U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 30044608

Date: MAR. 28, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an electromechanical engineer, seeks employment-based second preference (EB-2) immigrant classification as a noncitizen of exceptional ability,[1] as well as a national interest waiver 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 Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that he was a noncitizen of exceptional ability or that a waiver of the classification's job offer requirement, 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 because the Petitioner did not establish that his proposed endeavor has national importance and thus, he did not meet the national importance requirement of the first prong of the Dhanasar framework. See Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016). Because this identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding whether he established that he met the requirements of EB-2 classification and the remaining Dhanasar prongs. 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).

I. LAW

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). In addition, the

[1] We note that the Petitioner never sought classification as an advanced degree professional before the Director or on appeal.

regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). However, meeting the minimum requirements by providing at least three types of initial evidence does not, in itself, establish that the individual in fact meets the requirements for exceptional ability. See 6 USCIS Policy Manual F.5(B)(2), https://www.uscis.gov/policymanual. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. Id. The officer must determine whether the petitioner, by a preponderance of the evidence, has demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. Id.

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. Next, a petitioner 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. at 889, provides the framework for adjudicating national interest waiver petitions. Dhanasar states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[2] 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.

II. ANALYSIS

The Director determined that the Petitioner had not submitted sufficient evidence to demonstrate eligibility for EB-2 classification as a noncitizen of exceptional ability.[3] Further, the Director determined that the Petitioner had provided insufficient evidence to demonstrate his eligibility for the national interest waiver under the Dhanasar framework.

The Petitioner, through counsel, states that he has 38 years of experience, including 20 years as an "electromechanical engineer." According to the Petitioner's Form ETA-750, which only lists experience since 2017, he is currently employed as "Head of Production/Technical Manager" at a firm that he founded based in [redacted] Ukraine. According to his resume, the Petitioner also works as a manufacturing engineer at [redacted] A memorandum prepared by counsel explains that the Petitioner's latest project has "to do with plasma and its application to water, wastewater, and material treatment."

[2] See also Flores v. Garland, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[3] We note that the Director's decision erroneously states that the Petitioner "submitted sufficient evidence to establish that he is an alien of exceptional ability" on page 4. However, the Director's decision contains a subsection titled "E21 Exceptional Ability" where the Petitioner is unambiguously put on notice that the Director determined that the Petitioner did not qualify for the requested EB-2 classification.

Initially, the Petitioner submitted evidence of his education and experience, recommendation letters, an award, and a legal memorandum prepared by counsel describing his asserted eligibility for EB-2 classification and a national interest waiver.

Following initial review, the Director issued a request for evidence (RFE) allowing the Petitioner an opportunity to submit additional evidence in attempt to establish his eligibility for the national interest waiver. The Petitioner's response to the RFE includes a letter from counsel addressing both exceptional ability as well as the three Dhanasar prongs, an education printout, a letter written by [redacted] about the Petitioner in 2023[4] along with a biography of [redacted] and related a university release, background information about plasma, a proprietary [redacted] copies of a provisional patent application co-filed by the Petitioner, a list of possible future patent applications, and the Petitioner's statement.

Upon review of the Petitioner's RFE response, the Director determined that the Petitioner had not established that he is a person of exceptional ability or that he meets any of three prongs under the Dhanasar framework. Specifically, the Director concluded that he had not established that he met at least three of the six criteria to show eligibility for EB-2 classification as a noncitizen of exceptional ability.[5] The Director further concluded that the Petitioner had not identified his proposed endeavor with enough specificity to allow any meaningful discussion of the endeavor. Next, the Director concluded that the Petitioner had not demonstrated that his proposed endeavor had substantial merit and national importance, that he was well-positioned to advance his proposed endeavor, or that, on balance, it would be beneficial to the United States to waive the requirements of a job offer, and thus of the labor certification.

On appeal, the Petitioner submits a legal brief and asserts that the Director "committed error in finding that" the Petitioner "did not establish that he is an individual of exceptional ability." Further, the Petitioner asserts that the Director "committed an error of fact in finding" that the Petitioner "failed to meet the requirement for a National Interest Waiver." The Petitioner references evidence already in the record and states that the evidence in the record is sufficient to grant his case. As we have reserved discussion of the Petitioner's potential EB2 classification, we will address the Petitioner's potential qualification under the first prong.

A. Substantial Merit and National Importance

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

[4] The Director found that the Petitioner submitted "the same recommendation letter" from Dr. David Garman in his RFE response. However, the letter contains new information and has a different date.

[5] We note that the Director did not consider evidence that the Petitioner submitted in his RFE response relating to his license. The decision notes that the Petitioner submitted a "printout from K12 Academics discussing the Higher Education Diplomas and Certificates in Ukraine." However, the Director omitted any analysis of the document in discussing whether the Petitioner met the exceptional ability criteria. The K12 Academics printout states that "[t]he Diploma is the State-recognized document which serves both as an educational certificate and a professional license..." in Ukraine. Because we resolve this appeal on a different basis, we need not reach, and therefore reserve this issue.

whether the proposed endeavor has national importance, we consider its potential prospective impact. Matter of Dhanasar, 26 I&N Dec. at 889. The relevant question is not the importance of the field, industry, or profession in which the individual will work; instead we focus on the "the specific endeavor that the foreign national proposes to undertake." See Id. In Dhanasar, we further noted that "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." Id. We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." Id. at 890.

The Director concluded that "[i]t is apparent that the petitioner intends to work as an Electrical Engineer in the field of Engineering." In the Petitioner's response to the RFE, he submitted a signed statement where he referred to himself as an "electromechanical engineer" who designs "apparatus and systems for the facilitation of complex plasma phenomena." The Petitioner further elaborated that the "widespread use of plasma technologies will help make a change in the Earth's ecology, provide industrial-scale solutions for a cleaner and healthier future and a more efficient and prosperous economy." The Petitioner states that he has "developed a complex electrical system in the form of a cylindrical inductor for the formation and persistance [sic] of a non thermal plasma in a processing zone." The Petitioner says that his invention "will allow the purification of effluents from industrial enterprises, manure from livestock farms, [and] wastewater from field hospitals." However, the Director stated that "USCIS is unable to determine that his proposed work will have both substantial merit and national importance."

On appeal, we find that the Petitioner has sufficiently specified his general work as an "electromechanical engineer" in the field of cold plasma applications to discuss and consider whether he meets the first prong. We do, however, agree with the Director that the manner in which the Petitioner would carry out any of these activities, and, therefore, his specific proposed endeavor is unduly vague. As explained below, we withdraw the Director's determination and conclude that the Petitioner provided sufficient evidence to demonstrate that his proposed endeavor has substantial merit, but not national importance.

When adjudicating the substantial merit portion of prong one, we consider the specific endeavor the Petitioner proposes to undertake. Matter of Dhanasar, 26 I&N Dec. at 889. "In addition, officers may consider evidence of the endeavor's potential significant economic impact, but "merit may be established without immediate or quantifiable economic impact" and "endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States." See generally 6 USCIS Policy Manual F.5(D)(1), https: //www.uscis.gov/policy-manual.

In response to the RFE, the Petitioner provided sufficient evidence of the substantial merit of his proposed endeavor. For instance, the Petitioner's endeavor has applications in the purification of effluents, manure, and wastewater. Further, his endeavor could be used for the processing of mineral ores. Finally, the endeavor could find uses in providing "Plasma Activated Water" for use in agriculture.

Next, regarding national importance, the Director determined that the Petitioner had not established how he "will be engaged in the field" and that he did not "identify his proposed projects and goals that he will undertake as part of his work." As a result, the Director concluded that "USCIS cannot meaningfully discuss the endeavor."

On appeal, we conclude that the Petitioner submitted insufficient evidence to establish that his proposed endeavor is of national importance.

The Petitioner states that "[t]he widespread use of plasma technologies will help make a change in the Earth's ecology, provide industrial-scale solutions for a cleaner and healthier future and a more efficient and prosperous economy." To support that assertion, the Petitioner submitted two recommendation letters from [redacted] along with his biography and a news release about the letter's author, a presentation titled [redacted] by [redacted] a provisional patent filed at the U.S. Trademark and Patent Office (USTPO), a recommendation letter from [redacted] (Director of [redacted], a fact sheet published by the Biden Administration on PFAS Pollution, an article titled [redacted] from [redacted] from 2018, an article titled "New directions for processing – Non Thermal Plasma – a potentially sustainable outcome," an article titled "Here's what's in the bipartisan infrastructure package," an article titled "Recent advances of cold plasma technology for water and soil remediation: A critical review," and, a list of five potential patents.

While the Petitioner submits articles describing the perilous state of U.S. infrastructure and the potential uses of cold plasma, these articles are not specific to his proposed endeavor.[6] For instance, the article titled "Here's what's in the bipartisan infrastructure package," discusses President Joe Biden having signed a $1.2 trillion infrastructure bill in November 2021, but the article does not explain how the Petitioner's proposed endeavor will help better American infrastructure. The article does not mention the Petitioner by name. Although there is a section titled "Improving power and water systems" and another titled "Environmental remediation," the article provides general information about the bill and not information specific to the Petitioner's endeavor.

The Petitioner references the fact sheet put out by the Biden Administration on forever chemicals like per- and polyfluoroalkyl substances (PFAS). The fact sheet talks about the Biden Administration's efforts to deliver clean water across the United States by mobilizing "federal, state, and local investments to confront contamination, protect public health, and advance environmental justice." However, the article does not mention the Petitioner or anything to do with using plasma to purify the nation's water supply.

Likewise, the Petitioner's statement, provided in response to the Director's RFE, does not articulate how his proposed endeavor will have a potential prospective impact. The Petitioner does not identify whether he will carry out his proposed endeavor as an employee of a company, or if he will start his own company. The Petitioner has not provided a model of how his endeavor will employ U.S. workers or any study of the potential positive economic impacts. As noted, to establish national importance, the Petitioner must demonstrate the proposed endeavor's impact. In Dhanasar, we noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national

[6] While we discuss a sampling of these articles and reports, we have reviewed and considered each one.

importance for example, because it has national or even global implications within a particular field." Matter of Dhanasar, 26 I&N Dec. at 889.

Of note, the Petitioner submits a filing receipt from USTPO from 2022. The receipt lists [redacted] the Petitioner, and [redacted] as the inventors and applicants. The provisional patent was obtained for the invention titled [redacted] The Petitioner's statement does not refer to the patent filing. Further, counsel's brief on appeal makes no mention of the application for a provisional patent. Thus, we can give the patent application little weight in determining the national importance of the Petitioner's endeavor.

The Petitioner provided two letters from [redacted] one from 2022 and one from 2023. [redacted] as of the 2022 letter, was a visiting professor at the [redacted] in Australia and was formerly the inaugural dean of the [redacted] at the [redacted] states that he has been "involved in water and wastewater treatment and other associated technologies for over 40 years." In this letter, [redacted] states that he has been retained by [redacted] as a consultant to advise on new technologies, particularly on Non-Thermal (or Cold) Plasma technologies." He states that [redacted] technology" is the only cold plasma technology that can be [redacted] regarding water, wastewater, and material treatment. While [redacted] concludes that the Petitioner has "become a world expert on [the] design, operation and implementation" of [redacted] technology and that the Petitioner has "the sole complete unstanding [sic] of the development process, the qualitative outcomes from processing and the background to the experimental work already undertaken," he does not describe how the Petitioner will effectuate his proposed endeavor or what the endeavor's scale will be.

Both letters reference [redacted] having worked with the Petitioner over the "past 18 months." [redacted] describes the Petitioner's work generally, but it is unclear whether his general work would be the Petitioner's proposed endeavor, as the Petitioner has not sufficiently articulated the parameters of any proposed endeavor. For instance, [redacted] states that he has examined the Petitioner's "proposals for development of the technology and if the company elects to proceed with patenting there are potentially 4 new patents associated with these developments." He further states that "[o]n the other hand preservation of the intellectual property as proprietary or trade secrets is an equally valid option to be made by the company."

As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we will reject an opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. Id. We are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. Id.

Here, the letters from [redacted] are of little probative value as the letters do not specifically address the Petitioner's proposed endeavor and why it would have national importance. [redacted] does not provide details on how the Petitioner's proposed endeavor will have a prospective impact on the United States, including the national or global implications on cold plasma technology applications,

the potential to employ U.S. workers, or the positive economic effects. While his opinion provides some specific details, those details are not in harmony with the Petitioner's statement regarding his proposed endeavor. "In determining national importance, the officer's analysis should focus on what the beneficiary will be doing rather than the specific occupational classification." 6 USCIS Policy Manual F.5(D)(1), https://www.uscis.gov/policy-manual. His letter also suggests that much of the Petitioner's work might not extend beyond his current employer based on potential intellectual property issues.

The Petitioner, through his counsel's brief on appeal, relies on assertions regarding the national importance of the Petitioner's proposed endeavor. The brief states that the evidence submitted "establishes the importance of and that the potential for the plasma technology is extensive and has applications in the fields of water and wastewater including treatment of PAS/PFOS." Counsel's unsubstantiated assertions do not constitute evidence. See, e.g., Matter of S-M-, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). However, as discussed above, it is the endeavor itself that is relevant and not the field of the endeavor. The evidence does not sufficiently demonstrate the proposed endeavor's national importance. Therefore, we conclude that the Petitioner has not established that he meets the requisite first prong of the Dhanasar framework.

Because the Petitioner has not established the national importance of his proposed endeavor as required by *Dhanasar's* first prong, he is not eligible for a national interest waiver and further discussion of the balancing factors under the second and third prongs would serve no meaningful purpose. As previously noted, we reserve the Petitioner's appellate arguments regarding whether he established that he met the requirements of EB-2 classification and the remaining Dhanasar prongs. 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

As the Petitioner has not met all of the requisite three prongs set forth in the Dhanasar analytical framework, we conclude that he has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.