U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23042124

Date: DEC. 1, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a mechanical engineer, 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. *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 the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . the 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.

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).[1] *Dhanasar* states that, after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the noncitizen's proposed endeavor has both substantial merit and national importance; (2) that the 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 he or she 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; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

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. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the noncitizen's qualifications 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. In each case, the factor(s) considered must, taken together,

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

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.[2]

II. ANALYSIS

The Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue to be determined 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. For the reasons discussed below, the Petitioner has not established that a waiver of the requirement of a job offer is warranted.

Initially, the Petitioner described the endeavor as a plan "to share her knowledge in the fields of product development, quality development and management with Companies, Universities and Research Centers to their benefit and that of the overall U.S. economy." She stated that she "will provide highly specialize services to help her employers improve their financial performance, market share, increase of market leadership and pursue growth strategies." She further stated that she "will not only help improve her employer's business operation, she will also help improve the local and U.S. economy through increased earning and the creation of a more stable business environment that is capable of sustained employment." The Petitioner also referenced development of an "aeronautical meal cart," described in a business plan.

In response to the Director's request for evidence (RFE), the Petitioner submitted a copy of an employment contract with [redacted] dated August 25, 2021, indicating that the Petitioner "will start in a full-time position as Supplier Development Engineer – Mechanical." Similarly, on appeal, the Petitioner asserts, "Since August 2021, [I have] been employed as a Supplier Development Engineer for [redacted] which is based in the [redacted] industry." Specifically, the Petitioner asserts that she "provides a supplier development database for mechanical commodity, technical reviews, supplier risk assessments for new development processes, and she developed the company supplier database" for [redacted]

The Petitioner's employment contract with [redacted] contains a specific non-compete clause, as follows:

> Outside Activities. While you render services to the Company, you agree that you will not engage in any other employment, consulting or other business activity without the written consent of the Company. In addition, while you render services to the Company, you will not assist any person or entity in competing with the Company, in preparing to compete with the Company or in hiring any employees or consultants of the Company.

The Petitioner also clarified in the RFE response that "in 2018, I was invited by University [redacted] to develop an [redacted] project in the aerospace sector, reducing absenteeism in the work environment of flight attendants." The Petitioner asserts that, through that research project for the University [redacted] she studied [redacted]

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

[redacted] and that she "was able to explain the longstanding question about the underlying cause of the human/employee association and the inappropriate work tools variant . . . caused by the obsolete engineering of the manual version of the product." She further asserted, "I hope that I can continue my research on [redacted] here."

The Director acknowledged that "the submitted evidence establishes that the [P]etitioner's proposed endeavor as an engineer in the United States, providing her expertise and services to U.S. companies, which serves the business interests of her employer (or prospective employer), its clients/customers, alliances, and the [P]etitioner's workplace has substantial merit." However, the Director concluded that the record "does not demonstrate that the [P]etitioner's proposed endeavor has national importance" because it "does not convey an understanding of how the [P]etitioner's proposed employment activities stand to have a broader impact on her field."

On appeal, the Petitioner asserts that the following evidence establishes that the proposed endeavor has national importance:

- A letter written by [redacted] chairman of the manufacturing engineering department at [redacted] in [redacted], Ohio, submitted for the first time on appeal;
- The Petitioner's business plan for the development of an [redacted]
- Several industry articles and reports;
- A collection of job offer emails sent to the Petitioner from various companies; and
- A Memorandum published by the U.S. Department of Homeland Security's Cybersecurity & Infrastructure Security Agency in 2020, titled "Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response."

In determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. *Dhanasar* provided examples of endeavors that may have national importance, as required by the first prong, having "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" and endeavors that have broader implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

We first note that the Petitioner's reliance on industry reports and articles in the record regarding engineering, consulting, and aviation industries in general is misplaced. The articles and reports in the record, including "It's Official—Engineering Helps Economies to Grow," "Quality Control in Engineering Management," "Why is Industrial Engineering Important?," "Management Consulting Services Market to See Huge Growth by 2026: Deloitte, IBM, Booz Allen Hamilton," "2020 Small Business Profile," and "Why Is the Aviation Industry So Important?," do not address the Petitioner, her proposed endeavor, and how the specific endeavor that the Petitioner proposes to undertake will have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" and endeavors that have broader implications, such as "significant potential to employ U.S. workers or has other substantial positive

economic effects, particularly in an economically depressed area." *Id.* at 889-90. Similarly, the business history timeline of [redacted] the Petitioner's employer, does not address the Petitioner, her proposed endeavor, and how the specific endeavor that the Petitioner proposes to undertake will have "national or even global implications within a particular field." *Id.* at 889.

We next note that the non-compete clause in the Petitioner's employment contract with [redacted] submitted in response to the RFE, quoted in full above, precludes her from continuing to develop her [redacted] and from engaging in any other employment, consulting, or other business activity without the written consent of [redacted] The record does not contain the written consent of [redacted] for the Petitioner to continue developing her [redacted] or to otherwise engage in any other employment, consulting, or other business activity. Therefore, while the Petitioner is employed by [redacted], her endeavor appears to be limited to providing her services for the benefit of [redacted] and its clients and customers.

Next, we acknowledge that the "Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response" indicates that "workers who conduct a range of operations and services that are essential to continued critical infrastructure viability . . . should continue normal operations, appropriately modified to account for Centers for Disease Control (CDC) workforce and customer protection guidance" during the COVID-19 pandemic." However, the memorandum also states that the list of essential workers "is advisory in nature. It is not, nor should it be considered to be, a federal directive or standard in and of itself." The Petitioner's assertion on appeal that her proposed endeavor has national importance because "engineers have been deemed critical and essential in various industries like healthcare, energy, communications and information technology, and defense industrial base" through the memorandum is misplaced. The record establishes that the Petitioner works as a mechanical engineer for [redacted] which the Petitioner described in response to the Director's RFE as a company in the [redacted] not in the "healthcare, energy, communications and information technology, and defense industrial base" industries. Even to the extent that the Petitioner's employer is in the industries contemplated by the memorandum, the memorandum does not establish that the proposed endeavor has national importance. In determining national importance, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *Id.* at 889. The memorandum does not address the Petitioner, her proposed endeavor, and how the specific endeavor that the Petitioner proposes to undertake will have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" and endeavors that have broader implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

Finally, the Petitioner's reliance on [redacted] opinion letter is misplaced. As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we may give an opinion statement less weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.* We are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence

of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'").

[redacted] opines that the Petitioner's "research in the areas of Ergonomic and Reengineering Sustainability for Institutions of airlines . . . will benefit the entire airlines and aid institutions in achieving engineering sustainability while fulfilling their economic and social commitments to their stakeholders, the Association of Flight Attendants in U.S. (AFAC-WA) and U.S. Air Force." However, the record does not establish that the Petitioner's duties at [redacted] include conducting research in the areas of ergonomic and reengineering sustainability for airlines. [redacted] also opines that the Petitioner "plans to reach small business owners and new entrepreneurs by offering a variety of reengineering in current and new products launch, product improvement and process improvement in current products, keeping high quality of products, increasing the company market share and producing in low cost." We note that [redacted] opines that "[c]ars and other automobiles are an industry worth over $250 billion worldwide, with production trending towards efficiency and sustainability," and we note that the Petitioner asserts that her employer "is based in the automotive industry." However, as discussed above, the relevant question is not the importance of the industry, field, or profession in which an individual will work; instead, to assess national importance, we focus on the "specific endeavor that the [noncitizen] proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. [redacted] letter does not address how the specific endeavor that the Petitioner proposes to undertake—which appears to be as a mechanical engineer for [redacted]—will have "national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances" and endeavors that have broader implications, such as "significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area." *Id.* at 889-90.

In summation, the Petitioner has not established that the proposed endeavor has national importance, as required by the first *Dhanasar* prong; therefore, she is not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or 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

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that the Petitioner has not established eligibility for, or otherwise merits, a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.