U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 29127758

Date: JAN. 25, 2024

Appeal of Texas Service Center Decision

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

The Petitioner seeks classification as an individual of exceptional ability in the sciences, arts or business or, in the alternative, as a member of the professions holding an advanced degree. *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 does not establish the Petitioner qualifies for classification as an individual of exceptional ability. The Director did not address whether the Petitioner qualifies, in the alternative, as a member of the professions holding an advanced degree. The Director further 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. 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.

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 found that the record does not establish that the Petitioner qualifies as an individual of exceptional ability. However, the Director did not address whether the Petitioner qualifies as a member of the professions holding an advanced degree. On appeal, the Petitioner asserts, in relevant part, that the Director erred by not concluding the Petitioner qualifies as a member of the professions holding an advanced degree. The Director specifically noted that the record establishes "the [P]etitioner's foreign degree is equivalent to a Bachelor's degree in Mechanical Engineering at a college or university in the United States." The Director also acknowledged that the record contains "employment verification letters from his prior employers, reflecting he possesses seven years of fulltime employment" related to the proposed endeavor's occupation. Therefore, the Petitioner establishes on appeal that the Director erred by not concluding the Petitioner qualifies as a member of the professions holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(2); 8 C.F.R. § 204.5(k)(3)(i). However, for the reasons discussed below, the Petitioner has not established that a waiver of the requirement of a job offer is warranted.

Initially, the Petitioner described the endeavor as a plan to "seek employment as a [m]echanical [e]ngineer in the field of [e]ngineering, seeking to offer my services across the U.S." We note that the Petitioner did not initially indicate that the proposed endeavor would entail founding his own company or working as a mechanical engineering consultant, rather than as a mechanical engineer per se. The distinction appears to be significant because "[m]echanical engineers who sell services publicly must be licensed in all states and the District of Columbia." Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Mechanical Engineers, https://www.bls.gov/ooh/architecture-and-engineering/mechanical-engineers.htm#tab-4.

In response to the Director's request for evidence (RFE), the Petitioner substantially modified his description of the proposed endeavor. In a business plan generally dated 2023, submitted in response to the RFE, the Petitioner asserted that he and his spouse would each be 50% co-owners of a startup company that "will provide engineering project consulting services to businesses across the United States." The business plan further asserts that the Petitioner would work as "the [e]xecutive [m]anager and [l]ead [m]echanical [e]ngineer" of his startup consulting company, which will "provide engineering consulting services to operators in . . . the [e]ngineering [i]ndustry and domestic service sector in the U.S." The business plan also indicates that the company would employ four workers in the first year of operations, increasing to 17 workers in the fifth year of operations, including the

Petitioner, respectively. The business plan does not clarify where the company would operate, although it notes that its "personnel will work directly with clients and provide their expertise on-site," apparently throughout the United States at unspecified locations. However, the Petitioner also submitted a certificate of organization for the startup company in response to the Director's RFE, indicating that the address of the company's registered office matches the residential address in [redacted] Pennsylvania, the Petitioner provided on the Form I-140, Immigrant Petition for Alien Workers.

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 as a [m]echanical [e]ngineer in the field of [e]ngineering" or found his own mechanical engineering consulting company and hire workers is material to the first *Dhanasar* prong because it addresses the scope of the proposed endeavor and whether it may have national importance.[1] *See Matter of Dhanasar*, 26 I&N Dec. at 888-90. Because the Petitioner did not initially indicate that the proposed endeavor would entail founding his own company or working as a mechanical engineering consultant, rather than as a licensed mechanical engineer per se, the 2023 business plan, dated after the Petitioner filed the Form I-140 in 2022, presents a new set of material facts that cannot establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. Furthermore, because the new set of material facts regarding the founding of a mechanical engineering consulting company and the Petitioner's proposal to work as a mechanical engineering consultant cannot establish eligibility, references to that new set of facts, including in the Petitioner's response to the Director's RFE and on appeal, also cannot establish eligibility. *See id.*

The Director acknowledged, "it appears that the activities of the proposed endeavor will have substantial merit." However, the Director observed that "the record does not demonstrate the [P]etitioner's proposed endeavor will have the ability to create a significant number of job opportunities for U.S. workers." The Director also observed that the record does not establish the proposed endeavor may have substantial positive economic effects or "a broader potential prospective impact." Accordingly, the Director concluded that "the [P]etitioner has not established that the proposed endeavor is of national importance." The Director also concluded that the record does not satisfy the second and third *Dhanasar* prongs.

On appeal, the Petitioner reasserts that his "proposed endeavor through [his startup mechanical engineering consulting company] is widely recognized by experts as being of substantial merit and national importance due to its significant contributions in several key areas." The Petitioner also

[1] It also is material to the second *Dhanasar* prong—whether an individual is well positioned to advance a proposed endeavor—because mechanical engineers in general, as opposed to mechanical engineering consultants, "who sell services publicly must be licensed in all states and the District of Columbia." Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Mechanical Engineers, https://www.bls.gov/ooh/architecture-and-engineering/mechanical-engineers.htm#tab-4. *See Matter of Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on the three prongs.

references on appeal generalized information regarding "the oil and gas industry" and entrepreneurship.

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 has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

Neither the business plan nor references to the Petitioner's proposal to found a mechanical engineering consulting company and hire workers, can establish eligibility for the reasons discussed above. *See* 8 C.F.R. § 103.2(b)(1); *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. The record does not establish how the Petitioner's plan, as indicated at the time of filing the Form I-140, to "seek employment as a [m]echanical [e]ngineer in the field of [e]ngineering, seeking to offer my services across the U.S." for some unspecified employer in some unspecified location may have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" or broader implications, such as "significant potential to employ U.S. workers or . . . other substantial positive economic effects, particularly in an economically depressed area." *See Matter of Dhanasar*, 26 I&N Dec. at 889-90. Moreover, as noted above, 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 id.* at 889. Therefore, the Petitioner's generalized references on appeal to "the oil and gas industry" and entrepreneurship do not establish how the specific endeavor he proposes to undertake may have national importance, which is distinguishable from whether a particular industry in general may have national importance.

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. 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) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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

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.