U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30667959

Date: APR. 11, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a computer software engineer, seeks classification as a member of the professions holding an advanced degree or, in the alternative, 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. The Director concluded that the Petitioner does not qualify for classification as an individual of exceptional ability; however, the Director did not address whether, in the alternative, the Petitioner qualifies for classification as a member of the professions holding an advanced degree. The Director also concluded that 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 pursuant to 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 a member of the professions holding an advanced degree 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.

While 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, after a petitioner has established eligibility for EB-2 classification, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the noncitizen's proposed endeavor has both substantial merit and national importance; (2) that 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. *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver is discretionary in nature).

The first prong, substantial merit and national importance, focuses on the specific endeavor that 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. *See Matter of Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

As noted above, the Director concluded that the Petitioner does not qualify for classification as an individual of exceptional ability; however, the Director did not address whether, in the alternative, the Petitioner qualifies for classification as a member of the professions holding an advanced degree. *See* section 203(b)(2) of the Act. The record does not clarify why the Director addressed whether the Petitioner may qualify for a national interest waiver if he is ineligible for second-preference classification, as the Director concluded.

Because we nevertheless find that the record does not establish that a waiver of the requirement of a job offer, and thus of a labor certification, would be in the national interest, we reserve our opinion regarding whether the Petitioner satisfies second-preference eligibility criteria. *See* section 203(b)(2) of the Act; *see also 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"); *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).

Initially, the Petitioner described the endeavor as a plan "to continue my [s]oftware [d]eveloper activities . . . in different projects, in the RD&I market, both in technical and managerial roles." The Petitioner did not initially assert that his endeavor would entail founding his own company; instead, he indicated that he would seek employment by filling a position vacancy at some unspecified company. More specifically, the Petitioner elaborated that his "strategy would be to look for a position either as a backend developer or a full stack developer" because that would "cover more than 2/3 of all available positions in the American market." He asserted that his "level of employability would be quite high, and that [he] would be a perfect fit for a huge amount of vacancies and job opportunities."

In response to the Director's request for evidence (RFE), the Petitioner asserted that, after he filed the Form I-140, Immigrant Petition for Alien Workers, he co-founded "a Wyoming-based company owned by him and his partner." The Petitioner elaborated that his company is "a startup that markets its products in the SaaS (software as a service) model." The Petitioner asserted, "By establishing a US-based company, [he] is progressing towards achieving his proposed endeavor." The Petitioner no

longer indicated that he "would look for a position either as a backend developer or a full stack developer" among the "huge amount of vacancies and job opportunities . . . in the American market," as he had initially stated the proposed endeavor would involve.

A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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).

Whether the Petitioner would seek employment at an existing company or found his own company and employ himself—and potentially other workers—is material to the first *Dhanasar* prong because it pertains to the scope of the proposed endeavor and whether it may have significant potential to employ U.S. workers or other substantial positive economic effects. *See Matter of Dhanasar*, 26 I&N Dec. at 889-90. Because the Petitioner did not indicate at the time he filed the Form I-140 that his proposed endeavor would involve founding his own company and employing himself—rather, he indicated that he would seek employment among existing position vacancies at an existing company—and because he founded his company after he filed the Form I-140, the Petitioner's assertions in response to the Director's RFE that his proposed endeavor would involve founding his own company and employing himself presents a new set of material facts that cannot—and do not—establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. Because the Petitioner's assertions regarding founding his own company and employing himself cannot—and do not—establish eligibility, we need not address them further. *See id.*

The Director addressed the Petitioner's impermissible presentation of a new set of facts that cannot establish eligibility, discussed above. *See id.* The Director also addressed other information in the record; however, the Director explained that the Petitioner's focus on generalized information regarding the software development industry does not establish how the specific endeavor the Petitioner proposes to undertake may have national importance. The Director observed that the record "falls short of showing the [Petitioner's] specific proposed endeavor has national or even global implications within a particular field; has significant potential to employ U.S. workers or has other substantially positive economic effects, particularly in an economically depressed area; will broadly enhance societal welfare or cultural or artistic enrichment" or otherwise may have national importance, paraphrasing *Matter of Dhanasar*, 26 I&N Dec. at 889-90. Although the Director concluded the proposed endeavor has substantial merit, the Director also concluded that the record does not establish that the proposed endeavor has national importance. The Director further concluded that the record does not satisfy the second and third *Dhanasar* prongs. *See id.* at 888-91, for elaboration on these three prongs.

On appeal, the Petitioner reasserts that an opinion letter, written by a professor of computer science at [redacted] establishes that the proposed endeavor has national importance. Rather than quoting or paraphrasing the opinion letter, the Petitioner inserts reproductions of excerpts from the opinion letter within the body of the appeal brief.

As explained above, the new set of material facts the Petitioner presented in response to the Director's RFE cannot—and do not—establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. The opinion letter the Petitioner addresses on appeal does not acknowledge that the Petitioner impermissibly presented a new set of material facts to seek eligibility for the requested immigration benefit, as discussed above. Doubt cast on any aspect of a petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Because the opinion letter does not acknowledge that the Petitioner impermissibly presented a new set of material facts to seek eligibility for the requested immigration benefit, the opinion letter casts substantial doubt on the extent to which the letter writer may be familiar with all applicable immigration laws, regulations, and decisions. Furthermore, the omission casts substantial doubt on whether the writer's opinion is informed and unbiased. Those doubts undermine the reliability and sufficiency of both the opinion letter and of the remaining evidence offered in support of the visa petition. *See id.* Because the opinion letter the Petitioner addresses on appeal bears minimal probative value, it does not establish eligibility, and we need not address it further.

In determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See Matter of Dhanasar*, 26 I&N Dec. at 889. *Dhanasar* provided examples of endeavors that may have national importance, as required by the first prong, having "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" and endeavors that have broader implications, such as "significant potential to employ U.S. workers or . . . other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

The proposed endeavor, as established at the time of filing, appears to benefit the Petitioner, whichever unspecified employer(s) with position vacancies that may hire him, and the clients and customers who would use the products and services of the Petitioner's prospective employer(s). However, the record does not establish how the Petitioner's proposed endeavor to fill one of the "huge amount of vacancies and job opportunities . . . as a backend developer or a full stack developer" at some unspecified company may have the type of national or even global implications within the field of computer software development, or any other particular field, "such as those resulting from certain improved manufacturing processes or medical advances," as contemplated by *Dhanasar*. *See id.* The record also does not establish how the Petitioner's proposal to work as a computer software engineer at—presumably—one computer software development company at a time, in some unspecified location, may have the type of broader implications, such as "significant potential to employ U.S. workers or . . . other substantial positive economic effects, particularly in an economically depressed area," as contemplated by *Dhanasar*. *See id.*

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. *See id.* We reserve our opinion regarding whether the record satisfies the second or third *Dhanasar* prong. *See Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7. As noted above, we also reserve our opinion regarding whether the record establishes the Petitioner is eligible for second-preference classification. *See id.*

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.