U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20492203

Date: MAR. 24, 2022

Appeal of Texas Service Center Decision

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

The Petitioner 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 had not 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 asserts that he is eligible 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 withdraw the Director's decision and remand the matter for further review of the record and issuance of a new decision.

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.
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> (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 definitions:

> *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.
>
> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
>
> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition to the definition of "advanced degree" provided at 8 C.F.R. § 204.5(k)(2), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) provides that a petitioner present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

To demonstrate eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

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, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the 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.

II. ANALYSIS

For the reasons discussed below, we withdraw the Director's conclusions that the Petitioner has established that 1) he is an advanced degree professional and 2) his proposed endeavor meets prong one under the *Dhanasar* analysis.

A. Eligibility for the Requested Classification

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability.

The record establishes that the Petitioner holds the foreign equivalent of a U.S. bachelor's degree in mechanical engineering. As indicated above, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires documentation of the "United States baccalaureate degree or [] foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

In response to the Director's request for evidence (RFE), the Petitioner submits a translated "Record of Employment," which covers ten years of the Petitioner's employment as president of the company and lists his "responsibilities" as:

- Surveil the resources of the company
- Supervise the accomplishment of goals on sales
- Execute strategic businesses for the growth and development of the company

The Director should determine whether the Petitioner has sufficiently established "at least five years of progressive post-baccalaureate experience" in his specialty, mechanical engineering.

If the Director determines that the Petitioner has not demonstrated that he is an advanced degree professional, he should then consider whether he is an individual of exceptional ability.

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[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*, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

B. The Proposed Endeavor

In *Dhanasar*, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." On the Form I-140, Immigrant Petition for Alien Worker, the Petitioner provided the following information:

> Part 5 - Additional Information About the Petitioner
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> Section 11. Occupation: Mechanical Engineer
>
> Part 6 - Basic Information About the Proposed Employment
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> Section 1. Job Title: Petitioner left this section blank
>
> Section 2. SOC Code: 17-2141[3]
>
> Section 3. Nontechnical Description of Job: Perform engineering duties in planning and designing tools, engines, machines, and other mechanically functioning equipment.

On the U.S. Department of Labor Employment and Training Administration Form ETA 750 Part B, Application for Alien Employment Certification, the Petitioner also listed "mechanical engineer" in Box 6 as the occupation in which he is seeking work.

The Petitioner, through counsel, indicated in the initial letter of support that "[h]is career plan in the United States is to continue working in [m]echanical [e]ngineering with multi-national companies, providing indispensable guidance regarding national and cross-border contracts involving the development of different manufacturing and engineering projects in the U.S. and abroad."

In response to the Director's RFE, the Petitioner provided a "Professional Plan & Statement" indicating that, in addition to working as a mechanical engineer, he would also be an entrepreneur. The Petitioner submitted a business plan for his proposed endeavor, indicating that his holding company "offers project design and development services for the construction industry," in addition to selling "tiles, bathroom equipment (faucet[s], vanities, toilet[s]), and kitchen cabinet[s] to wholesale and resale." The Petitioner, however, 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). 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.

[3] This standard occupational classification (SOC) code 17-2141 corresponds to the occupation of mechanical engineers. *See* https://www.onetonline.org/link/summary/17-2141.00 (last accessed Mar. 24, 2022).

The Director, therefore, should consider whether the information provided by the Petitioner in the RFE response provided more specificity to the proposed endeavor as initially described or 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 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.

C. The *Dhanasar* Analysis

If the Director concludes that the Petitioner provided consistent and sufficient information regarding the proposed endeavor(s) in the United States and that it is as both an entrepreneur and a mechanical engineer, he must then consider each endeavor separately. We note that in *Dhanasar*, we concluded that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893.

III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to consider anew whether the Petitioner 1) qualifies for EB-2 classification, the threshold determination in national interest waiver cases, 2) has provided sufficient and consistent information regarding his proposed endeavor, and 3) has established whether a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Director may request any additional evidence considered pertinent to the new determination.

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