U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28050767

Date: FEB. 15, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a construction management and project development entrepreneur, seeks classification as a member of the professions holding an advanced degree or of exceptional ability. *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, 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 petition 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 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.

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, 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

A. Categorical Ineligibility for EB-2 Classification

In the first instance, we conclude that the Petitioner has not provided relevant, material, or probative evidence to demonstrate their categorical eligibility for classification as an EB-2 immigrant. So we withdraw the Director's conclusion that the Petitioner is an advanced degree professional classifiable as an EB-2 permanent immigrant.

The evidence the Petitioner submitted into the record does not sufficiently establish the Petitioner's eligibility for EB-2 classification as a member of the professions holding an advanced degree. The regulation at 8 C.F.R. § 204.5(k)(2) defines advanced degree to mean any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree and so permit classification as an EB-2 permanent immigrant. Progressive experience can be demonstrated by the Petitioner by providing letters from current or former employers showing that they have at least five years of progressive post-baccalaureate experience in the specialty. The regulation at 8 C.F.R § 204.5(g)(1) requires letters from current or former employers include the name, address, and title of the writer, and a specific description of the duties performed.

The Petitioner claimed they earned a four-year bachelor's degree in engineering from [redacted] on April 4, 2013. [redacted] is a private for-profit educational company operating institutions conferring undergraduate degrees in Brazil. The Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), reflects that four-year bachelor's degrees earned at accredited institutions of higher education in Brazil are the single source equivalent to a United States bachelor's degree. So the Petitioner's Brazilian bachelor's degree in engineering is a foreign equivalent degree to a U.S. baccalaureate degree in administration from an accredited U.S. institution of higher education.

The petitioner provided several letters to document their accumulation of more than five years of progressive post-baccalaureate work experience. But the letters contained in the record were not sufficient to evaluate whether the Petitioner had earned five years of progressively responsible post-baccalaureate full-time work experience in the specialty. The Petitioner submitted letters from [redacted] project coordinator employed by [redacted] and [redacted] chief executive office for [redacted] Both letters omitted specifying whether the Petitioner's employment with the respective companies they worked for was full-time or part-time. This omission looms even larger when the evidence in the record reflects that there was substantial overlap in the Petitioner's period of employment with the two companies; the Petitioner was employed with [redacted] "from May 2011 to September 2016." The letter dated September 23, 2020 indicated the Petitioner was employed with [redacted] "from March 2012 to present day" and had "been working remotely since March 2020." The Petitioner has not provided explanation or clarification in the record for the period of overlap from March 2012 to September 2016 such that we could evaluate whether the work experience meets the requirements of the regulation. And we note that the letters the Petitioner provided only indicate the month and year of the start and end dates of employment. So we cannot reliably conclude that the Petitioner has the requisite 5 years of progressively responsible experience in the specialty.

And the record contained insufficient evidence to evaluate the Petitioner's eligibility for EB-2 classification as an individual of exceptional ability. The Petitioner should be prepared to address their categorical eligibility for EB-2 classification in any future proceedings requiring a petitioner to demonstrate eligibility as an advanced degree professional or individual of exceptional ability.[1]

B. Eligibility for Discretionary Waiver of the Job Offer, And So a Labor Certification, in the National Interest.

We now turn to the Petitioner's appeal of the Director's decision concluding 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. On appeal, the Petitioner asserts that their proposed endeavor is substantially meritorious and nationally important, that they are well-positioned to advance their proposed

[1] As the resolution of the issues pertaining to the Petitioner's eligibility for a waiver of the job offer requirement, and thus of a labor certification, under the *Dhanasar* analytical framework are dispositive of this appeal, further investigation and analysis of the Petitioner's categorical eligibility for EB-2 classification by issuing a request for evidence would serve no legal purpose.

endeavor, and 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 so that they can undertake their proposed endeavor. But the evidence the Petitioner has submitted into the record is not relevant, material, or probative to support their assertion of eligibility for a national interest waiver under the *Dhanasar* analytical framework. So we agree with the Director, albeit on a different basis, to conclude that a favorable exercise of discretion to waive the job offer requirement and thus a labor certification is not warranted.

Initially the Petitioner proposed to own and operate a business entity called [redacted] in the United States. The professional plan the Petitioner submitted described [redacted] as a "company focuse[d] on project development and the management of residential, commercial and industrial construction." The Petitioner stated they "established [redacted] in the State of Florida to provide innovative consulting sustainability solutions." The Director considered the merit of the proposed endeavor but issued a request for additional evidence (RFE) to determine its national importance as well as eligibility under the remaining prongs of the *Dhanasar* framework.

The Petitioner's response to the RFE introduced a new endeavor that significantly departed from the endeavor they proposed in their initial filing. In the response to the RFE, the Petitioner transformed themselves from an entrepreneur owning and operating a business entity focused on project development and construction management to functioning as a quality test leader with [redacted] is an environmental controls supplier offering products and services designed to heat, cool, humidify/dehumidify, ventilate, and desiccate primarily industrial environments. The Petitioner's position as quality test leader at [redacted] differed significantly from owning and operating a construction management and project development company. The Petitioner's initially intended endeavor contemplated their application of their "expertise and [their] sustainable engineering methods to the U.S. construction and telecommunication market [to] enhance the quality of living in the United States." But their new endeavor to work as a quality test lead required them to test [redacted] environmental control units after assembly. The Petitioner's reversal introduced ambiguity into their proposed endeavor which prevented analysis into its substantial merit or national importance. So the Director correctly denied the petition. On appeal, the Petitioner makes substantially the same arguments as they did in the RFE but attempts to characterize the transfiguration of their proposed endeavor as a minor clarification and not the wholesale change that it is.

The Petitioner's proposed endeavor was ill-defined and amorphous due to the material and significant changes made when they responded to the RFE. The Petitioner's expressed intention to undertake employment with a U.S. employer materially changed the endeavor they intended to undertake in the United States. A petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed. *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). The proposed endeavor changed from construction management and project development entrepreneur to quality test lead at a U.S. employer. The *Dhanasar* framework cannot be applied to two dueling proposed endeavors. A petitioner must identify the specific endeavor they propose to undertake. *See Matter of Dhanasar*, 26 I&N Dec. at 889. It is not possible to determine the substantial merit and national importance of an endeavor when a Petitioner cannot consistently articulate the nature of the endeavor.

And the Director further found that the record does not satisfy the second or third *Dhanasar* prongs. A Petitioner cannot be appropriately evaluated for how well they are situated to advance a proposed endeavor when the proposed endeavor is not evident. And the absence of a well-defined proposed endeavor can render balancing the benefit to the United States to waiving the job offer requirement and consequently a labor certification impossible.

Because the Petitioner has not established that the proposed endeavor has substantial merit or national importance, as required by the first *Dhanasar* prong, they are not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or 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

The Petitioner has not demonstrated their categorical eligibility for EB-2 permanent immigrant classification. And the record contains insufficient evidence to establish they met the first prong of the *Dhanasar* analytical framework. We conclude the Petitioner has not established that they are eligible for or otherwise merit a national interest waiver as a matter of discretion. So the petition will remain denied and the appeal is hereby dismissed.

ORDER: The appeal is dismissed.