U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28427544

Date: OCT. 20, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an electronics engineer, seeks classification 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. 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.

I. LAW

To qualify for a national interest waiver, a petitioner must first show eligibility 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.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation

that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] USCIS will then conduct a final merits determination to decide whether the evidence as a whole shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

Once a petitioner demonstrates EB-2 eligibility, 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 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

Although the Petitioner claimed EB-2 eligibility as an individual of exceptional ability, the Director concluded that the Petitioner qualifies for the alternative EB-2 classification of a member of the professions holding an advanced degree, because the Petitioner's occupation qualifies as a profession under 8 C.F.R. § 204.5(k)(2) and he holds a bachelor's degree followed by more than five years of progressive experience in the specialty. We need not consider this issue further, because the distinction between the two types of EB-2 classification does not affect eligibility for the national interest waiver.

The issue before us 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. For the reasons discussed below, we conclude that the Petitioner has not sufficiently demonstrated that he is well-positioned to advance the proposed endeavor under the second prong of the *Dhanasar* analytical framework.

The Petitioner earned a bachelor's degree in electronics engineering in Venezuela in 2005. He worked in various capacities relating to maintenance of medical laboratory equipment in Venezuela and Colombia from 2006 to 2022, when he entered the United States as a B-2 nonimmigrant visitor. From 2016 to 2022, he was self-employed, providing maintenance services to clients as a contractor.

The Petitioner's proposed endeavor is to develop and distribute a smartphone application (app). When he first filed the petition, the Petitioner indicated that the purpose of the app would be assist individuals with cognitive or neurological disabilities with medical issues such as scheduling appointments, filling

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual.

[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).

prescriptions, and tracking medical records. In response to a request for evidence, the Petitioner expanded the intended scope of the app, stating that it would help "people with any disability, to find medical services, therapy, jobs, schools, keep medical and health records, medical profile, recreation, and more."

A petitioner must meet all eligibility requirements at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). In the discussion below, we consider the proposed endeavor as described at the time of filing in August 2022.

A. Substantial Merit and National Importance

The first *Dhanasar* prong, substantial merit and national importance, focuses on the specific endeavor that the individual 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. *Matter of Dhanasar*, 26 I&N Dec. at 889.

In the denial notice, the Director concluded that the Petitioner had established the substantial merit of the proposed endeavor, but not its national importance. The Director determined that the Petitioner had not shown that the proposed endeavor would result in "substantial positive economic effects"; "that his mobile app business stands to impact the regional or national population at a level consistent with having national importance," or "broader implications for the Engineering field."

On appeal, the Petitioner contends that the Director erred by "limit[ing] discussion of the first Dhanasar prong to the endeavor's potential economic effects vis-à-vis [the Petitioner's] hiring of employees," and that the Director "failed to consider the endeavor's potential to broadly enhanc[e] societal welfare."

We agree with the Petitioner that his "endeavor presents potential for broadly enhancing societal welfare" because he seeks to "improve the quality of life of people with physical and intellectual disabilities." In principle, millions of people could download and use the app, and the Petitioner asserts that the app would improve access to important and even essential services.

We conclude that the Petitioner has established that the proposed endeavor has national importance. Next, we will consider whether the Petitioner has shown that he is well positioned to advance the proposed endeavor.

B. Well Positioned to Advance the Proposed Endeavor

The second *Dhanasar* prong shifts the focus from the proposed endeavor to the individual. To determine whether an individual is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: their education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed

endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals. *Matter of Dhanasar*, 26 I&N Dec. at 890.

In concluding that the Petitioner had not met the second *Dhanasar* prong, the Director stated:

> [T]he petitioner has not demonstrated that he is well positioned to advance his proposed endeavor to create a mobile app while running his own business. The petitioner has not submitted documentary evidence that he has had a record of success in developing apps or running a business in the Biomedical Engineering field. The petitioner also failed to submit sufficient evidence of funding, users, and other relevant entities for his proposed endeavor.

On appeal, the Petitioner argues that the Director did not sufficiently consider "[q]uotes from investors" and "[c]orrespondence from prospective / potential clients, customers, or users." The Petitioner refers, here, to a proposal from a consulting company, expressing interest in providing financing and designing the app in exchange for "40% of the company shares," and letters from three potential customers. These materials, however, all date from early 2023 and therefore they do not establish the Petitioner's progress toward achieving the proposed endeavor as of the petition's filing date in August 2022. As discussed above, a petitioner must meet all eligibility requirements at the time of filing the petition. Progress toward achieving the proposed endeavor that occurred after the time of filing cannot establish eligibility at the time of filing.

The business plan, which describes the substantially revised version of the proposed endeavor rather than the original version described at the time of filing, dates from January 2023.[4] The consulting company's proposal is dated late February 2023, and the Petitioner did not show that the proposal was under consideration or negotiation at the time of filing.

The letters from potential customers all date from March 2023, and therefore they do not show potential customer interest in the proposed endeavor at the time of filing. All three potential customers – a behavioral therapy facility, a preschool, and a learning center for children with autism – are within 20 miles of the Petitioner. These letters indicate some degree of local interest in the app that the Petitioner proposes to develop, but the Petitioner has not shown that this level of interest is sufficient to demonstrate that he is well positioned to advance the proposed endeavor.[5]

We further agree with the Director that the Petitioner has not established the required "education, skills, knowledge and record of success in related or similar efforts" stipulated in *Dhanasar*.

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[4] The business plan in the record states: "The Company will be structured as a sole proprietorship. There is a possibility of dividing the company's shares between the owner and the potential investor." By definition, a sole proprietorship has only one owner, and does not exist as a legal entity separate from that owner. *See* https://www.irs.gov/businesses/small-businesses-self-employed/sole-proprietorships ("A sole proprietor is someone who owns an unincorporated business by himself or herself"). Therefore, a sole proprietorship has no shares to divide among multiple shareholders. This contradictory information about the fundamental nature of the proposed endeavor adds to doubts that the Petitioner is well positioned to advance that endeavor.

[5] Two of the letters contain mostly identical language, which undermines their probative value. Identical language in letters "suggests that the letters were all prepared by the same person and calls into question the persuasive value of the letters' content." *Hamal v. U.S. Dep't of Homeland Security*, No. 19-2534, slip op. at 8, n.3 (D.D.C. June 8, 2021).

Throughout this proceeding, in addition to calling himself an electronics engineer, the Petitioner has also asserted that he is a biomedical engineer. The Petitioner defined "biomedical engineering" as "focuse[d] on the development of principles and designs to be applied to medicine and biology for health care purposes. For example, Biomedical engineers were heavily involved in the development of COVID-19 vaccines." He asserts that the proposed endeavor will be "a biomedical engineering firm." But the Petitioner's use of the label "biomedical engineering" does not establish that, or explain how, managing a company that develops smartphone apps relates to the Petitioner's education and employment history.

For this reason, we do not accept the Petitioner's argument on appeal that his history of repairing and maintaining medical laboratory equipment constitutes a track record of success in the same or similar endeavor that he proposes to undertake in the United States. His self-employment in that capacity does not amount to experience establishing and running the type of company described in the business plan. The Petitioner has not claimed or documented any prior experience with the kind of business described in the proposed endeavor. He has not established that the maintenance of medical laboratory equipment relates in any significant way to his proposed endeavor of running a company to develop and market a smartphone app.

In light of the above conclusions, the Petitioner has not met his burden of proof to show that he satisfies the second prong of the *Dhanasar* national interest test. Detailed discussion of the third *Dhanasar* prong cannot change the outcome of this appeal. Therefore, we reserve argument on the third prong.[6]

III. CONCLUSION

The Petitioner has not established that he is well-positioned to advance the proposed endeavor. Therefore, the Petitioner has not shown eligibility for the national interest waiver, and we will dismiss the appeal as a matter of discretion.

ORDER: The appeal is dismissed.

[6] *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).