U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29337735

Date: JAN. 18, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an airline pilot, seeks classification as a member of the professions holding an advanced degree or of exceptional ability, 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 employment based second preference (EB-2) 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. *See 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).

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that a waiver of the required job offer, and thus of a 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

The Director denied the petition, concluding that the Petitioner's substantially meritorious proposed endeavor was not of national importance, they were not well-positioned to advance their endeavor, and on balance a waiver of the requirement of a job offer and labor certification would not be beneficial to the United States. We reach the same decision as the Director, albeit on another basis.

A. Substantial Merit and National Importance

Initially the Petitioner proposed to work as an aviation security instructor. The Petitioner intended to leverage their "expert training in aviation safety and security" to "enhance the level of aviation security and maintain the United States competitiveness in the field" by engaging in "the training of pilots and instructors in the U.S." But we have previously stated in *Dhanasar* that teaching activities did not rise to a level of having national importance because teaching activities do not have an impact on a specific field more broadly. *Dhanasar* at 893. So the Director issued a request for additional evidence (RFE) to consider the national importance of the proposed endeavor as well as the Petitioner's eligibility for a waiver of the job offer requirement and thus of a labor certification under the remaining prongs of the *Dhanasar* framework.

The Petitioner's response significantly departed from the proposed endeavor they indicated in their initial filing. The proposed endeavor morphed from one where the Petitioner would have served as an aviation security instructor into the Petitioner flying commercial and private freight and passenger charter service aircraft with [redacted] as an airline pilot and, in so doing, purportedly address a shortage of pilots in the United States. The Petitioner submitted a revised personal statement, industry articles about aviation safety, publications discussing a shortage of airline pilots, recommendation letters from airline pilots acquainted with the Petitioner, and an employment offer letter. The Petitioner also submitted an assessment of their qualifications and expertise in the field of aviation authored by [redacted], assistant professor of aviation systems management at [redacted]. The wholesale revision of the Petitioner's proposed endeavor did not enhance or clarify the Petitioner's proposed endeavor to be an aviation security instructor. It transformed the proposed endeavor into a wholly different one; an airline pilot. 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 Petitioner's RFE response constituted a materially different endeavor wherein they flew commercial and private freight and passenger aircraft for a charter flight company. The Petitioner's materially significant transformation into an airline pilot from an aviation security instructor rendered their proposed endeavor ill-defined and amorphous. The Petitioner's reversal introduced ambiguity into their proposed endeavor which prevented analysis into its national importance. 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. So 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.

Moreover, the Petitioner's new proposed endeavor to serve as an airline pilot would not rise to a level of national importance even if the Petitioner's proposed endeavor had remained consistent. In response to the RFE, the Petitioner described their airline pilot endeavor as "effectively and safely operat[ing] airplanes in the United States" in addition to teaching aviation safety to address a shortage of professional pilots under the auspices of full-time proffered employment with [redacted]. It is unclear from the evidence in the record that the work of a single airline pilot would have a significant impact beyond the immediate benefit provided to that airline pilot's employer by their services. The evidence in the record does not highlight how the work of one professional could have broader implications that address the paucity of airline pilot professionals that prompted the government funding initiatives administered by the Federal Aviation Administration and the United States Department of Transportation the Petitioner asserted addressed pilot shortages. And if in fact this professional airline pilot shortage can be addressed by adding additional able, willing, qualified, and available international workers like the Petitioner, they would be better addressed through the U.S. Department of Labor's (DOL) labor certification process. The labor certification process permits U.S. employers to test the labor market to document the lack of able, available, qualified, and willing U.S. workers for positions with U.S. employers. So, even if the Petitioner had been consistent in their intended activities, the Petitioner's proposed airline pilot endeavor did not have a potential prospective impact stemming from its broader implications that demonstrated its national importance.

B. Categorical Eligibility for Employment Based Second Preference

Upon a de novo review of the record, we will withdraw the Director's conclusion that the Petitioner was ineligible for classification in the employment based second preference category as an individual of exceptional ability. [1]

The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." To demonstrate exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

The evidence the Petitioner submitted to document their exceptional ability consisted of a service letter from their employer, certificates commemorating milestones of service with that employer, a letter recognizing the Petitioner's participation in training programs with that employer, and institutional awards conferred by that employer. The Petitioner also submitted their pay records, evidence of their membership in professional associations, and letters of support.

The Director reviewed this initial evidence and stated in their request for evidence (RFE) that the evidence satisfactorily established the Petitioner's eligibility for EB-2 classification as an individual of exceptional ability. But in their Decision, the Petitioner reversed course and concluded that the

[1] The Petitioner does not seek eligibility for classification as a permanent immigrant in the employment based second preference category as an advanced degree professional.

Petitioner was ineligible for EB-2 classification as an individual of exceptional ability because their examination of the same evidence described in the RFE did not reflect the Petitioner's degree of expertise beyond that which would be ordinarily encountered in the field.

Whilst we agree with the Director that the record as it is currently constituted does not readily reflect the Petitioner's eligibility for classification as a permanent immigrant in the employment based second preference category as an individual of exceptional ability, we do not agree with the rationale for their conclusion. The regulation at 8 C.F.R § 103.2(b)(8)(iv) requires an RFE to request evidence in a manner providing a petitioner or applicant "adequate notice and sufficient information to respond." The Director's RFE contained preliminary conclusions about the Petitioner's eligibility contrary to their ultimate decision and, in so doing, deprived the Petitioner of the "adequate notice and sufficient information to respond."

But further investigation and analysis of the Petitioner's categorical eligibility for EB-2 classification by issuing a request for evidence today would serve no legal purpose. 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. So we will reserve the issue of the Petitioner's categorial eligibility for EB-2 classification along with the issue of whether the Petitioner demonstrated eligibility under the remaining prongs of the *Dhanasar* analytical framework respecting whether the Petitioner is well-positioned to advance their proposed endeavor and whether 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. *See INS v Bagamasbad*, 429 U.S. at 25 and *Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

III. CONCLUSION

As the Petitioner has not met the requirements of the *Dhanasar* analytical framework, we find that they have not established that they are eligible for or otherwise merit a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.