U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28819107

Date: OCT. 31, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a film director/editor, seeks employment-based second preference (EB-2) immigrant 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 the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that they 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 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. 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 U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[1], grant a national interest waiver of the job offer, and thus the labor certification, to a petitioner classified in the EB-2 category if the petitioner demonstrates that (1) the noncitizen's proposed endeavor has both substantial merit and national importance; (2) the

[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).

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, 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

The Director concluded that the Petitioner qualifies as a member of the professions holding an advanced degree. Accordingly, the remaining issue to be determined on appeal is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus of a labor certification, would be in the national interest.

In the Form I-140, the Petitioner listed their occupation as a Film Director/Editor. With respect to the Petitioner's proposed endeavor, the Petitioner stated that they intend to "seek employment at one of America's top universities [sic] such as the University [redacted] to teach cinematic arts." The Petitioner asserted that they are an "exceptionally talented filmmaker with outstanding skills in directing and editing films" with "the artistic and technical ability to make an indelible contribution to the global film industry." The Petitioner also submitted two letters of recommendation from University [redacted] professors attesting to the Petitioner's abilities as a screenwriter, filmmaker, and editor. The professors also mentioned the Petitioner's experience as a teaching assistant while taking graduate courses at the University [redacted] and his qualifications to teach the cinematic arts professionally.

The Director considered the proposed endeavor's merit, but found conflicting information, and thus issued a request for additional evidence (RFE) to determine its substantial merit, national importance, and eligibility under the Dhanasar framework's remaining prongs.

In response to the Director's RFE, the Petitioner submitted copies of the previous support letters, his official school transcript, and a business plan describing his proposal to open an establishment called the [redacted]. The Petitioner asserted that [redacted] is "being established to give people the opportunity to excel at visual arts. Our goal is to improve the lives of every person with artistic abilities worldwide, by providing them with cinematic arts training so that they can effectively express themselves using audio and visuals and make a positive impact in their communities." The Petitioner also attempted to clarify the record's conflicting information and explained that they now wanted to "establish a business in the United States instead of seeking employment." The Petitioner further noted that they will "employ people as administrators and educators to work at [redacted]."

In denying the petition, the Director determined that the Petitioner has not established eligibility for the benefit sought. In particular, the Director found that the Petitioner had "not established that his multi-faceted proposed endeavor has implications beyond his current employer (or prospective employer or self-owned company), their business partners, alliances, and/or clients/customers and his prospective co-workers/employees or workplace at a level sufficient to demonstrate the national importance of his endeavor."

On appeal, the Petitioner resubmits the same documents and asserts that the Director's decision was erroneous. The Petitioner further asserts that the proposed endeavor is "to open a school and teach" and that the Petitioner "will be an entrepreneur and self-employed."

The Petitioner's initial description of their proposed endeavor did not include plans to open a business. As indicated above, the Petitioner initially stated that they intend to seek employment at a university to teach cinematic arts. Additionally, the two letters of support submitted on the Petitioner's behalf heavily discussed the Petitioner's past experience related to screenwriting, filmmaking, and editing. They did not mention the Petitioner's plans to establish a business. In fact, one of the writers stated that they would recommend the Petitioner for "any creative position." It was only upon issuance of the RFE that the Petitioner, for the first time, presented their proposed endeavor of establishing a business to teach cinematic arts. The Petitioner affirms on appeal that they want to open a school and will be an entrepreneur.

The Petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(12); Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, the purpose of an RFE is to elicit information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(1), 103.2(b)(8), 103.2(b)(12). 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). Here, the Petitioner has made significant changes to their initial proposed endeavor of seeking employment at a university to teach cinematic arts to becoming an employer and entrepreneur. As the Dhanasar framework requires an analysis of the proposed endeavor's substantial merit and national importance, such a change is material to their eligibility for a national interest waiver.

The Petitioner's new plans in the RFE reply, and contended in this appeal, describe a new set of facts regarding the proposed endeavor. The Petitioner's proposed endeavor to open a business was presented after the filing date and cannot retroactively establish eligibility. Accordingly, we conclude that the Petitioner made an impermissible material change to their proposed endeavor. We will therefore adjudicate the petition under the fact pattern as originally presented: the Petitioner's plan to seek employment and teach cinematic arts.

We have insufficient information concerning the Petitioner's initial proposed endeavor with which to determine whether it has substantial merit because the Petitioner's proposed endeavor has not been clearly defined. Again, the Petitioner abandoned the initially proposed endeavor after the RFE was issued and therefore never fully built out an I-140 petition based on it. Because we have so little information regarding that initially proposed endeavor, we cannot even analyze it under the Dhanasar framework, let alone determine whether it has substantial merit and national importance under Dhanasar *'s* first prong. We, therefore, find that the Petitioner did not submit persuasive evidence to support a finding of substantial merit and national importance, and thus did not meet the first prong of the Dhanasar framework. The Petitioner bears the burden to both affirmatively establish eligibility under the Dhanasar framework, of which substantial merit is one piece, and establish their eligibility by a preponderance of the evidence. See Matter of Chawathe, 25 I&N Dec. at 376.

Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding their eligibility under the second and third 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-, 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

As the Petitioner has not met the Dhanasar analytical framework's requisite first prong, we conclude that they have not established that they are eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.