U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28427371

Date: OCT. 25, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur in real estate, seeks employment-based second preference (EB-2) classification as a member of the professions holding an advanced degree, 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 although the Petitioner established his eligibility for EB-2 classification as a member of the professions holding an advanced degree, he did not demonstrate 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, under section 203(b)(2) of the Act. Next, a petitioner must then demonstrate 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 that U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion,[1] grant a national interest waiver if the petitioner shows:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and

[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).

- On balance, waiving the job offer requirement would benefit the United States. [2]

II. ANALYSIS

The Petitioner earned a bachelor's degree in business administration from a Brazilian university in 2004. According to the Petitioner's résumé, since 2008 he has worked as an investment broker for home construction businesses in [redacted] Brazil. He entered the United States in May 2019 as the F-2 spouse of an F-1 nonimmigrant student, and filed this petition in January 2021. The Petitioner stated on his Form I-140, Immigrant Petition for Alien Worker, that he intends to work in the United States as an entrepreneur in real estate. In 2019, the Petitioner established a new real estate construction company in [redacted] Florida, [redacted] for which he serves as Director and Investor Partner.[3] He submitted a business plan for [redacted] with the petition, indicating that his company operates as a property development company and "acts on behalf of buyers, investors, and commission contractors to build properties that are then sold to consumers." The documentation the Petitioner submitted, including on appeal, indicates that at the time of filing his company had built approximately 19 residential properties in [redacted] Florida.

The Director determined that the Petitioner qualifies for the underlying EB-2 classification as a member of the professions holding an advanced degree. Therefore, the primary issue before us on appeal is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. The Director determined that he did not establish his eligibility under the first and third prongs of the *Dhanasar* analytical framework. The Director found substantial merit in the proposed endeavor but concluded that the record did not establish that the Petitioner's endeavor has national importance and therefore did not meet the first *Dhanasar* prong. The Director also concluded that the Petitioner did not establish that, on balance, it would be beneficial to the United States to waive the requirement of a job offer, and thus of a labor certification, under the third *Dhanasar* prong.

On appeal, the Petitioner asserts that he submitted enough evidence to establish eligibility, and that, by failing to give that evidence sufficient weight, the Director imposed an improperly strict standard of proof.[4] We adopt and affirm the Director's decision as it relates to the first prong of the *Dhanasar*

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[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[3] The record reflects that the Petitioner also serves as Director and Investor Partner for three additional companies he established in [redacted] Florida in 2019 and 2020: [redacted]

[4] On appeal, the Petitioner's supporting evidence relating to his proposed endeavor reflects events occurring after the initial filing of the petition. For example, as evidence of [redacted] "impact in the U.S.," the Petitioner provides real estate settlement sheets, impact fees, and permit fees related to the construction of 34 additional properties after the date the petition was filed. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Moreover, a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1988). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Accordingly, we will not consider this evidence. Notwithstanding that the evidence relates to events occurring after the initial filing of the petition, we will not consider this evidence for the first time on appeal as it was not presented before the Director. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose" and that "we will adjudicate the appeal based on the record of proceedings" before the Director).

framework. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

The Director's decision reflects a careful and thorough review and analysis of the Petitioner's claims and supporting evidence under the first prong of *Dhanasar*. The Petitioner broadly contends on appeal that the Director did not give due consideration to his business plan, his personal statement, his letters of recommendation, and industry reports and articles, noting that such reports demonstrate the national importance of his proposed endeavor. However, all of this evidence is specifically addressed in the Director's decision and the Petitioner does not further articulate how the Director failed to give proper weight to the evidence.

For instance, the Director addressed the substance of the Petitioner's business plan and its specific five-year staffing and growth projections, as well as the Petitioner's stated intention to locate the business in [redacted] Florida and provide "single-family and multi-family affordable housing." However, the Director explained that the Petitioner did not substantiate the growth projections in the business plan, corroborate that it provides "affordable housing,"[5] or demonstrate that his endeavor will have substantial positive economic effects, particularly in an economically depressed area. The Director further observed that the endeavor's projected staffing of seven full-time workers within five years was insufficient to demonstrate a significant intent to employ U.S. workers.

Moreover, despite recognizing the endeavor's potential to impact the individual and corporate clients it intends to serve, the Director found that the record contains insufficient evidence that the endeavor's homebuilding services would have broader implications, or national or global implications, within the specific field or industry. The Director concluded that the information contained in the business plan, considered within the context of other evidence in the record, did not show that the prospective impact of the proposed endeavor would rise to the level of having national importance.

We have reviewed the business plan for the Petitioner's company, and affirm that it does not establish that the company's staffing levels and business activity would provide substantial economic benefits in Florida or the United States, that it would meaningfully alleviate a claimed shortage of trained professionals in the construction industry, or that its projected future revenues of $7.68 million in its fifth year would significantly impact the homebuilding industry, which, as the Director noted, is described in the record as a $94.7 billion market.

The Petitioner also contends that the Director did not consider industry articles, noting that such reports highlight the national importance of the homebuilding industry. However, as highlighted by the Director, in determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on the "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In

[5] The Director noted that the property contracts of the Petitioner's business show the average price of its new houses to be "in the $350,000 - $400,000 range;" articles in the record indicate that "by the end of 2017" the median single-family home sales price in [redacted] County (which includes [redacted] was $434,900, while the statewide median was $237,500.

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.* Even if an industry is considered nationally important, the Petitioner must still demonstrate the implications of his specific proposed endeavor within that industry. The Director's decision reflects that due consideration was given to the industry articles and reports insofar as they are relevant to the first prong of the *Dhanasar* framework.

Finally, the Petitioner maintains that the Director did not give sufficient weight to the submitted recommendation letters and personal statement. This evidence, along with a considerable portion of the Petitioner's appellate brief, primarily focuses on the relevance of his professional experience, past achievements, and abilities. While important, the Petitioner's expertise acquired through his prior experience in the field relates to the second prong of the *Dhanasar* framework, which "shifts the focus from the proposed endeavor to the foreign national." *Id.* Here, the Director considered the relevant evidence and determined that the Petitioner satisfied the second prong. The issue under *Dhanasar's* first prong is whether the specific endeavor the Petitioner proposes to undertake has national importance and, for the reasons discussed, the Director properly concluded that he did not meet his burden with respect to the first prong.

Because the Petitioner has not established his proposed endeavor has national importance, he is not eligible for a national interest waiver under the *Dhanasar* analytical framework. We reserve our opinion regarding whether the evidence of record satisfies the 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).

III. CONCLUSION

For the reasons discussed, the Petitioner has not established that he merits, as a matter of discretion, a national interest waiver of the job offer requirement attached to this classification. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.