U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29338178

Date: JAN. 12, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a civil engineer, seeks classification as a member of the professions holding an advanced degree. 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 Petitioner qualifies as an advanced degree professional but that the record did not establish that a waiver of the job offer requirement is 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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.

The Director determined that the Petitioner qualifies as an advanced degree professional. Based upon the evidence in the record that the Petitioner possesses the foreign equivalent of a bachelor's degree in civil engineering followed by at least five years of progressive experience in civil engineering and construction projects, we agree. *See* 8 C.F.R. § 204.5(k)(2) (a U.S. bachelor's degree or the foreign equivalent followed by at least five years of progressive experience in the specialty is equivalent to a master's degree).

Once a petitioner demonstrates eligibility for the EB-2 classification, the petitioner must then establish eligibility for a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither 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 a matter of discretion,[1] 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.

As to the Petitioner's request for a national interest waiver, the Director concluded that the Petitioner demonstrated the substantial merit of the proposed endeavor but not its national importance, and as such did not establish eligibility under the first prong of the *Dhanasar* analytical framework. The Director's decision did not analyze or make findings as to whether the Petitioner demonstrated eligibility under the second and third *Dhanasar* prongs, and denied the matter based solely on finding the first prong was not met. However, prior to the decision in this matter the Director stated in a request for evidence (RFE) that the record demonstrates both the substantial merit and the national importance of the proposed endeavor. Therefore, while the RFE requested additional evidence related to the second and third prongs, it did not request additional evidence to establish the first.

On appeal, the Petitioner points out this discrepancy between the RFE and the decision and contends that, because the Director stated in the RFE that the record was sufficient to establish national importance, the petition was denied without an opportunity for the Petitioner to respond or present additional evidence related to this question. The Petitioner also asserts, because the decision did not include findings regarding the second and third *Dhanasar* prongs, that "we are left to conclude that USCIS does not contest our response to the RFE that [the Petitioner] is well-positioned, and that it would be beneficial to waive the requirement of a labor certification."

We disagree with the Petitioner that the decision's lack of analysis as to prongs two and three leads to the conclusion that the Petitioner's RFE response was sufficient to establish those prongs. Rather, the Director's decision concludes only that because the record does not demonstrate the national importance of the endeavor, as required, the Petitioner has not demonstrated eligibility for a national interest waiver. Nevertheless, we agree that, due to the statement in the RFE that the record did in fact establish the requisite national importance, the Petitioner was not afforded an opportunity to provide additional evidence to potentially establish this requirement, if needed, prior to the Director's decision. Moreover, because the Director did not make a finding as to whether the Petitioner established prongs two and three of the *Dhanasar* framework, the decision rests entirely upon finding a deficiency that is contrary to what was stated in the RFE, and that the Petitioner did not previously have an opportunity to address. Therefore, we will withdraw the Director's decision.

In addition to noting this discrepancy on appeal, the Petitioner also provides further arguments and briefing related to the potential national importance of the proposed endeavor and to the second and third *Dhanasar* prongs. Where a petition is denied based on a deficiency of proof, and the petitioner was not put on notice of the deficiency with a reasonable opportunity to address it before the denial, then we will remand the matter to allow the Director to consider and address the new evidence or

[1] *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).

information. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). Here, the Petitioner was not notified of the deficiencies as to the first prong before the denial. Additionally, although he was put on notice as to the potential deficiencies in establishing prongs two and three prior to the denial, without a finding from the Director as to whether the RFE response addressed those deficiencies, the Petitioner has not been provided with a reasonable opportunity to appeal those issues, if needed. Therefore, we will remand the matter for the Director to consider the Petitioner's arguments in the first instance. In addition to considering the information presented on appeal, the Director may consider requesting additional evidence, if needed. On remand, the Director should review the entire record and consider whether the Petitioner has established eligibility under each of the three prongs of the *Dhanasar* framework. Because we remand the matter to the Director to consider the Petitioner's arguments in the first instance, we express no opinion regarding the ultimate resolution of this case on remand.

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