U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29095947

Date: DEC. 04, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a "software developer entrepreneur," 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 the record did not establish 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 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 observed that the Petitioner was eligible for EB-2 classification as an individual who is a member of the professions holding an advanced degree. But the Director ultimately concluded that the Petitioner's proposed endeavor was not substantially meritorious and did not rise to a level of national importance as required by the first prong of *Dhanasar*. The Director also determined that the Petitioner was not well positioned to advance their proposed endeavor. And the Director concluded that on balance of applicable factors, a waiver of the requirement of a job offer, and thus a labor certification, would not be beneficial to the national interest.

Although the evidentiary standard in immigration proceedings is the lowest preponderance of the evidence standard, the burden is on the Petitioner alone to provide material, relevant, and probative evidence to meet that standard. Section 291 of the Act, 8 U.S.C. § 1361. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *see also* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). First, a petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form

of documents, testimony, etc. that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits.

The evidence and argument the Petitioner introduced into the record does not help them carry their burden of production and persuasion. In support of their assertions of eligibility under the *Dhanasar* analytical framework, the Petitioner provided their business plan and evidence in the form of recommendation letters, professional certificates and memberships, numerous articles relating to cybersecurity and information technology, job offer letter, company registration documents, academic records, and resume.[1]

The Petitioner proposed to develop a "consultancy in information technology (IT), focusing on end user computing and project management…regarding transformation strategies to support, expand, and implement remote collaboration tools" in the United States named [redacted] The endeavor proposed to offer "digital strategy, software engineering, products/platform development, data management, artificial intelligence, agile software, and security and transformation strategies to support remote work."

From the outset, the Petitioner's business plan couched their endeavor in terms of targeting their services to "support companies to adopt innovative technologies and become more agile, flexible and well prepared for the challenges created by the COVID-19 and a possible new normal that will transform the way we work and do business." The Petitioner intended to base their endeavor in the [redacted] Georgia region.[2] The Petitioner's business plan advances their intention to "expand by opening branches in Texas, North Carolina, Massachusetts, California, and the District of Columbia."

To satisfy the first prong under the *Dhanasar* analytical framework, the Petitioner must demonstrate that their proposed endeavor has both substantial merit and national importance. The first prong focuses on the specific endeavor that the individual proposes to undertake. An endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. *Dhanasar* at 889. The Petitioner described their endeavor as a "software developer entrepreneur." The record before us contains evidence of the characterization of the Petitioner's proposed endeavor as a "software developer entrepreneur" which falls within the range of areas we concluded could demonstrate endeavor of substantial merit. So the record supports the substantial merit of the Petitioner's proposed endeavor and we will withdraw the Director's conclusion to the contrary.

Nevertheless, the Petitioner's substantially meritorious proposed endeavor lacks the requite national importance when evaluated under the first prong of the *Dhanasar* analytical framework. The Petitioner proposed their endeavor would have "national impact" by helping "companies to adopt innovative technologies and become more agile, flexible and well prepared for the challenges created by the COVID-19 and a possible new normal that will transform the way we work and do business" thereby generating tax revenue and creating jobs. The Petitioner grounds their "unique value

[1] While we may not discuss every document submitted, we have reviewed and considered each one.

[2] On appeal, the Petitioner's counsel states the Petitioner will "establish [their] company in the state of [redacted] Florida." As there is no evidence or documentation supporting the assertion of the Petitioner's counsel, we will disregard it. *See INS v. Phinpathiya*, 464 U.S. 183, 188-89 n.6 (1984)(the unsupported assertions of counsel on appeal or in a motion are not evidence).

proposition" in the changes companies made in response to the COVID-19 pandemic making remote work increasingly more common. The Petitioner identifies this transition to remote work as a "key for [a] business to keep its operation and for growing." The Petitioner anticipates their endeavor would "solve a specific market problem where digital transformation is key for every company to survive."

The record contains numerous documents in the form of articles and industry corresponding to the importance of information technology and entrepreneurship. But these relate more to the substantiality of the proposed endeavor's merit than its national importance. In determining national importance, the focus is not on the importance of the industry in which the petitioner will work or even their past success. The focus is on "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec.at 889.

In *Dhanasar* we said that "we look for broader implications." And it is here that the Petitioner's proposed endeavor's deficiencies are revealed. The record does not adequately describe how the Petitioner's information technology consulting services would broadly implicate the field of information technology rising to a level of national importance. That is not to say that the broader implications of the Petitioner's information technology consulting services for companies seeking to introduce or incorporate remote working paradigms are evaluated from a geographic perspective. Broader implications are not necessarily geographically evaluated; implications within a field which demonstrate a national or even international influence of broader scale can rise to a level of national importance. But the record as it is presently constituted does not sufficiently describe how the information technology consulting services the Petitioner will provide will influence the adoption, expansion, or efficient implementation of remote work technology and paradigms in the "companies" that may engage the service of the Petitioner's proposed endeavor.

The Petitioner's employment verification and employment letters did not reflect how the proposed endeavor implicates national importance because the letters focused on the Petitioner's past work. When evaluating the national importance of a proposed endeavor under the first prong of *Dhanasar*, we are concerned with its potential prospective or future impact. The Petitioner's demonstration of prior similar work does not have an influence on the proposed endeavor's potential prospective impact based on its national importance.

And whilst the Petitioner anticipates increasing gross income, a hiring spree increasing their head count, and increasing their expenditures on salary, it is not clear from the record how this job creation for the proposed endeavor itself would have a substantial prospective positive economic effect commensurate with national importance. The Petitioner's aspirations did not demonstrate the national importance of the endeavor because they, whether realized or not, would not extend beyond the endeavor itself to have an impact on a level of national importance. The record also did not contain sufficient probative, material, or relevant evidence showing how the endeavor's hiring plan would influence the area's unemployment rate or how the endeavor's operations and revenue rose to a level of national importance.

Furthermore, the Petitioner's intention to base their company in a Small Business Administration (SBA) HUBZone is unpersuasive. The HUBZone program's goal is to promote business growth in underutilized business zones with the goal of awarding 3% of federal contract dollars to companies that are HUBZone certified. Joining the HUBZone program makes a business eligible to compete for

certain federal contracts in the "set-aside" category. There are several required qualifications to participate in the program, but the most dispositive requirement for purposes of our analysis is that the business seeking to participate in the HUBZone program must be at least 51% owned by U.S. citizens, a community development corporation, an agricultural cooperative, an Alaska Native corporation, a Native Hawaiian organization, or an Indian tribe. Whilst it is unknown and the record is silent about what if any federal programs exist in the "set-aside" category for residential and commercial cleaning services like the one proposed by the Petitioner, the record is crystal clear that the Petitioner's proposed endeavor would be wholly owned and controlled by the Petitioner and that the Petitioner is not a U.S. citizen, a community development corporation, an agricultural cooperative, an Alaska Native corporation, a Native Hawaiian organization, or an Indian tribe. And to the extent the Petitioner asserts that they would base their company in a SBA HubZone designated underutilized business zone, the record does not adequately establish that increased employment in these designated underutilized business zones would have positive economic effects commensurate with national importance. So the fact that the Petitioner' proposed endeavor may be in a HUBZone is wholly irrelevant to whether the Petitioner's endeavor rose to a level of national importance.

The Petitioner's appeal highlights their "over fifteen (15) years of work experience" as a software and system developer and stresses that it is their execution of their proposed endeavor which elevates it to a level of national importance. But the Petitioner's argument spotlights a fundamental misunderstanding of the first prong of the *Dhanasar* framework. The first prong of the *Dhanasar* framework focuses on the proposed endeavor; not on the Petitioner's execution of that proposed endeavor. The *Dhanasar* framework is consequently unconcerned with the likelihood of the success of the proposed endeavor. The Petitioner's contentions about their successful past performance in the endeavor they propose, as well as evidence and information of their achievements and recognition would better serve a demonstration of eligibility under the second prong of the *Dhanasar* framework.

The Petitioner also asserts at appeal that a "looming shortage of IT talent…highlights the urgency, and national importance" of their proposed endeavor. But the national interest waiver does not exist to address labor shortages. The U.S. Department of Labor (DOL) addresses shortages of qualified workers through the labor certification process. And the impracticality of immigration options designed to address labor shortages, like the labor certification process, to support the discretionary grant of a national interest waiver are evaluated under the third prong of the *Dhanasar* analytical framework, not the first prong we evaluate here.

The relevant inquiry for evaluation of an endeavor's national importance is whether the prospective positive impact judged by the endeavor's broader implications or positive economic effects apply beyond just narrowly conferring the proposed endeavor's benefit. The Petitioner here has not demonstrated how conferring the benefit to the "mid-size to large enterprises" they intend to solicit have any implication or benefit rising to a level beyond them and touching matters of national importance.

III. CONCLUSION

The Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework. Because this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the remaining arguments concerning eligibility under 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-I*, 26 I&N Dec. 216, 526n.7 (BIA 2015) (declining to reach alternate issues on appeal where an applicant is otherwise eligible). So we conclude the Petitioner has not established that they are eligible for or otherwise merit a national interest waiver of the job offer requirement, and thus of a labor certification. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.