U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28513445

Date: DEC. 04, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, a nurse, 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 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. 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 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. ELIGIBILITY FOR DISCRETIONARY WAIVER OF THE JOB OFFER, AND SO A LABOR CERTIFICATION, IN THE NATIONAL INTEREST

A. The Proposed Endeavor

The Petitioner's proposed endeavor in the United States as described in their initial and updated professional plan and statement is to continue their career as a nurse to "assist U.S. hospitals, clinics, and any other medical facilities to treat patients (children, adults, and the elderly) that need [their] specialty to recover their health." The Petitioner identifies "neonatology, family health, public and community health, occupational health and school health with a focus on urgent care for emergencies, risk classification and mobile pre-hospital emergency care" as areas of their expertise. The Petitioner described their intended services and initially vaguely referred to a nascent intention to "validate [their] nursing credentials in the United States" in order "to mimic [their] professional achievements in Brazil." The Petitioner contended that the expectation of continued increasing demand for nursing services in combination with a shortage of nurses in the United States demonstrated a national importance for their proposal to serve as nurse in the United States. The Petitioner also submitted an expert opinion letter from [redacted] a professor at [redacted] in New York, New York. [redacted] opinion also rooted the national importance of the Petitioner's proposed endeavor in terms of the demand for nursing services in the United States, the shortage of qualified

nursing personnel leading to "burnout," and the benefit to an aging population and workforce requiring nursing services.

B. Substantial Merit and National Importance

1) Substantial Merit

We withdraw the Director's determination that the Petitioner's proposed endeavor was not of substantial merit. 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 "nurse." The record before us contains evidence of the characterization of the Petitioner's proposed endeavor as a "nurse" which falls within the range of areas (health) we concluded could demonstrate endeavors of substantial merit. So the record supports the substantial merit of the Petitioner's proposed endeavor.

2) National Importance

As stated above, the Petitioner's proposed endeavor is to continue their career as a nurse. We agree with the Director that the Petitioner did not demonstrate that their proposed endeavor was of national importance, albeit on a different basis. The Petitioner contended that ripple effects of their proposed nursing endeavor rose to a level of national importance because the intended effects could realize national benefits such as addressing a shortage of nursing professionals, optimizing obstetric nursing care, and training the "next generation of nurses, as well as current professionals in the field.[1]

The Petitioner heavily grounds their assertions in support of a national interest waiver on their past function as a nurse in their home country. They submitted numerous documents into the record to support their contention that they were a nurse in their home country whose work was appreciated, recognized, valued, and contributed to positive outcomes. But the Petitioner's past performance of their proposed endeavor is not relevant to an evaluation of that endeavor's national importance.[2]

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirements, we look to evidence documenting the "potential prospective impact" of their work. In determining national importance under Dhanasar, the relevant question is not the importance of the field, industry, or profession in which the individual will work; instead, we focus on "the specific endeavor that the foreign national proposes to undertake." See Dhanasar, 26 I&N Dec. at 889. In Dhanasar, we noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have a national importance for example, because it has national or even global implications within a particular field." Id. We also noted 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. So what is critical in determining the national importance under Dhanasar is whether the

[1] We depart from the Director's comments about the endeavor's commonality and ubiquity because the Dhanasar analytical framework does not elevate an endeavor's prevalence or common occurrence above its potential prospective impact when evaluating the endeavor's substantial merit and national importance.

[2] The Petitioner's education, skills, knowledge, and record of success in related or similar efforts are a relevant point for evaluation under *Dhanasar's* second prong.

proposed endeavor has a potential prospective impact with broader implications which rise to the level of national importance. Thus, it is not what duties or what occupation the noncitizen will fill or perform but their actual plan with their occupation and duties that is examined.

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); also see 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. For example, the expert opinion submitted by the Petitioner does not illuminate the national importance of the Petitioner's proposed endeavor. The writer did not explain how the Petitioner's work would address a shortage of nursing professionals at a national level. Moreover, the writer mainly focused on the Petitioner's past performance as a nurse, which is not germane to an evaluation of whether the benefits of their present nursing endeavor in the United States would rise to a level of national importance.

And the industry reports and articles record do not adequately reflect how the Petitioner's endeavor will broadly enhance societal welfare in a manner that rises to a level of national importance. For example, it is not apparent from the record how the Petitioner's practice of nursing has broader implications beyond the immediate circle of patients they will treat. And it is not sufficiently explained in the record how government concerns for the provision of quality healthcare are impacted by the Petitioner's nursing endeavor in a manner which rises to a level of national importance. For example, whilst the Petitioner cites health literacy limitations in the population and their impact on health outcomes, they do not describe how their provision of nursing services as part of their endeavor would increase health literacy in a manner implicating national importance.

The Petitioner's aim to address nursing shortages in the United States through the national interest waiver process is misplaced. The national interest waiver is not designed to address labor shortages. Moreover, a streamlined process allows employers to sponsor nurses in the employment based second or third preference immigrant classification under the Department of Labor's (DOL) Schedule A designation of nurses under their regulation at 20 C.F.R. § 656.15. Schedule A designation is available to U.S. employers petitioning for noncitizen workers to fill occupations identified as having a recognized shortage of able, available, and qualified U.S. workers. As there is a recognized shortage, those employers are not required to take the mandatory regulatorily prescribed steps to test the labor market prior to filing an application for permanent employment certification. See 20 C.F.R. § 656.17. By regulation, a petition seeking to designate a noncitizen under Schedule A must be filed by an employer with a qualifying job offer. See 8 C.F.R. § 204.5(k)(4)(i) and (ii). Consequently, the noncitizen's work is sought by the petitioning employer for their benefit and not necessarily for the

broader national interest. Immigration and Nationality Act (the Act) section 203(b)(4), 8 U.S.C. § 1153(b)(4).

In any case, the practice of nursing directly benefits only those individuals benefiting from the Petitioner's administration of nursing care. And the Petitioner's intention to train the "next generation of nurses, as well as current professionals in the field" also only benefits the individuals directly receiving the training or instruction from the Petitioner. The end result of the Petitioner's attention to nursing shortages and training of professionals new and more seasoned in their endeavor is akin to how the benefit of someone's teaching is generally only directly beneficial to the students being taught and not wider population. In Dhanasar we discussed how teaching would not impact the field of education broadly in a manner which rises to national importance. Dhanasar at 893. By extension activities which only benefit a small subset of individuals, like the Petitioner's proposed physical therapy endeavor, would not rise to a level of national importance.

So we conclude that the Petitioner has not established that their proposed endeavor is of national importance.

III. 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 demonstrated that they were an advanced degree professional eligible for classification as an employment based second preference immigrant.

The Director determined that the Petitioner qualifies as a member of the professions holding an advanced degree. The record contains a credential evaluation equating a combination of the Petitioner's education and progressive work experience to a U.S. master of science in nursing degree. In order to be eligible under section 203(b)(2), 8 U.S.C. § 1153(b)(2)(A), the Petitioner must have a single degree that is the "foreign equivalent degree" to a United States master's degree or a single degree that is the "foreign equivalent degree: to a United States baccalaureate degree plus five years of progressively responsible work experience. So the credential evaluation is not probative to establish the Petitioner's categorical eligibility for classification as an employment based second preference immigrant.

And the record contained insufficient evidence to evaluate the Petitioner's eligibility for EB-2 classification as an individual of exceptional ability.[3] So the Petitioner should be prepared to address their categorical eligibility for EB-2 classification either as an advanced degree professional or an individual of exceptional ability in any future proceedings requiring a petitioner to demonstrate eligibility as an advanced degree professional or individual of exceptional ability.

IV. CONCLUSION

[3] As 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, further investigation and analysis of the Petitioner's categorical eligibility for EB-2 classification as an advanced degree profession or individual with exceptional ability by issuing a request for evidence would serve no legal purpose.

The Petitioner has not demonstrated the record contains sufficient evidence to establish they met the first prong of the Dhanasar analytical framework. And because the Petitioner has not established that the proposed endeavor has national importance, as required by the first Dhanasar prong, they are not eligible for a national interest waiver. We reserve our opinion regarding the second and third Dhanasar prong. 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). So we must dismiss the appeal.

ORDER: The appeal is dismissed.