U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28087432

Date: SEP. 25, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a business operations specialist, seeks second preference 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 EB-2 classification. 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 the Petitioner had not established eligibility for 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility for a national interest waiver, petitioners must 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. In addition, petitioners must show the merit of a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver if:

- 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.

[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).

II. ANALYSIS

The Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. The sole issue to be determined in this 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.

A petitioner must establish that he meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. at 376. In other words, a petitioner must show that what he claims is "more likely than not" or "probably" true. USCIS examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." Additionally, to determine whether a petitioner has met his burden under the preponderance standard, USCIS considers not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989). The Petitioner must establish that he is eligible for a national interest waiver as of the date of filing the petition, which in this case is January 26, 2021. 8 C.F.R. § 103.2(b)(1).

The first prong relates to the substantial merit and national importance of the specific proposed endeavor. *Dhanasar*, 26 I&N Dec. at 889. The Director determined in the denial that the Petitioner's proposed endeavor which involves standing up a new marketing research firm has substantial merit, and the record supports this conclusion. However, the Petitioner correctly observes on appeal that the Director erred in disregarding certain evidence submitted in response to the request for evidence (RFE) relevant to the national importance determinations under *Dhanasar's* first prong in the denial. The Petitioner initially indicated that upon obtaining lawful permanent residence in the United States he will commence his proposed endeavor, as follows:

> I plan to start a third-party market research firm in the U.S., specializing in three sub-sectors' next generation flat panel display like OLED (organic light-emitting display), memory semiconductor (DRAM and NAND), and EV (electric vehicle) battery. The established research houses such as IDC and Gartner have limited presence in these areas, as these are relatively new and technology developments have been underway mostly in Korea. Ironically, the U.S., as one of the largest markets of the products based on this technology, needs this market research service.
>
> . . . .
>
> The market research is not capital-intensive, but brain intensive business. The business needs only a few analysts and a couple of administrative staffs. I believe that this third-party research service should be well-received by the U.S. companies in [the] automotive industry and technology industry equally. The target clients also include Korean companies, which want to keep expanding the U.S. presence. . . . My research firm should be able to provide regular research service as well as to offer ad-hoc base consulting service to these Korean companies.

In the RFE, the Director acknowledged the evidence initially provided, such as the Petitioner's reference letters, his academic and experiential achievements, and internet pages documenting his

media appearances. She advised the Petitioner that he had not provided sufficient evidence to show how his proposed endeavor rises to the level of national importance, among other things. The Director discussed the deficiencies in the evidence initially provided, including the Petitioner's stated intentions about establishing a marketing research firm to pursue his proposed endeavor, and the consulting services that he intends to provide to companies in the United States and abroad. She also provided a non-exhaustive list of documentation that the Petitioner could submit in his RFE response to establish that he merits a national interest waiver.

In response to the RFE, the Petitioner provided a brief, and additional evidence including an abbreviated business plan for his new business, and additional letters of support and interest from the CEOs of two investment companies. The Director reviewed the evidence provided and determined that the Petitioner did not meet any of *Dhanasar's* three prongs. In her determination that the evidence was insufficient to demonstrate the national importance of the Petitioner's proposed endeavor, she noted that the Petitioner's business plan and the newly submitted letters were "signed and dated" after the filing of the petition. She concluded that "this evidence cannot be considered in support of the petition as they were not submitted at the time of filing, but at a later date." As support for her determination that this evidence cannot be considered, the Director referenced *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which requires that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications *as of the filing date of the visa petition*.

On appeal, the Petitioner asserts that his plan to start his own market research business in the U.S. and the investment company's plan to continue seeking consulting services from the Petitioner, which the CEO alluded to in his letter, "already existed before filing the initial petition." He contends these business initiatives "were not new plans that arose after the initial petition was submitted" and by submitting this evidence, "we were merely trying to clarify and answer the questions [USCIS] asked in the RFE. [T]herefore, the plan and letter must not be rejected and [should] be properly considered."

Based on our de novo review of the record, we agree with the Petitioner that the Director improperly disregarded the evidence provided in the RFE response. Though this material was created post-filing, we conclude the evidence presented therein was provided to further document and explain how the Petitioner qualifies for a national interest waiver based on the nature of the proposed endeavor discussed in the initial filing. In this case, the Director specifically requested documentary evidence to establish whether the Petitioner's proposed endeavor is of national importance under *Dhanasar's* first prong. When the Petitioner provided his business plan and supporting letters in an attempt to address the Director's concerns about the plans *he initially outlined when the petition was filed*, the Director erred in not considering this evidence when determining the Petitioner's eligibility for a national interest waiver.

On remand, the Director should analyze the entire record to determine whether it sufficiently demonstrates that the Petitioner's proposed endeavor has national importance, including the initially submitted documentation the evidence provided in the RFE response, and the arguments presented in the Petitioner's appeal brief. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Matter of Dhanasar*, 26 I&N Dec. at 889. The Director should focus on what the Petitioner will be prospectively doing rather than the specific occupation. The Director should keep in mind that it is the national importance of the Petitioner's specific proposed endeavor that must be shown, not the importance of the overall market research and business consulting fields. An endeavor having significant potential on the broader implications for a field or

region, generally may rise to the level of having national importance for the purpose of establishing eligibility for a national interest waiver. The Director should review the record to determine whether the Petitioner has demonstrated his proposed endeavor will have significant potential impacts on the broader impact in the field.

If the Director concludes that the Petitioner's documentation does not meet the national importance requirements of *Dhanasar's* first prong, the decision should discuss the insufficiencies in the evidence and adequately explain the reasons for ineligibility.

2. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the petitioner. To determine whether a petitioner is well positioned to advance the proposed endeavor under *Dhanasar's* second prong, USCIS considers factors, including, but not limited to: the individual's education, skills, knowledge, and record of success in related efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals. *Dhanasar at 890.*

On remand, the Director should analyze all of the submitted evidence to determine whether the record sufficiently demonstrates the Petitioner is well positioned to advance the proposed endeavor. The Director should articulate the basis for finding whether the evidence shows or fails to show that he is well positioned to advance his endeavor.

3. Balancing Factors to Determine Waiver's Benefit to the United States

The third prong requires the petitioner to demonstrate 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. If the Director determines that the Petitioner's documentation does not meet this prong, his decision should address all of the Petitioner's arguments and evidence, and explain the relative decisional weight given to each balancing factor.

III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to consider anew whether the Petitioner qualifies for a national interest waiver as a matter of discretion. The Director should review the entire record and properly apply all three prongs of the *Dhanasar* analytical framework to determine if 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 may request any additional evidence considered pertinent to the new determination.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.