U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28446214

Date: NOV. 03, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, 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 Texas Service Center denied the petition, concluding that while the Petitioner had established his eligibility for the EB-2 classification as an individual of exceptional ability, the record did not establish that he merited, as a matter of discretion, a national interest waiver. 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. Section 203(b)(2)(B)(i) of the Act.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence

[1] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[2] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they 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. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[3], 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. EB-2 CLASSIFICATION

The Petitioner was the President and CEO of [redacted], an Argentinian company doing business as [redacted] as well as its licensed distribution company in the United States, [redacted] The company produces and markets polo equipment and apparel, as well as luxury clothing and accessories. Through [redacted] the Petitioner initially proposed to offer experiential sales and marketing consulting to retail businesses in the U.S. as well pursue entrepreneurial ventures including a mobile application, [redacted] offering products and services to polo players, clubs, and associations, and [redacted] a version of polo where the players ride electric unicycles instead of horses. In response to the Director's request for evidence (RFE), the Petitioner added that he would continue to grow the [redacted] brand in the United States as President and CEO of [redacted]

In their decision, the Director concluded that while the Petitioner had not demonstrated that he is a member of the professions holding an advanced degree, as the record did not include evidence of his educational credentials, he did establish his eligibility as an individual of exceptional ability. Specifically, the Director determined that the Petitioner met the evidentiary criteria relating to at least ten years of full-time experience in the occupation sought, a salary demonstrating exceptional ability, membership in professional associations, and recognition for achievements and significant contributions to the industry or field. In addition, they concluded that the totality of the record showed that the Petitioner possesses a degree of expertise significantly above that ordinarily encountered in the field. After review of the record, we disagree with and withdraw the Director's determinations regarding three of those criteria, and conclude that he has not established his eligibility for the EB-2 classification as an individual of exceptional ability.

[3] *See also 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).

A. Evidentiary Criteria

> *Evidence in the form of letters from current or former employers showing that the individual has at least ten years of full-time experience in the occupation for which he or she is being sought*; 8 C.F.R. § 204.5(k)(3)(ii)(B)

The Petitioner submitted letters [redacted] Director and Treasurer of [redacted] We agree with the Director's conclusion that they establish that the Petitioner has more than ten years of full-time experience as an executive specializing in retail marketing, and that he meets this criterion.

> *Evidence that the individual has commanded a salary, or other remuneration for services, which demonstrates exceptional ability*; 8 C.F.R. § 204.5(k)(3)(ii)(D)

In order to meet this criterion, a petitioner must demonstrate that they have commanded a salary or remuneration for services that is indicative of their claimed exceptional ability relative to others working in the field. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), www.uscis.gov/policy-manual. The Petitioner submitted a copy of his Internal Revenue Service (IRS) Form W-2 for the year 2019, showing that he earned wages of $173,842 from [redacted] He also submitted salary data obtained from the Foreign Labor Certification Datacenter's Online Wage Library (OWL) for the position of general and operations manager in the [redacted] Florida area for July 2020 through June 2021. That evidence shows that the prevailing wage for "fully competent" employees, who generally have management or supervisory responsibilities, was approximately $143,000 per year. A different set of salary data, obtained from the O*NET Online website, shows that in 2019, for the same position and location, the median wage was approximately $90,000, the 75th percentile wage was approximately $140,000, and the 90th percentile wage was above $208,000.

However, although the letter from [redacted] referenced above initially states that the Petitioner's job title was (and remains) general manager for [redacted], she later states that he is the company's President and CEO. She also explains that in this position, he is "responsible for guiding [redacted] strategy and is the brains behind continuous brand innovation," duties which appear to align with those of a CEO rather than a general manager.[4] Further, the "impact analysis" dated September 16, 2020 which discusses the past and future of [redacted] also states that the Petitioner has been that company's President and CEO, in which role he is "responsible for guiding strategy and planning continuous brand innovation." The record thus does not include comparative salary data for the position in which the Petitioner served in 2019 or the duties which he performed. So while the Petitioner has submitted evidence of his salary, he has not submitted evidence showing that it is indicative of exceptional ability relative to others working in the field. Accordingly, we withdraw the Director's conclusion that he meets this criterion.

> *Evidence of membership in professional associations*; 8 C.F.R. § 204.5(k)(3)(ii)(E)

[4] The description of the Chief Executive position, with SOC 11-1011.00, provided by the OWL website is as follows: Determine and formulate policies and provide overall direction of companies or private and public sector organizations within guidelines set up by a board of directors or similar governing body. Plan, direct, or coordinate operational activities at the highest level of management with the help of subordinate executives and staff managers.

The Petitioner bases his claim to this criterion on his role of "Ambassador" with the Federation of International Polo (FIP). According to Article 4 of the FIP bylaws, which the Petitioner submitted in response to the Director's request for evidence (RFE), the members of the association are "polo national associations of different countries and other polo organizations," and are divided into three classifications: full members, corresponding members, and contacts. Of these, only contacts are described as individuals, and they are only appointed to work with FIP in countries where there is no national polo association or club. Notably, the role of ambassador is not mentioned as a membership classification of FIP, and Article 9 notes that the association's general assembly, which is composed of members, has the authority to confirm ambassadors appointed by the President, thereby setting them apart from members. As such, the Petitioner has not established that, as an ambassador, he is considered to be a member of FIP.

In addition, to the extent that in concluding that the Petitioner met this criterion, the Director accepted the Petitioner's arguments in its RFE concerning the definition of a "professional association," we disagree. The Petitioner noted in that response that neither the INA nor the relevant regulations define the term "professional association," and rejected the Director's statement in the RFE that because polo is not a profession as defined at 8 C.F.R. § 204.5(k)(2), FIP is not a professional association. Instead, the Petitioner presented a definition of the term as "a body of persons engaged in the same profession, formed usually to control entry into the profession, maintain standards, and represent the profession in discussions with other bodies." While FIP possesses some of these characteristics, as it is an officially recognized body charged with promoting polo and introducing standardization of rules and conduct within the sport, this definition still uses the term "profession," which is defined in the regulations. There is no indication in FIP's bylaws or elsewhere in the record that this association requires its individual members to be professionals per 8 C.F.R. § 204.5(k)(2), or that the sport of polo qualifies as a profession. We therefore conclude that FIP is not a professional association for purposes of this criterion.

For both of the reasons given above, we withdraw the Director's conclusion that the Petitioner meets this criterion.

B. Final Merits Determination

The Director determined in his decision that the Petitioner also met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), relating to recognition for achievements and significant contributions to the industry or field. However, because we have concluded that the Petitioner does not meet two of the four evidentiary criteria he claimed, he cannot satisfy the initial evidence requirement by meeting at least three of the evidentiary criteria. As the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the issue of whether he meets this criterion. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *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).

In addition, because the Petitioner has not established that he meets the initial evidence requirements for an individual of exceptional ability, we need not address the issue of whether the totality of the

evidence demonstrates that he possesses a degree of expertise significantly above that ordinarily encountered in the field. Nevertheless, after review of the record, we conclude that the Petitioner has not established that he has the level of expertise required to meet the standards of this criterion.

III. NATIONAL INTEREST WAIVER

The Petitioner has not established that he is an individual of exceptional ability, and he does not claim, nor does the record show, that he is a member of the professions holding an advanced degree. He has therefore not established his eligibility under the EB-2 immigrant classification, and is not eligible for a national interest waiver. Nevertheless, we will address the Petitioner's eligibility under the *Dhanasar* framework below.

As noted above, the Petitioner proposes to continue to grow the [redacted] brand in the United States as the President and CEO of [redacted], as well pursue entrepreneurial ventures including a mobile application, [redacted] devoted to serving the needs of polo players and associations, and [redacted] a version of polo where the players ride electric unicycles instead of horses. He also intends to work as a marketing consultant for retail companies.[5]

The first prong of the *Dhanasar* analytical framework, 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 whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889.

In his decision, the Director makes conflicting conclusions regarding whether the Petitioner's proposed endeavor has substantial merit, initially stating that it does but then seeming to withdraw this conclusion in the next sentence. We agree with the initial conclusion that the Petitioner has demonstrated the substantial merit of his proposed endeavor in the areas of business and entrepreneurialism.

Turning to the national importance of the proposed endeavor, the Director acknowledged the success of the Petitioner's experiential marketing techniques as applied to [redacted] but noted that the benefits of this approach in a consultancy setting would be limited to the Petitioner, his company and his clients, and thus not of sufficiently broad impact to be of national importance. They also concluded that the record lacked sufficient evidence that the Petitioner's proposed endeavor would have a significant potential to employ workers in the United States, or that that it would have other substantial positive economic effects, two factors highlighted in *Dhanasar* as potential indicators of national importance. *Id.* at 890.

On appeal, the Petitioner initially asserts that substantial merit and national importance "go hand-in-hand," and that since his proposed endeavor is of substantial merit it "inevitably has implications at a level sufficient to establish national importance." We disagree. Although they are both elements of the first prong of the analytical framework, the difference between them is clearly shown in the

[5] We note that the Petitioner does not address the practicality of pursuing four different ventures as part of his proposed endeavor as an entrepreneur and consultant. This should be explained in any further proceedings in this matter.

Dhansar decision itself. Specifically, while we considered the petitioner's proposed STEM teaching activities in that case to be of substantial merit due to their relation to U.S. educational interests, we concluded that since the impact of those activities would not impact the field of education more broadly, they were not of national importance. *Id.* at 893.

The Petitioner also asserts that the Director "disregarded the past, current, and future positive economic effects of [the Petitioner's] business and consulting endeavor." But this assertion reflects a fundamental misunderstanding of the first prong of the *Dhanasar* analytical framework, in which we focus on the merit of the proposed endeavor and its potential prospective impact. Consideration of the petitioner's ability to advance that endeavor, including such factors as their education, experience, record of success in similar endeavors, and planning and support, occurs in the second prong of the analysis. In addition, the Petitioner's comparison of the Director's statements in the final merits determination, relating to his eligibility as an individual of exceptional ability, to statements made in their analysis of the proposed endeavor's national importance, is one of apples to oranges, as those analyses involve entirely different considerations.

In further arguing that his proposed endeavor will have substantial positive economic effects, the Petitioner refers to the expert opinion letter he submitted in response to the Director's RFE. The section of that letter referred to in the brief discusses the Petitioner's potential impact upon consulting clients, stating that the Petitioner would "help companies find new ways to draw closer to consumers and build their brands." However, as noted by the Director in their decision, the Petitioner has not shown that the benefits of his proposed consulting would have a broader impact on the field of business, beyond his own company and that of his clients.

We note that another portion of that expert opinion letter, also highlighted on appeal, states that the Petitioner will "spread his knowledge to encourage professionals and multipliers through training courses," thereby having a broader impact on the fields of business and entrepreneurialism. But the Petitioner's statement, which describes his proposed endeavor in great detail, does not mention that teaching training courses is a part of that endeavor.

As previously mentioned, in addition to offering consulting services focusing on experiential sales for the retail sector, the Petitioner also proposes to develop a mobile application, [redacted] offering products and services to polo players and clubs, as well as developing the new sport of [redacted] The Petitioner asserts on appeal that these endeavors, particularly [redacted] will employ U.S. workers and have other substantial positive economic effects. Regarding [redacted] the Petitioner initially submitted a business plan dated 2018, and in response to the Director's RFE added an "information deck" that provided updates to that endeavor's goals and progress. The initial plan named six employees devoted to this endeavor's development and operations, including the Petitioner, while in the later version this team is down to five employees. Neither document includes projections of future job creation, nor does the business plan for [redacted] which only mentions the Petitioner and his co-founder as employees. This evidence is not sufficient to establish that either venture has significant potential to employ U.S. workers. *See Dhanasar* at 890.

The business plans also include revenue projections, although those for [redacted] are described as "total market opportunity" and are highly speculative at more than $36 million per year. This also appears to be a worldwide estimate, so its value in determining whether this venture would have

substantial positive economic effects for the U.S. is very limited. Turning to [redacted] the latest document does not include revenue projections, and the projections from the 2018 document are based upon dated information and market conditions, and thus are also of limited evidentiary weight. The totality of this evidence does not show that either venture would potentially have substantial positive economic effects to the extent that they can be considered to be of national importance.

For all of the reasons given above, we conclude that the Petitioner has not established that his proposed endeavor would be of national importance. We therefore agree with the Director that he has not shown that he meets the first prong of the *Dhanasar* analytical framework. Since this is dispositive of the Petitioner's appeal, as he cannot establish that he merits a national interest waiver as a matter of discretion, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding the second and third prongs. *See Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

ORDER: The appeal is dismissed.