U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29549395

Date: MAR. 28, 2024

Appeal of Texas Service Center Decision

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

The Petitioner is an environmental engineer who seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree as well as a national interest waiver (NIW) of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Texas Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding the record did not establish that the Petitioner merits a discretionary waiver of the job offer requirement in the national interest. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (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 an NIW, 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.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they must then establish that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the 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 NIW petitions. *Dhanasar* states that USCIS may, as matter of discretion, grant an NIW 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.

The purely discretionary determination of whether to grant or deny an NIW rests solely with USCIS. *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining four U.S. Circuit Courts of Appeals in concluding that USCIS' decision to grant or deny an NIW to be discretionary in nature).

II. NATIONAL INTEREST WAIVER

The Petitioner holds the foreign equivalents of U.S. bachelor's and master's degrees in environmental studies. The Petitioner presented her proposed endeavor as contributing to sustainable development in the United States through the improvement of waste and plastics management in the implementation of processes towards ecosystem restoration in America.

After reviewing the entire record, we adopt and affirm the Director's decision with the added comments below addressing some elements within the appeal brief relating to *Dhanasar's* first prong. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Edwards v. U.S. Att'y Gen.*, No. 19-15077, 2024 WL 950198, at *5 (11th Cir. Mar. 6, 2024) (joining every other U.S. Circuit Court of Appeals in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual 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. *Dhanasar*, 26 I&N Dec. at 889.

The Petitioner's counsel includes arguments in the appeal brief that do not appear to apply to this case. It is unclear whether counsel relies on this as a template for several filings or whether it might have mistakenly been included in the brief. It does not appear Petitioner's counsel mistakenly included the content because some of the irrelevant arguments do include information pertaining to this Petitioner. Nevertheless, we will discuss some of this content. The brief discusses the first prong requirements then indicates the Director's decision "contains instances of a misunderstanding and misapplication of law that goes beyond harmless error and reach the levels of abuse of discretion." The brief delineates between two scenarios: the submission of no evidence versus the submission of insufficient evidence. Here, the Petitioner implies that the Director's analysis in the denial fell under the scenario in which no evidence was submitted to demonstrate the national importance of the proposed endeavor.

The evidence the Petitioner identifies that was allegedly ignored consisted of her revised personal statement provided in the request for evidence (RFE) response and various executive orders, governmental reports, news articles, and industry reports and pamphlets. Aside from her personal statement, these identified documents did not pertain to the Petitioner's proposed endeavor, and instead they were related to the industry or to the field in which the endeavor is situated. We note the Director discussed this personal statement as well as others from the Petitioner in the decision. The Director noted her claims within the initial statement as well as a revised statement she offered in the RFE response, and concluded some of the revisions were so materially different than the initial plan

that she could not include them as a claim in this petition because she must demonstrate eligibility as of the petition filing date.

Turning to the reports and articles, we do not agree that the Director ignored this evidence. The Director noted while this material confirmed the endeavor could have substantial merit, it did not make such a showing regarding its national importance. The Director also noted an absence of the mention of the Petitioner's proposed endeavor in any of the evidence, which instead focused on the field and occupation in general. So, the allegations that the Director abused their discretion and ignored this evidence don't bear out. That the Petitioner proclaims the material she submitted was viable and probative of her eligibility is not determinative or relevant to our inquiry. Instead, it is USCIS that makes that determination. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988) (finding that the appropriate entity to determine eligibility is USCIS); *see also Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (2012).

Next, the Petitioner continues the argument that she was placed at a disadvantage because the Director did not provide any meaningful review for the evidence she submitted. The Petitioner observes in prior cases, federal courts have noted that decisions failing to contemplate or discuss the entirety of the evidence in a filing amounts to critical error in the adjudicative process. In support of this concept, the Petitioner cites to *Buletini v. INS*, 860 F. Supp. 1222, 1233 (E.D. Mich. 1994). The *Buletini* court opinion referred to the Director's failure to consider all the forms of evidence that the petitioner in that case submitted such as the book and the medical dictionary he authored, and his study that appeared in the largest circulation newspaper in that petitioner's home nation. *Buletini*, 860 F. Supp. at 1232–33. These are *forms* of evidence the *Buletini* court determined that the USCIS director had failed to consider; the court did not indicate that director was required to discuss each and every piece of evidence within the record.

We note that in the appeal before us, the Director provided a comprehensive analysis of the case that exceeds the depth we regularly observe, which played a role in our call to affirm and adopt their decision. Although we agree with the Petitioner that the Director did not directly discuss every piece of evidence she considers as salient to qualifying under this program, she has not established how those omitted documents demonstrated eligibility. In other words, the Petitioner did not demonstrate that the Director's failure to discuss every document in detail changed the outcome of the case. And that is the Petitioner's burden. When USCIS provides a reasoned consideration to the petition, and has made adequate findings, it will not be required to specifically address each claim a petitioner makes, nor is it necessary for it to address every piece of evidence a petitioner presents. *Amin v. Mayorkas*, 24 F.4th 383, 394 (5th Cir. 2022); *Martinez v. INS*, 970 F.2d 973, 976 (1st Cir. 1992); *aff'd Morales v. INS*, 208 F.3d 323, 328 (1st Cir. 2000); *see also Pakasi v. Holder*, 577 F.3d 44, 48 (1st Cir. 2009); *Kazemzadeh v. U.S. Atty. Gen.*, 577 F.3d 1341, 1351 (11th Cir. 2009); *see also United States v. Teixeira*, 62 F.4th 10, 25 (1st Cir. 2023) (concluding a trier of fact "need not articulate its conclusions as to every jot and tittle of evidence in making a determination").

After all, it is not enough to demonstrate errors in an agency's decision, the Petitioner must also establish that they were prejudiced by the mistakes. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009); *Molina-Martinez v. United States*, 578 U.S. 189, 203 (2016); *Amin*, 24 F.4th at 394. While we agree that the Director did not discuss every form of evidence she presented, the Petitioner doesn't establish through her appeal brief that these materials are sufficient to demonstrate her proposed endeavor has

national importance. As the Petitioner has not demonstrated she was prejudiced by the lack of discussion of any evidence, even if we agreed that this was an error, such a lapse would appear to be harmless and is insufficient grounds upon which to base this appeal. Errors can be overlooked when they had no bearing on the substance of an agency's decision. *Aguilar v. Garland*, 60 F.4th 401, 407 (8th Cir. 2023) (citing *Prohibition Juice Co. v. United States Food & Drug Admin.*, 45 F.4th 8, 24 (D.C. Cir. 2022)). The party that "seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Shinseki*, 556 U.S. at 409 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943)); *Molina-Martinez*, 578 U.S. at 203.

The Petitioner asserts the Director erred in their analysis in describing her lack of strategy or methodology to replicate the elements of her proposed endeavor broadly in the industry on a scale that could be considered commensurate with national importance. The Petitioner states this analysis is inapplicable to the first prong and belongs under the second prong in evaluating whether the Petitioner is well positioned to advance the proposed endeavor. While we agree that these factors could be considered under the second prong, we disagree that they do not at all implicate prong one. Here, we view the Director's analysis in context as being appropriate for the national importance of the endeavor. Petitioners in general should demonstrate the endeavor will substantially benefit and "impact the field . . . more broadly" and "we look for broader implications" of the proposed endeavor, and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Dhanasar*, 26 I&N Dec. at 889. A major portion of our focus is whether the evidence highlights the "potential prospective impact" of the actual proposed work. *Id.* The Director's analysis of the Petitioner's plans and how that will be distended more broadly in the field is relevant to the national importance of the *Dhanasar* requirements here. In other words, in context we do not consider this as an error on the Director's part.

Turning her attention to other claimed errors, the Petitioner takes issue with the portions of the Director's analysis that highlighted changes or additions to her claims, as well as evidence that formed or appeared subsequent to the petition filing date. We note that a filing party is not categorically prohibited from submitting claims and evidence that postdate the petition filing date, but those materials should not advance new eligibility claims or discuss new agreements that only came into being subsequent to when she filed the petition. For instance, the Petitioner's statement submitted in the RFE response asserts new methods in which the endeavor might have a greater impact in the broader field. Those methods were not included in the initial filing and appear to be in direct response to the RFE.

Evidence that the Petitioner creates or produces after USCIS points out the deficiencies in the petition is not necessarily independent and objective evidence. Fundamentally, independent and objective evidence would be material that is contemporaneous with the event to be proven and existent at the time of the Director's notice. *See Matter of O-M-O-*, 28 I&N Dec. 191, 197 n.5 (BIA 2021) (quoting *Matter of Pineda*, 20 I&N Dec. 70, 73 (BIA 1989) for the prospect that the most persuasive evidence presented was "documentary evidence which was contemporaneous with the events in question"). While the Director has the discretion to consider the new materials, if they elect to do that the newly created evidence will generally garner less evidentiary value than if the Petitioner had provided them prior to being notified of the deficiency. *See Innova Solutions, Inc. v. Baran*, Case No. 18CV09732DDPRAOX, 2019 WL 5748215, at *4 (C.D. Cal. Nov. 5, 2019) (finding that USCIS may

assign evidence less probative weight because it was created after the agency issued an RFE informing a petitioner of the evidentiary shortcoming).

Even setting the independent and objective evidence issue aside, the Petitioner develops their arguments further indicating the Director improperly invoked a precedent decision (*Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971)) because the prohibition in *Katigbak* applied to a particular classification and visa while the NIW "is not a classification, but a separate waiver assessment conducted AFTER eligibility is determined for an EB2 visa." (Emphasis in original.) Here we do not agree, and even if we were to omit any consideration of the *Katigbak* decision from our analysis, the Petitioner does not address other legal requirements pertaining to demonstrating eligibility at the time of filing.

First, the regulation at 8 C.F.R. § 103.2(b)(1) requires in part that a "petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request." Second, the Regional Commissioner continued this reasoning in *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977) where they reemphasize the importance of not obtaining a priority date prior to being eligible based on future events. In fact, despite the Petitioner's assertion to the contrary, this principle has been extended beyond the foreign national's eligibility for *the classification* sought. For example, an employer must establish its ability to pay the proffered wage as of the date of filing. *Matter of Great Wall*, 16 I&N Dec. 142, 144–45 (Acting Reg'l Comm'r 1977). That decision provides that a petition should not become approvable under a new set of facts. Recognizing that *Katigbak* was not "foursquare with the instant case" in that it dealt with a beneficiary's eligibility, *Great Wall*, 16 I&N Dec. at 145 still applies the reasoning. The decision provides:

> In sixth-preference visa petition proceedings the Service must consider the merits of the Petitioner's job offer, so that a determination can be made whether the job offer is realistic and whether the wage offer can be met, as well as determine whether the alien meets the minimum requirements to perform the offered job satisfactorily. It follows that such consideration by the Service would necessarily be focused on the circumstances at the *time of filing* of the petition. The Petitioner in the instant case cannot expect to establish a priority date for visa issuance for the Beneficiary when at the time of making the job offer and the filing of the petition with this Service he could not, in all reality, pay the salary as stated in the job offer.

(Emphasis in original.) Finally, when evaluating revisions to a partnership agreement the Associate Commissioner stated that "a petition cannot be approved at a future date after the Petitioner becomes eligible under a new set of facts." *Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). The *Izummi* decision further provides that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. "To do otherwise would make a farce of the preference system and priorities set up by statute and regulation." *Matter of Bardouille*, 18 I&N Dec. 114, 117 (BIA 1981). Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008).

Any additional evidence submitted in connection with a benefit request at a later date, including evidence responding to a request from USCIS, must also establish "eligibility at the time the benefit

request was filed." 8 C.F.R. § 103.2(b)(12); *Robinson v. Napolitano*, 554 F.3d 358, 364 (3d Cir. 2009). "Under this rule, USCIS will deny [an immigration benefit] if the [filing party] becomes eligible only after the [benefit] was filed." *Tingzi Wang v. United States Citizenship & Immigr. Servs.*, 375 F. Supp. 3d 22, 27 (D.D.C. 2019) (citing 8 C.F.R. § 103.2(b)(12)); *Doe v. United States Citizenship & Immigr. Servs.*, 410 F. Supp. 3d 86, 100 (D.D.C. 2019).

Closing her appellate discussion of the first prong, the Petitioner notes the standard of review for meeting each of the relevant and respective prongs in the *Dhanasar* decision is a preponderance of the evidence standard. The Petitioner subsequently states:

> It is not inherently necessary to meet each of the possible evidentiary examples provided in the precedent decision in order to prove that a proposed endeavor is of national importance. Instead, so long as a Petitioner has provided sufficient evidence to demonstrate that the proposed endeavor is of national importance by a preponderance of the evidence, the standard is met and the prong is satisfied.

Here, it is unclear what the Petitioner means when she references "each of the possible evidentiary examples" originating from the *Dhanasar* decision, as she does not expand on this concept. However, we make two observations.

First, *Dhanasar* itself speaks to the requirements under the preponderance of the evidence standard when citing to *Chawathe*, 25 I&N Dec. at 376 and noting "a petitioner must establish that he or she more likely than not satisfies the qualifying elements." *Dhanasar*, 26 I&N Dec. at 889 n.8. Second, the Petitioner's simple assertions that she submitted evidence satisfying the NIW requirements by a preponderance of the evidence is a perfunctory method to apply the preponderance standard. Instead, we follow the reasoning from *Chawathe* when we consider a piece of evidence by evaluating its quality, reviewing its contents, and finally coming to a conclusion of whether that material supports a petitioner's claims. That analysis should result in an officer determining whether a petitioner has preponderantly demonstrated that their claims are true, and that those claims are sufficient to satisfy the statutory and regulatory requirements, in addition to the interpretations of those legal sources as outlined in precedent decisions and agency guidance. Ultimately, the truth is to be determined not by the quantity of evidence alone but by its quality. *Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 79–80 (Comm'r 1989)).

In other words, the process of meeting the standard isn't simply submitting evidence; it requires an evaluation of those materials relating to their reliability and relevance. It does not appear the Petitioner factored these aspects into her analysis of the preponderance standard. And it remains that making a determination on what the evidence establishes under this immigrant program falls to USCIS, not to the Petitioner. *See Caron International*, 19 I&N Dec. at 795. As a result, the Petitioner's assertions that the previously submitted evidence satisfies her burden of proof has been considered, but it is not determinative of the issue.

ORDER: The appeal is dismissed.