U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28424227

Date: OCT. 05, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a software engineer and information technology specialist, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner qualified for the EB-2 classification as a member of the professions holding an advanced degree, but 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. Section 203(b)(2)(B)(i) of the Act.

If a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, 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 (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,[1] grant a national interest waiver if the petitioner demonstrates that:

[1] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

- The proposed endeavor has both substantial merit and national importance;
- The individual is well positioned to advance the proposed endeavor; and
- On balance, waiving the requirements of a job offer and a labor certification would benefit the United States.

II. ANALYSIS

The Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. [2] The remaining issue to be determined is 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.

The Petitioner described himself as an engineer and "an IT specialist with almost two decades of experience" in his personal statement dated March 16, 2022.[3] In the March 28, 2022 letter, the Petitioner explained that his proposed endeavor is to bring his expertise in information technology and digital transformation software to the United States "by providing software applications and technical training that support the digital transformation, digital marketing, and overall continue success of U.S. companies." The Petitioner further stated that his company, [redacted] will commercialize the digital transformation applications that he develops and included a business plan with the initial filing.

In response to the Director's request for evidence (RFE), the Petitioner provided an updated personal statement dated October 10, 2022, and stated that he will "build on my extensive experience in computational sciences, server administration, software development, data science, and artificial intelligence in order to continue in my development of novel and unique custom software systems and programs for various professional industries." The Petitioner also added that with his digital marketing package services, he will "help small businesses reduce their operating expenses by using a unified tool that covers all six aspects of the organization: Marketing, Human Resources, Finance, operations, customer service, and planning."

The Director concluded that the Petitioner's endeavor has substantial merit but not national importance under the first prong of *Dhanasar*.[4] The Director first determined that the Petitioner's personal statement submitted in response to the RFE is inadmissible as it postdated the petition's original filing, citing *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), and the Petitioner materially changed his proposed endeavor, citing *Matter of Izummi*, 22 I&N Dec. 169 (AAO 1998). The Director then concluded the record does not demonstrate that the Petitioner's business would offer substantial economic effects or has significant potential to employ U.S. workers, rising to the level of national importance.

On appeal, the Petitioner claims that the Director erred in relying on *Matter of Katigbak* to disqualify the evidence submitted in response to the RFE. The Petitioner distinguishes *Matter of Katigbak* from the present case for two reasons. The Petitioner first contends that *Katigbak* focused on the

[2] The Petitioner has a U.S. equivalent of a bachelor's degree in computer systems engineering and worked as an IT technical lead consultant from April 2014 to November 2020 at [redacted]

[3] The Petitioner did not state his proposed employment on Form I-140, Immigrant Petitioner for Alien Workers. Instead, the Petitioner referred to his evidence and support letters for a description of his proposed endeavor.

[4] The Director also found that the Petitioner did not meet the second or third prong of the *Dhanasar*'s analytical framework.

beneficiary's qualification for the requested visa classification while the Petitioner here is seeking a national interest waiver or an "ancillary waiver." The Petitioner also contends that the beneficiary in *Katigbak* submitted new evidence after the adjudication was completed whereas the Petitioner here provided evidence in response to a request for evidence while adjudication was pending. Although we acknowledge that the specifics between *Katigbak* and the present case differ, the basic principle still applies: the beneficiary of the petition must qualify for the benefit sought at the time of filing. *See also* 8 C.F.R. § 103.2(b)(1) (requiring an applicant or petitioner to establish that he or she is eligible for the requested benefit at the time of filing the benefit request and continue to be eligible through adjudication).

Although we disagree with the Petitioner's reasons for distinguishing *Katigbak,* we still conclude, upon de novo review, that the Petitioner did not significantly alter or materially change his endeavor when replying to the RFE. Comparing the personal statements dated March 2022 and October 2022, we find that the Petitioner has claimed from the beginning that he will assist U.S. companies in the field of digital transformation and information technology by developing and selling novel software applications via his company, [redacted] In his October 10, 2022 letter, the Petitioner stated that "his original endeavor has suffered some changes in vision and approach due to the survey and demands from current clients." Although the Petitioner used the word "changes in vision and approach," the record supports that he intended to modify types of products to commercialize,[5] but not the nature of his original endeavor – that is to support U.S. businesses with digital transformation software applications. Therefore, we will withdraw this portion of the Director's decision and review the entire record, including the evidence submitted in response to the Director's RFE, to evaluate whether the Petitioner's endeavor is of national importance.

On appeal, the Petitioner claims that the Director's decision was arbitrary and capricious because "there has been no formal or substantial analysis of the evidence and no explanation of the reasoning behind the decision to exclude the evidence and reach a conclusion regarding this matter." We concur with the Petitioner that the Director did not provide sufficient analysis of the evidence submitted in determining the endeavor's national importance. The Director's discussion of the first prong focused on the material change of his proposed endeavor as discussed above and ended in a conclusory finding that the Petitioner did not meet his burden without mentioning any specific evidence.

Nevertheless, we agree with the Director's ultimate conclusion that the Petitioner has not established national importance of his proposed endeavor. Therefore, we find it unnecessary to discuss all of the Petitioner's arguments on appeal regarding deficiencies in the Director's decision and instead, we will offer substantive analysis as to why the Petitioner's endeavor does not meet the national importance element of the *Dhanasar*'s first prong.

The Petitioner's initial filing contained various reports and articles regarding the impact of digital marketing on business growth and business owners, the rapid increase in adoption of digital technologies due to COVID-19, and the trends and outlook for the information technology industry in the United States. Furthermore, the Petitioner included several articles on employment projections in STEM occupations and talent shortage in technology industry, press releases announcing government initiatives in information technology, as well as the White House's priority on STEM education and

[5] The Petitioner initially mentioned that he will commercialize products such as [redacted] but later changed to "digital marketing services pack" and "the [redacted]

strategies for recruiting and retaining STEM students. Although we recognize the value of information technology and importance of digital marketing for businesses, merely working in an important field is insufficient to establish the national importance of the proposed endeavor. Instead, we focus on the "the specific endeavor that the foreign national proposes to undertake" and consider the endeavor's "potential prospective impact." *See Dhanasar*, 26 I&N Dec. at 889.

Instead of submitting independent and corroborating evidence of the Petitioner's specific endeavor's "potential prospective impact," the Petitioner offered additional personal statements in response to the RFE. In these statements, the Petitioner discussed the role of small businesses in new job creation, the urgent need for digital transformation, and the value of digital technology in start-up businesses. The Petitioner continued to claim the endeavor's national importance based on the importance of the field even though the Director requested that the Petitioner submit "documentary evidence that *supports* the Petitioner's statement" (emphasis added).

The Petitioner further claimed that his technological solutions "represent a fundamental contribution and advancement to American business, to be resilient, grow and be competitive, but also it vastly contributes to building and enhancing U.S. competitiveness and leadership in emerging technologies, such as software as services[redacted]." But the Petitioner has not suggested that his solutions or methodologies somehow differ from or improve upon those already available and in use in the United States, as contemplated by *Dhanasar*: "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances." *Id.* at 889. The record is insufficient in that his endeavor's specific impact will extend beyond himself and his clients to impact the field nationally.

The Petitioner provided a recommendation letter and a case study from[redacted]Academy, a truck driving school located in New Jersey. The founder of[redacted]Academy praised the Petitioner's digital solutions that improved the leads handling capability and increased new student sign ups and stated: "[the Petitioner] helped me put my entire vision together, make it a one-stop shop, and automate many processes that I didn't even think could be automated." The record, however, does not indicate that the Petitioner's automation technology implemented at this driving academy is widely spread or used in the United States, or that it has significant potential to advance the digital marketing or information technology fields aside from helping this one client.

In *Dhanasar*, 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. On appeal, the Petitioner claims that the Director unduly focused on employment and payroll numbers and that economic effects are not the only gauge for determining national importance of an endeavor. However, economic impact is one of the factors provided by *Dhanasar* to evaluate the endeavor's national importance, especially when the Petitioner has not established, as discussed above, that his endeavor will have a broad impact in the industry or field.

Here, the record does not support that his company will have "substantial positive economic effects" as contemplated by *Dhanasar*. *Id.* The Petitioner has not provided persuasive details concerning how he intends to grow his company. The Petitioner's business plan projected that the income within the

first year will grow from $35,000 to $420,000, but it does not sufficiently demonstrate the basis for its financial projections. The business plan also estimated that the operation team will grow to ten members in the first year, but the Petitioner later claimed in his updated personal statement that his "contribution to the country is not focused on [sic] my company job creation itself" and "the salary cannot be predicted at this moment as those position will be hired dynamically while we grow and the salary on the market can be very different of today market offer."

The Petitioner provided a consulting agreement with [redacted] (his previous employer) and a partner agreement with [redacted] as well as two letters expressing interest in hiring the Petitioner for his experience in digital marketing and [redacted] development. However, these documents do not corroborate the nature or numerosity of clients or clients' projects to support the claims that his endeavor will have substantial economic impact.

The Petitioner contends on appeal that "the totality of the evidence of record" will corroborate that the Petitioner's endeavor will assist U.S. businesses to "jump to the digital era" and "maximize the companies' efficiency, generate cost savings solutions and improve operational performance, thereby enhancing its ability to compete in the global market and consequently, the U.S. economy as a whole." We acknowledge that any offer of goods or services has the potential to impact the economy; however, the record does not support the Petitioner's company would operate on such a large scale that would benefit the U.S. economy rising to the level of national importance. In addition, the record does not demonstrate that the company will provide substantial impact to any economically depressed areas. The Petitioner must support his assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

In summation, the Petitioner has not established that the proposed endeavor has national importance, as required by the first *Dhanasar* prong; therefore, he is not eligible for a national interest waiver. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's arguments regarding his eligibility under the second or third 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 he has not established he is eligible for or otherwise merits a national interest waiver. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.