U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28819054

Date: DEC. 5, 2023

Appeal of Texas Service Center Decision

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

The Petitioner seeks classification as a member of the professions holding an advanced degree. *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 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 Texas Service Center denied the petition. The Director did not indicate clearly whether the Petitioner qualifies for classification as a member of the professions holding an advanced degree. However, the Director concluded that the Petitioner had not established 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 a member of the professions holding an advanced degree 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.

While 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, after a petitioner has established eligibility for EB-2 classification, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the noncitizen's proposed endeavor has both substantial

merit and national importance; (2) that 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. *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

As noted above, the Director did not clarify whether the Petitioner qualifies for second-preference classification as a member of the professions holding an advanced degree. *See* section 203(b)(2) of the Act. The Director stated that a diploma in the record "has been accurately described as a foreign equivalent to a Master's degree in the United States." However, the Director continued, stating, "The fact is that the [P]etitioner does not have the requisite experience." The Director did not clarify the materiality of the Petitioner's experience if the Director concluded that the Petitioner possesses a qualifying degree. Because we nevertheless find that the record does not establish that a waiver of the requirement of a job offer, and thus of a labor certification, would be in the national interest, we reserve our opinion regarding whether the Petitioner satisfies second-preference eligibility criteria. *See id.*; *see also 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"); *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).

Initially, the Petitioner described the endeavor as a plan to "to be useful and improve myself in two areas such as engineering and pilot perspective." The Petitioner stated that he "will try my best to join the team of one of the best aircraft manufactures [sic] in the US such as [redacted]" The Petitioner elaborated that he "can assist them with flight testing and product enhancement . . . us[ing] my experience to find solutions to current aviation problems and improve the safety of flying." The Petitioner specified that he "would like to be a focus [sic] on business airplanes and charters." The Petitioner added that he "would like to help to create, build, and test the systems [that] manage traffic [and] approach the landing of airplanes safely without human control" for unmanned aircraft. The Petitioner further stated that he "would like to create a new flight course for flight instructors with an entirely new syllabus that will be based on my flight instructor experience and then get FAA approval for it." The Petitioner also provided generalized information regarding the aviation industry.

In response to the Director's request for evidence (RFE), the Petitioner reiterated that he "would like to work for [a commercial airline for] about 3 years and get about 2000 flight hours [then] make another step forward and join . . . one of the influential manufactures with work of creation the future design aircrafts, airframes, engines etc. [sic]." However, the Petitioner also stated, in response to the RFE, for the first time that he "plan[s] to create the course and open my own flight school on the side of my flight testing and engineering career." He asserted that his flight school "will be able to train

the active pilot on every level and flight instructor on the cutting edge." The Petitioner also reiterated generalized information regarding the aviation industry in response to the RFE.

A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. *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).

We acknowledge that the Petitioner initially expressed a plan "to create a new flight course for flight instructors with an entirely new syllabus that will be based on my flight instructor experience." However, the Petitioner did not indicate at the time of filing that his proposed endeavor would entail founding his own flight school. Because the Petitioner did not indicate at the time of filing that his proposed endeavor would entail founding his own flight school, those assertions in response to the RFE present a new set of facts. Whether the Petitioner would found his own flight school is material to the first *Dhanasar* prong because the scope of the proposed endeavor affects whether it may have the type of broader implications contemplated by *Dhanasar*. *See Dhanasar*, 26 I&N Dec. at 888-90. Because the Petitioner presented a new set of material facts in response to the RFE, those new facts relating to a plan to "open my own flight school on the side of my flight testing and engineering career" cannot—and do not—establish eligibility. *See* 8 C.F.R. § 103.2(b)(1); *see* also *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176.

The Director concluded that the record does not establish "that the specific endeavor [the Petitioner] proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects," referencing *Dhanasar*, 26 I&N Dec. at 888-90. The Director acknowledged that the Petitioner's instructional goals may benefit his students; however, the Director observed that the record does not establish that his teaching plans "will be adopted or implemented on a level that creates national or even global implications in the aviation industry." The Director further noted that the record does not establish how the Petitioner's instructional goals may "resolve the shortage [of pilots, as the Petitioner asserted] or produce an impact that rises to the level of national importance." The Director concluded that the record, in its entirety, does not establish that the proposed endeavor has national importance, as required by the first *Dhanasar* prong. *See id.* The Director further concluded that the record does not satisfy the second and third *Dhanasar* prongs; however, the Director did not clearly indicate whether the record establishes the proposed endeavor has substantial merit, as required by the first *Dhanasar* prong. *See id.* at 889-90.

On appeal, the Petitioner first asserts that "the [p]roposed [e]ndeavor does not undergo any substantial change, as the [RFE] response does not materially modify or alter the Petitioner's projection. The Petitioner will perform the same work, either as a flight instructor working as an employee, or providing his mentioned services with a company of his own." The Petitioner further asserts on appeal that *Matter of Katigbak* and *Matter of Izummi* are "only limited in scope to the general classification for visa types, such as a second or third classification as an individual," but that they are inapplicable to "ancillary benefits such as a [n]ational [i]nterest [w]aiver." The Petitioner further asserts on appeal that *Matter of Katigbak* and *Matter of Izummi* apply "only after the denial [when a petitioner attempts]

to introduce evidence on a motion to reopen and reconsider to establish eligibility," but not "when adjudicating [RFE] responses."

We first note again that, contrary to the Petitioner's assertions on appeal, the Petitioner's RFE response materially modified the details of the proposed endeavor after filing the petition, presenting a new set of facts that cannot—and do not—establish eligibility for the reasons discussed above. *See* 8 C.F.R. § 103.2(b)(1); *see* also *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176. Next, contrary to the Petitioner's assertions on appeal, *Matter of Katibgak* and *Matter of Izummi*, like 8 C.F.R. § 103.2(b)(1), apply both to evidence pertaining to a particular visa classification and to evidence pertaining to issues the Petitioner describes as "ancillary benefits such as a [n]ational [i]nterest [w]aiver." *Matter of Katibak* specifically noted that a central question is whether an individual qualified for the requested visa at the time the visa petition is filed, based on the set of facts that existed as of that date, because the priority date attaches to the petition filing date. *Matter of Katigbak*, 14 I&N Dec. at 48-49. Section 203(b)(2)(A) of the Act makes second-preference visas available, in relevant part, to qualified individuals "whose services in the sciences, arts, professions, or business are sought by an employer in the United States," thus making the job offer requirement a visa classification eligibility criterion that must be satisfied at the time of filing, not "ancillary" to classification as the Petitioner describes it. *See* 8 C.F.R. § 103.2(b)(1); *see* also *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176.

Section 203(b)(2)(B) of the Act establishes criteria for a discretionary national interest waiver of the job offer requirement. Significantly, though, because the job offer requirement must be satisfied at the time of filing as a part of a requested visa classification, eligibility for the waiver of a requisite job offer must also be satisfied based on the set of facts that existed at the time of filing as part of the requested visa classification; otherwise, a beneficiary in question would not have been eligible for the requested visa classification on the filing date and, thus, as of the priority date. *See id.* Despite the Petitioner's assertions on appeal, whether evidence is submitted at the time of filing, in response to an RFE, or on motion after a benefit request has already been adjudicated is beside the point—the evidence in question must establish that the fact existed at the time of filing the benefit request in order for it to be within the set of facts that may establish eligibility for the benefit. *See id.* In this case, the Petitioner does not establish that, at the time of filing, the proposed endeavor entailed founding his own flight school; therefore, his post-filing statements to that effect present a new set of facts that cannot—and do not—establish eligibility for the reasons discussed above. *See* 8 C.F.R. § 103.2(b)(1); *see* also *Matter of Katigbak*, 14 I&N Dec. at 49; *Matter of Izummi*, 22 I&N Dec. at 176.

Next, the Petitioner restates generalized information in the record regarding the aviation industry, he reiterates his description of the proposed endeavor, and he asserts that "ample evidence was provided with the initial petition to demonstrate that the Petitioner's proposed endeavor was correctly stated and that it is of national importance."

In determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. *Dhanasar* provided examples of endeavors that may have national importance, as required by the first prong, having "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" and endeavors that have broader

implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

First, as noted, in determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work. The generalized information in the record regarding the aviation industry that the Petitioner discusses on appeal does not address the Petitioner, the "specific endeavor that the [Petitioner] proposes to undertake" or how the proposed endeavor may have national importance. *See id.* at 889. Therefore, the generalized information regarding the aviation industry referenced on appeal does not establish that the proposed endeavor has national importance.

Next, the Petitioner's general ambitions to work as an aircraft engineer, pilot trainer, or both, may benefit his current or potential employer(s), current or potential business partners of the employer(s), and the pilots the Petitioner may train. However, the record does not establish how the "specific endeavor that the [Petitioner] proposes to undertake" may have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances." *Id.* We acknowledge that the Petitioner shares his ambitions for pursuing theoretical engineering concepts at some point in his career; however, the record does not establish that the "specific endeavor that the [Petitioner] proposes to undertake," based on the set of facts that existed at the time of filing, may have the type of broader implications contemplated by *Dhanasar*. *Id.* Although the proposed endeavor may entail training pilots, the record does not establish how training pilots—or any other aspect of the proposed endeavor—has broader implications like "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90. Even the Petitioner's discussion in his RFE response of opening his own flight school—which we note again cannot and does not establish eligibility—does not articulate the location of the flight school, the number of employees his flight school would hire, the wages the Petitioner would pay those employees, and other details that could demonstrate how the proposed endeavor may have "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.*

In summation, the Petitioner has not established that the proposed endeavor has national importance, as required by the first *Dhanasar* prong; therefore, he is not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or third *Dhanasar* prong, and whether the proposed endeavor has substantial merit, as required by the first *Dhanasar* prong. *See Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7. As noted above, we also reserve our opinion regarding whether the record establishes the Petitioner is eligible for second-preference classification. *See id.*

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.