U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22064602

Date: SEP. 7, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner, a tennis coach, 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 Nebraska 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 proposed endeavor as a plan "to continue working my area [*sic*] of expertise, namely international and national coaching, and applying expertise to develop and create new ways and methods within the areas of my expertise supporting top universities, then manage and develop a new culture for tennis accessible to all communities." The Petitioner also indicated that he is developing a "product that you insert in a tennis racket that gives you active [a]nalytics about your [t]ennis game."

In response to the Director's request for evidence (RFE), the Petitioner elaborated on his endeavor, stating that he "seeks employment in the field of tennis instruction, eventually owning and operating his own tennis academy, which will be engaged in in-house leagues and ladders, private and group lessons, and training drills." The Petitioner also submitted a business plan, dated 2021, in response to the RFE. The business plan indicated that the Petitioner intends to operate a tennis academy in [redacted] California, employing a total of five workers, including the Petitioner, in each of the first five years of the academy's operation, "and possibly more as the [c]ompany grows." The Petitioner described the other employees as one "admin support" and three "tennis pros." The Petitioner further asserted the following:

> [My] endeavor has significant potential to benefit the United States. Regular physical activity has many positive health benefits, including protection against chronic disease, improved physical and mental health and cognitive function, and better health-related quality of life. Moreover, the lack of physical activity is associated with higher health care costs and utilization.

The Director acknowledged that the Petitioner's plan to start his own tennis academy to provide tennis instruction and promote regular physical activity has substantial merit. However, the Director concluded that "the [P]etitioner has not presented sufficient information and evidence to demonstrate that the prospective impact of his proposed endeavor rises to the level of national importance." The Director found "that the [P]etitioner has not shown his proposed endeavor in this case stands to sufficiently extend beyond his business and clients to impact the industry more broadly. Nor has the [P]etitioner shown that his operation of a tennis academy would have broader implications for the field of tennis." The Director further concluded that "the [P]etitioner has not demonstrated that the specific endeavor which he proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for the region or nation." The Director also

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

addressed comments made in a letter by an adjunct professor of business and sports management at [redacted] College, submitted in support of the petition, finding those comments to be "conjecture and speculation to claim that the [P]etitioner will contribute to the American economy," citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (BIA 1972).

On appeal, the Petitioner first asserts the following:

> On demand, the Director should seek further information and clarification of the Beneficiary's proposed endeavor and its broader implications. The Director may issue another RFE requesting additional evidence addressing this critical element. Unless and until the Petitioner conveys a meaningful understanding of the proposed endeavor, the Director cannot proceed with an assessment of the Petitioner's eligibility for a national interest waiver within the context of *Dhanasar's* three-prong analysis. Once the Petitioner provides the necessary information about the proposed endeavor, the Director shall then analyze the supporting evidence under the *Dhanasar* framework to determine whether the Petitioner has established eligibility for the national interest waiver.

The Petitioner further asserts on appeal the following:

> My initial plan was to create a tennis academy only however [*sic*] with the increase of demand in [p]ickleball being the fastest growing sport in the US[,] I have expanded my business to both [t]ennis and [p]ickleball. I have created [p]ickleball private lessons, clinics, socials, a summer camp for both kids and will [*sic*] plan to add an adult camp in the future after seeing the tremendous success of [p]ickleball in the area and hire more coaches to have broader implications of the proposed endeavor.

The Petitioner also asserts on appeal for the first time that he "will donate 30% of my time teaching low-income, disabled, and minority kids" and that his tennis academy "will happily support both seniors and veterans who served and sacrificed for the freedom we enjoy and the freedoms others hope to have." The Petitioner reasserts on appeal that "[t]ennis provides its players with numerous physical, social, and mental benefits." The Petitioner further reasserts that he is developing a "product that you insert in a tennis racket that gives you active analytics about your tennis game" but that "[i]n order for me to file a patent and get investors for my device, none of the active investors can if my green card application is denied or pending."

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.

The Petitioner's first assertion, in which he demands the Director to submit an additional RFE because "[u]nless and until the Petitioner conveys a meaningful understanding of the proposed endeavor, the Director cannot proceed with an assessment of the Petitioner's eligibility for a national interest waiver," is misplaced. Petitioners bear the burden to establish eligibility for the requested benefit. Section 291 of the Act. Petitioners do not have the prerogative to compel the Director to submit an RFE to them. *See id*; *see also* 8 C.F.R. § 103.2(b)(8)(ii) (providing USCIS the discretion either to "deny the benefit request for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS"). Furthermore, the Petitioner's suggestion on appeal that the record may not "convey[] a meaningful understanding of the proposed endeavor" such that "an assessment of the Petitioner's eligibility for a national waiver" cannot be conducted undermines his assertion that he is eligible for a national interest waiver. *See* 8 C.F.R. § 103.2(b)(1) ("An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication.").

Next, we note that the Petitioner asserts for the first time on appeal that, in contrast to his "initial plan . . . to create a tennis academy only," he has expanded his business to include pickleball. The Petitioner also asserts for the first time on appeal that he "will donate 30% of my time teaching low-income, disabled, and minority kids" and that his tennis academy "will happily support both seniors and veterans who served and sacrificed for the freedom we enjoy and the freedoms others hope to have." A petitioner must establish eligibility at the time of filing the petition. *See* 8 C.F.R. § 103.2(b)(1). A petition may not be approved at a future date after a petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm'r 1971). Because the Petitioner asserts, for the first time on appeal, that his endeavor will include expanding his business to include pickleball, that he will donate time to teaching low-income, disabled, and minority children, and that he will support seniors and veterans, those are a new set of facts that did not exist at the time of filing the petition in 2020. Therefore, none of the assertions made for the first time on appeal, presenting a new set of facts, may establish eligibility, and we need not address those assertions further. *See* 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45.

Next, the Petitioner's reassertion on appeal that "[t]ennis provides its players with numerous physical, social, and mental benefits" is misplaced. As noted above, 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. As the Director concluded, the Petitioner's endeavor of operating a tennis academy, providing "players with numerous physical, social, and mental benefits," as the Petitioner asserts, has merit. However, the generalized observation that tennis provides players physical, social, and mental benefits does not address how the specific endeavor 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," which are aspects of national importance. *See id.* at 889-90. Similarly, the Petitioner's reassertion on appeal that the endeavor entails developing a "product that you insert in a tennis racket that gives you active analytics about your tennis game" has merit; however, the record does not establish how the product

will have national or even global implications within a particular field, have other substantial positive economic effects, or otherwise demonstrate national importance. *See id.*

As the Director observed, the Petitioner's tennis academy will benefit the business that he owns and operates, and it will benefit his clients; however, at the time of the Director's decision, the record did not establish how the academy will provide benefits that extend beyond his own business and its clients, having broader implications or the field of tennis or other substantial positive economic effects. As noted above, several of the Petitioner's assertions made on appeal may not establish eligibility because they present a set of facts that did not exist at the time of filing. The Petitioner does not otherwise address that issue on appeal; rather, he reasserts generally that tennis provides players various benefits, which again does not address how the specific endeavor may have national importance. *See id.*

The Petitioner also does not address on appeal the Director's conclusion that "the [P]etitioner has not demonstrated that the specific endeavor which he proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for the region or nation." Other than employing himself, the Petitioner's business plan indicated that his tennis academy would employ one "admin support" and three "tennis pros," in each of the first five years of operation "and possibly more as the [c]ompany grows." However, the record does not establish how employing those four workers demonstrates "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, he 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.