U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29096229

Date: DEC. 04, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneurial dermatologist, seeks classification as a member of the professions holding an advanced degree or of exceptional ability. *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 employment based second preference (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 Nebraska Service Center denied the petition, concluding that 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 would be 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 petitioner 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

We address whether the Petitioner has established that a waiver of the job offer requirement, and thus of the labor certification, would be in the national interest.

The Director concluded that the Petitioner's substantially meritorious proposed endeavor 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.

On appeal, the Petitioner contends that the Director erroneously denied the petition under the preponderance of the evidence standard and instead imposed "novel substantive and evidentiary requirements beyond those set forth in the regulations." The Petitioner specifically assigned error alleging that the Director did not "give due regard" to the business plan, "definitive statement," letters of recommendation, and industry report and articles they submitted into the record. They state on appeal that the evidence they submitted in the record prior to and at appeal demonstrated that the Petitioner meets all three prongs under the *Dhanasar* framework and merits a discretionary waiver of the job offer, and thus the labor certification, in the national interest.

A. The Proposed Endeavor

In Part 6 of the initial petition, the Petitioner described their endeavor as a "dermatologist" who would "diagnose and treat diseases relating to the skin, hair, and nails. May perform both medical and dermatological surgery functions"[1] Specifically, as described in their statements and their business plan, they would chiefly "continue [their] career in the U.S. in the medical field providing [their] expertise in the areas of dermatology, dermatological surgery and skin care" in order to "assist medical institutions and professionals in the U.S. with [their] expertise in dermatology in management and minimization of impacts generated by skin neoplasms in the American population." The Petitioner described their endeavor as a "career plan" to proliferate their "specialized knowledge in dermatology and years of experience in the treatment of skin cancer to continue saving lives." The Petitioner's statement identified their endeavor's main services as providing "comprehensive care to the patients, in addition to maintaining the family updated with the progress and condition of the patient's type of disease." The Petitioner's statement further explains that "with [their] experience in diagnosing skin lesions, focused on the prevention and early diagnosis of skin cancer" they would "have an impact on the survival of the world population, and therefore, also on the American population" by reducing the morbidity and mortality of non-melanoma and melanoma type skin cancers. In essence, the record developed initially at the time of filing demonstrated that the Petitioner's proposed endeavor was essentially a job search. And the purpose of a national interest waiver is not to facilitate a petitioner's U.S. job search.

In their response to the Director's request for evidence (RFE), the Petitioner maintained that the thrust of their proposed endeavor was the provision of dermatological services but also incorporated an entrepreneurial element whereby they would "help patients of the United States as a Dermatologist in the field of medicine, while also helping with the administrative tasks of opening and operating a health services clinic."

A petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed. *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). The Petitioner's extensive revisions here are troublesome. The activities of a practicing dermatologist performing clinical patient care are manifestly different than those of an entrepreneur building and growing a small business. Materially different duties can tend to constitute a materially different endeavor and introduce ambiguities which prevent analysis into a proposed endeavor's substantial merit or national importance.

But the record here supports that the Petitioner's substantial additions to the proposed endeavor submitted in response to the Director's RFE described a manner or philosophy through which the Petitioner would carry out their duties of their proposed endeavor and not a different proposed endeavor. So the Petitioner's extensive revisions, whilst concerning, did not disrupt the character and nature of the proposed endeavor initially described by the Petitioner.

[1] The Petitioner has not provided any evidence in the record supporting their licensure to practice as a physician in the State of California. We note this issue so that it can be addressed in any future immigration proceedings where the Petitioner's occupation as a dermatologist is applicable. The analysis of the Petitioner's endeavor under the first prong of the *Dhanasar* analytical framework is not influenced by the Petitioner's medical licensure status.

B. The Proposed Endeavor's Substantial Merit and National Importance

We agree with the Director's conclusion that the Petitioner has not sufficiently demonstrated the national importance of their proposed endeavor under the first prong of the *Dhanasar* analytical framework. 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. This prong of the *Dhanasar* framework 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.

The record here supports the Director's determination that the Petitioner's proposed endeavor, which aims to address the health and well-being of individuals with diseases of the skin, has substantial merit. 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 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.* The broader implications of the proposed endeavor, national and/or international, can inform us of the proposed endeavor's national importance. That is not to say that the implications are viewed solely through a geographical lens. Broader implications can reach beyond a particular proposed endeavor's geographical locus and focus. The relevant inquiry is whether the broader implications apply beyond just narrowly conferring the proposed endeavor's benefit. And 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. 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); *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 burdens of production and persuasion. In support of their claim that they can satisfy the first prong of the *Dhanasar* analytical framework, the Petitioner provided articles from media, professional, and industry publications that attempted to identify the role of dermatologists in health care, the prevalence

and availability of and demand for dermatological services, work experience letter, letters or recommendation, support letters, and documentation describing the types of service dermatologists offer. The Petitioner's RFE response introduced documentation and information about a general affinity for business development, entrepreneurialism, and small business advocacy along with a new "Definitive Statement" in an attempt to characterize their endeavor as nationally important. [2] The Petitioner also submitted an expert opinion letter from [redacted] an assistant professor of medical education at [redacted] University and University of [redacted] Health Science Center, School of Medicine at [redacted] Texas and research assistant professor at University of [redacted] Health Science Center at [redacted] Texas.

USCIS may, in its discretion, use as advisory opinion statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. *See Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, the submission of letters from experts supporting a petition is not presumptive evidence of eligibility. *Id.* The record does not establish [redacted] expertise regarding dermatology or the provision of clinical dermatology services to patients. The record does not make clear how their experience and individual qualifications render them an industry expert such that their opinion could shed light on the national importance of the Petitioner's endeavor. More importantly, setting aside the authors' credentials, we observe that much of the letter's content lacks relevance when it comes to the evaluation of whether the Petitioner's work rises to the level of national importance. For example, the writer highlights the role dermatologists could play in management of skin changes caused by COVID-19. But the Petitioner's business plan does not highlight or emphasize the treatment of COVID-19 co-morbidities. In fact, the Petitioner's business plan focuses on providing services in general dermatology, Mohs surgery, reconstructive surgeries, facial and body aesthetics, laser, and other technologies as services the Petitioner's proposed endeavor would conduct with an aim to provide affordable medicine, diagnostics, reconstructive surgeries, and skin care services with a focus on cancer patients. So, the Petitioner's proposed endeavor aims to provide special emphasis to cancer patients and not COVID-19 afflicted individuals as explained by [redacted] points out the Petitioner's commitment to "help individual in need medical services, including those that are uninsured" as a point in favor of the national importance of the Petitioner's proposed endeavor. The Petitioner's business plan does mention an intention to work with Medicare, Medicaid, and private insurance entities in concert with providing services on a discount or sliding fee scale. But the record does not support how service to the medically indigent by and through the Petitioner's proposed endeavor would broadly implicate matters of national importance or have positive economic impacts.[3] And the author's special recognition of the Petitioner's prior experience in the Brazilian health care system is not persuasive to support the national importance of the Petitioner's proposed endeavor. The record does not adequately support the assertion that provision of the proposed endeavor's services after participation in the Brazilian health care system would implicate broader issues influencing national matters of importance. The national interest waiver process is a discretionary waiver of the labor certification to address those endeavors performed by foreign nationals rising to a level of concern with implications to the national interest.

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

[3] Physicians committed to work for five years in federally designated shortage areas and whose work is deemed to be in the public interest may pursue a national interest waiver under a separate section of INA 203(b)(2)(B). *See* INA section 203(b)(2)(B)(ii), 8 U.S.C. § 1153(b)(2)(B)(ii).

It is also unclear from the evidence in the record whether the work of a single dermatology practice, irrespective of its success or failure, would have a significant impact on the field beyond its immediate sphere of influence. The evidence in the record does not highlight how the prospective potential impact of the work of one professional or group of professionals in a dermatology practice could have broader implications implicating the national interest. The Petitioner in their business plan tries to highlight the broader implications of their endeavor by linking it to the treatment of cancer patients. But, as we stated earlier, we do not view the broader implications of a proposed endeavor through a narrow lens, such as geography or demographics. Whilst the health and welfare of individuals afflicted by cancer holds merit, the record does not sufficiently describe how the "ripple effects" of treating skin cancer patients implicates the greater national interest. The provision of general dermatology treatments or Mohs surgery directly benefits only those individuals with pets availing themselves of the Petitioner's services in those disciplines. This is akin to how the benefit of someone's teaching is generally only directly beneficial to the students being taught and not the wider population. In *Dhanasar* we discussed how teaching would not impact the field of education broadly in a manner rising to national importance. *Dhanasar* at 893. By extension activities which only benefit a small subset of individuals, like the Petitioner's dermatology practice, would not rise to a level of national importance. Neither provides any meaningful analysis of the endeavor's broader implications or potential prospective economic impact rising to the level of national importance. Similarly, the letters of recommendation containing testimonials of the services the Petitioner performed do not describe how the benefits they have received connect to broader implications rising to national importance or any nationally important economic impact.[4] In sum the record supports the conclusion that the potential impact of the endeavor of providing services such as general dermatology, Mohs surgery, reconstructive surgeries, facial and body aesthetics, laser and other technologies would benefit only the patients engaging the service.

The record also contains insufficient evidence to support the positive economic effects the Petitioner expects will be realized by their proposed endeavor. The Petitioner roots the potential positive effects of their dermatology practice [redacted] in their potential for job creation and revenue generation. The Petitioner optimistically expects that the endeavor would realize total revenue of $24,967,970 and an employee census of 81 people within five years of establishment. But the record contains insufficient documentation to support the Petitioner's projections.[5] And the Petitioner's business plan expresses an intention to establish itself in Small Business Administration (SBA) designated HubZone. 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

[4] Much of the documentation the Petitioner has submitted focuses on their individual accomplishments and expertise when attesting to the national importance and substantial merit of the proposed endeavor. It is important to note that the Petitioner's accomplishments and expertise are more relevant to the second prong of *Dhanasar*, which "shifts the focus from the proposed endeavor to the foreign national." *Dhanasar* at 889.

[5] "The aspirational fiscal and head count projections from the Petitioner's proposed endeavor appear incompatible with the endeavor's intention to provide services in traditional low reimbursement environments, like the charity care, discounted, or sliding fee scale reimbursement models the Petitioner mentions in their business plan."

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 dermatology practices 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. 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. And to the extent the Petitioner is asserting that their location or intention to locate, and not participation, in the HubZone program is relevant to the national importance of their endeavor, the record does not adequately establish the parameters the SBA considers in establishing HubZones such that we could evaluate whether the underutilized business zones the SBA identifies would be akin to the economically depressed areas within creating employment could be a potential positive economic effect relating to the national importance of a proposed endeavor. So the record does not support any potential positive economic effects, such as beneficially addressing high unemployment in economically depressed areas in a manner meaningful enough to implicate the national interest and rise to the level of national importance.

The manifest thrust of the Petitioner's claim of eligibility for the act of discretion to waive the requirement of a job offer, and thus a labor certification, in the national interest comes from the Petitioner's claims regarding their profession's importance, their past career as a dermatologist in their home country, and their dedication to their field. But these attributes, critical as they may be for an endeavor's success, are not germane to the question of whether a proposed endeavor elevates to a position of national importance. We are not concerned with an individual petitioner when evaluating the first prong of the *Dhanasar* analytical framework; we are focused on the petitioner's proposed endeavor. The success of the endeavor, or attributes that could tend to make the endeavor more successful, are consequently not as important as determining whether the proposed endeavor itself stripped away from a petitioner, has attributes that would highlight the prospective positive impact of its broader implications or positive economic effects rising to a level of national importance. So we conclude that the Petitioner has not established that their proposed endeavor is 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.