U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29060629

Date: NOV. 20, 2023

Appeal of Texas Service Center Decision

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

The Petitioner seeks classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). 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, concluding that the Petitioner had not established that he was an individual of exceptional ability or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that the Director erred in his decision. In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
>
> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will

> substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.
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> (B) Waiver of job offer –
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> > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Exceptional ability in the sciences, arts, or business is defined in 8 C.F.R. § 204.5(k)(2) as a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. To qualify as an individual of exceptional ability, 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, of which an individual must meet at least three.

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, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national 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.

II. ANALYSIS

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability. On appeal, the Petitioner does not assert nor does the record establish that he is eligible for the EB-2 classification as a member of the professions holding an advanced degree. Therefore, he must establish that he qualifies as an individual of exceptional ability.

As a preliminary matter, the Petitioner asserts that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, to [his] detriment." Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing immigration benefit requests. *See Matter of Chawathe, 25 I&N Dec. at 375; see also Matter of Martinez, 21 I&N Dec. 1035, 1036 (BIA 1997); Matter of Soo Hoo, 11 I&N Dec. 151, 152 (BIA 1965).* Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions. *See* 1 *USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-manual. While the Petitioner asserts he has provided evidence sufficient to demonstrate his eligibility for the EB-2 classification and a national interest waiver, he does not further explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

[1] *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. Substantive Nature of Occupation and Proposed Endeavor

We first conclude that the Petitioner has presented insufficient and inconsistent evidence regarding the nature of the occupation in which he is seeks employment in the petition, and the proposed endeavor that he intends to pursue. This is important because to qualify for the EB-2 classification as an individual of exceptional ability, the Petitioner must submit evidence within the context of his profession or occupation to show that he satisfies at least three of six regulatory criteria to meet the initial evidence requirement, and ultimately to demonstrate that he has a degree of expertise significantly above that ordinarily encountered in his field. Section 203(b)(2) of the Act, and 8 C.F.R. § 204.5(k).

Further, in order to demonstrate that the Petitioner is eligible for a national interest waiver he must, among other things, provide evidence sufficient to show that his specific proposed endeavor (1) has both substantial merit and national importance and (2) he is well positioned to advance it under the *Dhanasar* analysis. *See generally* 5 *USCIS Policy Manual F.5, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.*

The Petitioner indicated his prospective job title is "soccer coach," in part 6 of the petition, providing a list of proposed job duties, such as "[t]eaching athletes the rules, strategies, and techniques of soccer, aming to produce competitive players," and "developing training curriculums, including designing drills to optimize athletic performance," that appear to comport with those listed in DOL's Occupational Information Network (O*NET) summary report for "Coaches and Scouts," which may be viewed at https://www.onetonline.org /link/summary/27-2022.00. The Petitioner also submitted an employment offer letter from (E-), a soccer academy, offering him a position as a soccer coach. In response to the Director's request for evidence (RFE), the Petitioner reaffirmed his intention to coach soccer noting he is already employed by E- as a soccer coach.

On appeal, the Petitioner reiterates that he intends to be employed as a soccer coach. However, he also newly asserts on appeal that he intends to provide services as a "business development professional," noting that in that role he will "service as a conduit between [businesses] and its various markets." He states:

> Business development and sales professionals, such as [the Petitioner], are key to companies' financial stability – they are responsible for ensuring companies state afloat, and they primarily do this by aligning the business strategy with sales, pricing, and marketing tactics that resonate with consumers, including the overall market economy. . . The [Petitioner's] proposed endeavor of optimizing business functions for U.S. companies will also directly impact the domestic job market. . . . Further, we refer you to the initial filing and RFE response, where the [Petitioner] submitted evidence that he is advancing the proposed endeavor with his U.S. business.

Notably, the Petitioner's descriptions of his proposed endeavor in the United States - offered prior to filing the appeal - did not include plans to provide business development and marketing analysis services to U.S. companies through his own business. The Petitioner must resolve these inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Petitioner must meet eligibility requirements at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). We determine the Petitioner's appeal brief presents inconsistent information regarding his proposed employment, which is material to eligibility for the EB-2 classification and for a national interest waiver. On appeal, the Petitioner cannot materially change aspects of the occupation in which he will be employed, and the nature of the proposed endeavor that he intends to pursue. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), (which requires that petitioners seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.)

We therefore conclude that the Petitioner has not provided sufficient and consistent evidence to establish what his prospective occupational field will be, in order to demonstrate that he is an individual of exceptional ability who possesses "a degree of expertise significantly above that ordinarily encountered" within that occupation. Section 203(b)(2) of the Act, and 8 C.F.R. § 204.5(k). Nor has he sufficiently demonstrated the specific nature of his proposed endeavor to show that (1) it has both substantial merit and national importance and (2) he is well positioned to advance it under the *Dhanasar* analysis. *Dhanasar* at 889. For these reasons, the petition may not be approved.

B. Individual of Exceptional Ability

As discussed, a petitioner must first provide documentation that satisfies at least three of six regulatory criteria in order to meet the initial evidence requirements as an individual of exceptional ability under the EB-2 classification. 8 C.F.R. § 204.5(k)(3)(ii). In denying the petition, the Director determined that while the Petitioner met the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(F), he did not satisfy any of the other criteria.

On appeal, the Petitioner generally asserts that he "has submitted concrete evidence corroborating that he meets at least 3 of the 6 criteria to demonstrate he possesses a degree of expertise above that ordinarily encountered in the field." He points to his "extensive professional experience," and contends that he is "an extremely accomplished individual [with] deep insight and advanced knowledge on training students, educating about health and wellness, coordination, coaching and having specialized knowledge regarding sports techniques, strategic planning, real estate, budgeting, retrofitting, and construction."[2]

We conclude that the Petitioner does not directly address this aspect of the Director's decision - i.e., he fails to identify a specific error in the Director's decision when he determined that the Petitioner did not meet at least three of six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). The reason for filing an appeal is to provide an affected party with the means to remedy what they perceive as an erroneous conclusion of law or statement of fact within a previous proceeding. See 8 C.F.R. § 103.3(a)(l)(v). By presenting only generalized statements of eligibility without explaining the specific aspects of the Director's decision they consider to be incorrect, the Petitioner has failed to identify the basis for contesting this requirement on appeal. *Matter of O-R-E-*, 28 I&N Dec. 330, 336 n.5 (BIA 2021) (citing Matter of R-A-M-, 25 I&N Dec. 657, 658 n.2 (BIA 2012) and finding when a filing party mentions an issue without developing an argument, the issue is deemed waived).

[2] Notably, the Petitioner does not explain how specialized knowledge about "real estate, budgeting, retrofitting and construction" is relevant to his claimed advanced expertise as a soccer coach. *Matter of Ho*, 19 I&N Dec. at 582.

The Petitioner has not established that he is eligible for the EB-2 classification. Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's remaining arguments, including whether he is eligible for a national interest waiver, as a matter of discretion. *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 M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

Nonetheless, turning to the Petitioner's claims of eligibility under the *Dhanasar* analysis, we agree with the Director's ultimate conclusions. For example, regarding the national importance portion of the first prong, although the Petitioner's statements on appeal reflect, in part, that he intends to work as a soccer coach in the United States, he has not offered sufficient information and evidence to demonstrate that the prospective impact of his proposed endeavor rises to the level of national importance. In *Dhanasar*, we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893. Similarly, the record in this matter does not demonstrate that the Petitioner's proposed endeavor stands to sufficiently extend beyond his future employer(s) and the individuals that he will provide soccer coaching services to such that it would impact U.S. interests or the sport of soccer more broadly at a level commensurate with national importance. In addition, he has not demonstrated that his specific proposed endeavor has significant potential to employ U.S. workers or otherwise offer substantial positive economic effects for our nation.

III. CONCLUSION

The Petitioner has not demonstrated that he qualifies as an individual of exceptional ability under section 203(b)(2)(A) of the Act. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.