus, it is not what duties or what occupation the noncitizen will fill or perform but their actual plan with their occupation and duties that is examined.

As stated above, the Petitioner's proposed endeavor is to continue their career as a physical therapist, helping mainly children with special needs from low-income families in economically depressed areas. To establish that their endeavor rose to a level of national importance because of the DOL's designation of physical therapists under Schedule A of their regulations due to a shortage of able, willing, available, and qualified U.S. workers, the Petitioner would have to establish that their endeavor addresses and solves this national shortage.

The evidence and argument the Petitioner introduced into the record does not help them carry their burden of production and persuasion. The advisory opinion submitted by the Petitioner does not illuminate the national importance of the Petitioner's proposed endeavor. The writer did not explain how the Petitioner's work would alleviate a shortage at a national level. The practice of physical therapy, even when proscribed in the manner the Petitioner advances for children with special need from low-income families in economically depressed areas, directly benefits only those individuals availing themselves of the Petitioner's services. This is akin to how the benefit of someone's teaching is generally only directly beneficial to the students being taught and not wider population. In *Dhanasar* we discussed how teaching would not impact the field of education broadly in a manner which rises to national importance. *Dhanasar* at 893. By extension activities which only benefit a small subset of individuals, like the Petitioner's proposed physical therapy endeavor, would not rise to a level of national importance.

And while the Petitioner has submitted information from the Centers for Disease Control and Prevention (CDC) and Part C of the Individuals With Disabilities Education Act to attempt to establish physical therapy's overall importance, they have not demonstrated how the collective practice of physical therapy as a field rises to a level of national importance. It is unclear how the Petitioner's proposed provision of case and treatment for children from low-income families in economically depressed areas with cerebral palsy, microcephaly, hydrocephalus, and respiratory among other issues would provide benefits beyond the continued "rehabilitation process" for those specific patients to "enable greater independence and provide comfort to the patient."

Treating children, especially those from low-income families in economically depressed areas, is laudable. But it is not evidence of how the benefit to the specific population the Petitioner would serve rises to a level of national importance. The Petitioner describes that their services would have downstream benefits such as decreased likelihood for dependency on health care in adulthood, increased independence, and societal inclusion. But again, the Petitioner has not demonstrated how those benefits would be realized beyond the specific subset of individuals who would encounter the

Petitioner and benefit from their services. The Petitioner has not established how those localized benefits would rise to a level of national importance.

So we conclude that the Petitioner has not established that their proposed endeavor is of national importance. And because the Petitioner has not established that the proposed endeavor has national importance, as required by the first *Dhanasar* prong, they are not eligible for a national interest waiver. We reserve our opinion regarding the second and 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 find that they have not established that they are eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.