U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19274762

Date: JUN.7, 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 physical therapist, seeks second preference immigrant classification 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 did not qualify for the underlying classification as either a member of the professions holding an advanced degree or an individual of exceptional ability, nor had she established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner submits an updated US. Department of Labor Employment and Training Administration Form 750 Part B, Application for Alien Employment Certification, and a brief asserting her eligibility for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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* (emphasis added), 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. . . . [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.

Section 101(a)(32) of the Act provides that "[t]he term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. *If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree* (emphasis added).

Furthermore, 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* (emphasis added), U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion,[2] grant a national interest waiver if a 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. *See Id.* at 888-91, for elaboration on these three prongs.

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

II. ANALYSIS

A. Eligibility for the Requested Classification

As noted above, the Director concluded that the Petitioner did not qualify for EB-2 classification.[3] Regarding the Petitioner's eligibility as an advanced degree professional, the Director raised concerns with the submitted employment letters and ultimately concluded that they did not sufficiently establish that the Petitioner had at least five years of progressive post-baccalaureate experience. While we may share the Director's concerns, the Petitioner's proposed endeavor, as initially described, is to be a physical therapist.[4]

According to the "How to Become a Physical Therapist" section of the *Occupational Outlook Handbook* entry for physical therapists submitted by the Petitioner, "[p]hysical therapists entering the profession need a Doctor of Physical Therapy (DPT) degree. All states require physical therapists to be licensed." As noted above, the definition of advanced degree at 8 C.F.R. § 204.5(k)(2) clearly states, in pertinent part, that "[i]f a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." In other words, the regulation does not allow for a combination of education and experience if "a doctoral degree is customarily required by the specialty."

According to the "Evaluation of Education and Career Experience," the Petitioner holds the equivalent of a master's degree in physical therapy based upon her "[a]cademics and a minimum 5 years [p]rofessional experience." Notably, although the evaluator states that the Petitioner was "awarded a Bachelor's degree in Physiotherapy," neither the diploma, nor the accompanying translation, use the term "bachelor's degree." Rather, her diploma states that she was conferred the "title of physiotherapist." Further, the evaluator, who has a degree in human resources development, does not address the DPT requirement for physical therapists, nor does he sufficiently explain his experience evaluating the credentials of individuals in the healthcare field. The Petitioner also provided a "Report of Evaluation of Educational Credentials" from the Foreign Credentialing Commission on Physical Therapy, Inc.," which indicates that "[b]ased on the documents provided, it is [their] opinion that [the Petitioner]'s education does not appear to meet the requirements of the Florida rule at the time of graduation." For all these reasons, the record does not show that the Petitioner holds a "U[.]S[.] doctorate or a foreign equivalent degree," as required by the regulation.[5]

As the Petitioner has not demonstrated that she holds the foreign equivalent degree of a DPT, she has not

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[3] As the Petitioner does not address eligibility as an individual of exceptional ability on appeal, we consider this claim abandoned. *See Matter of R-A-M-*. 25 I&N Dec. 657. 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). *See also Sepulveda v. U.S. Att'y Gen.,* 401 F.3d 1226. 1228 n. 2 (11th Cir. 2005). citing *United States v. Cunningham,* 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark,* No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

[4] Both the Form I-140, Immigrant Petition for Alien Workers, and ETA 750 Part B indicate the proposed employment is as a physical therapist."

[5] We note that, although the record contains evidence that the Petitioner is taking courses at the [redacted] Doctor of Physical Therapy Program for Foreign Educated Physical Therapists, it does not contain any evidence that she has received a DPT or its foreign equivalent.

established that she is a member of the professions holding an advanced degree consistent with the regulatory definition at 8 C.F.R. § 204.5(k)(2).

B. The Proposed Endeavor

As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot. However, for the reasons explained below, the Petitioner's response to the Director's request for evidence (RFE) also presented a new set of facts regarding the proposed endeavor, which is material to eligibility for a national interest waiver. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *see also Dhanasar*, 26 I&N Dec. at 889-90.

In *Dhanasar,* we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." As discussed above, the Petitioner initially stated that her proposed endeavor was to be a physical therapist and confirmed her intention in her August 24, 2018 letter. In response to the Director's RFE, the Petitioner submitted an updated "Professional Plan" which indicated that her "proposed endeavor [] will include the following main activities:"

1.1 Developing, implementing and coordinating new physiotherapeutic methods and protocols.
1.2 Development of Home Care Programs[.]
1.3 Disseminating knowledge through professional training and events.
1.4 Providing clinical assistance to help patients recover from Covid-19 sequels.

She also provided "a table with the prospective number of hospitals and clinics" where she intends "to implement [her] methods and the associated number of patients that would [] benefit[] from" them. The Petitioner further asserted that her "proposed endeavor does not require a Physical Therapist (PT) license." Given her statement that she will "provid[e] clinical assistance to help patients recover from Covid-19 sequels," it is unclear how she would be able to do so without a license. Regardless, 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). 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). If significant, material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

In determining whether an individual qualifies for a national interest waiver, we must rely on the specific proposed endeavor to determine whether (1) it has both substantial merit and national importance and (2) the foreign national is well positioned to advance it under the *Dhanasar* analysis. Here, the Petitioner's RFE response presented a new set of facts regarding the proposed endeavor, which is material to eligibility for a national interest waiver. *See Michelin Tire Corp.*, 17 I&N Dec. at 248; *see also Dhanasar*, 26 I&N Dec. at 889-90.

ORDER: The appeal is dismissed.