U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28092214

Date: SEPT. 14, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a field production operator in the oil and gas industry, 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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. We will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[2]

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. ELIGIBILITY FOR EB-2 CLASSIFICATION

The Petitioner claimed exceptional ability, and did not claim eligibility as a member of the professions holding an advanced degree. Nevertheless, the Director stated: "the beneficiary has completed his Bachelor of Science in Industrial Engineering and thus qualifies as a member of the professions holding an advanced degree. Therefore, at this time, USCIS does not need to evaluate whether the beneficiary also qualifies as an alien of exceptional ability."

This conclusion, however, is in error. The Petitioner's only degree is the foreign equivalent of a U.S. baccalaureate, which, by definition, is not an advanced degree; an advanced degree is a "degree *above* that of baccalaureate." 8 C.F.R. § 204.5(k)(2). The same regulation also provides that a baccalaureate "followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." But the Petitioner received his baccalaureate in September 2020, less than two years before he filed the petition in May 2022. Therefore, at the time of filing, the Petitioner did not hold an advanced degree, and his baccalaureate was not followed by at least five years of progressive experience in the specialty.

The Director must, on remand, make an initial determination regarding the Petitioner's claim of exceptional ability.

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[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/volume-6-part-f-chapter-5.

[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).

III. NATIONAL INTEREST WAIVER

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.

When denying a petition, the Director must explain in writing the specific reasons for denial. 8 C.F.R. § 103.3(a)(1)(i). Here, the Director did not do so. In the denial notice, the Director did not discuss any evidence in the record or details of the Petitioner's proposed endeavor. The Director listed the requirements of the three *Dhanasar* prongs, and concluded, with no further discussion, that the Petitioner had satisfied the first prong, but not the second or third.

It cannot suffice for the Director only to list the elements of the various prongs. The Director must weigh the Petitioner's arguments and evidence relating to those elements, and explain specifically why the Petitioner has not met them. As written, the Director's denial notice did not afford the Petitioner a reasonable opportunity to provide specific responses on appeal to potentially overcome the basis of denial.

With regard to the Petitioner's proposed endeavor, we note that the Petitioner made very significant and substantial changes after the Director issued a request for evidence (RFE). Initially, the Petitioner stated his "intent to continue working as an oil production plant operator once admitted as a lawful permanent resident." He offered few details except to assert: "I plan to continue working in companies in the energy industry in the U.S., to continue to increase my experience and skills in this country and thus contribute significantly to the development and welfare thereof." The Petitioner also described his occupation, stating: "Field Production Operators in the oil and gas industry are typically responsible for initial separation processes, ensuring that impurities such as water, gas, and sediment are removed from oil and gas in the field."

After the Director requested more details in the RFE, the Petitioner submitted a business plan that indicates that the Petitioner would establish a company to provide "basic engineering services for oil and gas companies" and "technical consultancy." Through this company, the Petitioner "will work to improve the optimization of various resources" and "provide specific solutions . . . in the commissioning and verification processes of monitoring and control systems for facilities and plants."

While the business plan indicates that the Petitioner "will also provide engineering services," its description of the Petitioner's intended duties emphasizes managerial responsibilities such as "coordinating . . . as well as implementing [his company's] overall strategies," "monitor[ing] the Company's revenue" and "overseeing the recruitment and hiring of personnel." The business plan states that the Petitioner's company will hire four engineers over five years, who "will support . . . and manage oil and gas operations" and "implement solutions and designs."

The Petitioner's revised plan to start and run his own company appears to represent a substantial departure from the original proposed endeavor, which was simply "to continue working as an oil production plant operator," and "continue working for companies in the energy industry." 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). This is consistent with the requirement that a petitioner must meet all eligibility requirements at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1).

Therefore, on remand, the Director must consider the Petitioner's proposed endeavor as originally described. It is the Petitioner's responsibility and burden to reconcile his business plan with his original proposed endeavor.

IV. CONCLUSION

The Director erroneously concluded that the Petitioner holds an advanced degree, and did not address his claim of exceptional ability. The Director denied the national interest waiver with no discussion of the Petitioner's claims or evidence. The Director must issue a new decision, including an initial determination on the Petitioner's claim of exceptional ability. If the Director determines that the Petitioner qualifies as an individual of exceptional ability, then the Director must make a determination on whether the Petitioner qualifies for the national interest waiver.

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