U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22220730

Date: SEP. 8, 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 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 he 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 submits a brief asserting that the Director erred in denying the petition.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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. . . . [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.

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.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national 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 foreign national. 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 foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign

[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).

national 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 foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, 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.[3]

II. ANALYSIS

The Director determined that the Petitioner's endeavor has substantial merit under the first *Dhanasar* prong, and that he is well-positioned to advance his endeavor under the second *Dhanasar* prong but concluded that the Petitioner had not demonstrated the national importance of his particular proposed endeavor, or 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.

For the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of his endeavor in order to establish his eligibility under the first prong of the *Dhanasar* analytical framework. The Petitioner initially provided statements about his proposed endeavor indicating:

> My career plan in the United States is to continue working with American companies that require my specialized knowledge, years of experience, and significant expertise. I intent to continue designing marketing strategies, maintaining positive working relationships with peers to facilitate company growth, and identifying viable opportunities through extensive research. I can improve a company's marketing efforts by leveraging a wealth of consumer data from various sources and target messaging accordingly.
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> . . . .
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> In addition to helping the business industry in the U.S., [the Petitioner] can help U.S. businesses develop cross-border projects abroad, particularly in Latin America. He can provide significant benefits facilitating business operations of U.S. corporations and U.S. investors interested in making investments and developing productive relationships in the Brazilian and Latin American markets.

The Director issued a request for evidence (RFE), asking for more information and evidence to establish the national importance of the proposed endeavor. In response, the Petitioner submits a revised statement indicating that he will alternatively focus his endeavor on the operation of his existing business [S-], as follows:

> [M]y overall proposed endeavor in the United States is to offer my expertise as an Entrepreneur & Marketing and Business Developer to continue operating and expanding the company that has already been incorporated in the United States. S-

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

> will provide service Kiosks (Totems), specialized labor in research and market intelligence, and service solutions for the American market. Our company's primary focus is Digital Market research, which determines a new service or products viability through research conducted via a multi-channel technology with potential customers.

In response to the Director's RFE, the Petitioner provided a business plan for S-, that outlined the companies key marketing initiatives, including marketing his foreign company's "Covid-19 access control solution" in the United States which is described as "a kiosk terminal that uses biometrics to check patient status [temperature checks], access control and hand sanitation," to U.S. companies, such as restaurants and outpatient medical clinics. The Petitioner also provided an analysis of the impacts of COVID-19 on the U.S. economy generally and the marketing efforts of U.S. businesses specifically.

The Director concluded that this aspect of 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 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. Specifically, the Director determined that since the Petitioner filed the petition in 2019, before the COVID-19 pandemic, the Petitioner's narrative about the COVID-19 related aspects of his endeavor encompassed issues that did not exist as of the petition's filing date, noting that the Petitioner must meet eligibility requirements at the time of filing the petition, not at a later date. 8 C.F.R. § 103.2(b)(1). On appeal, the Petitioner asserts:

> The services [the Petitioner] seeks to provide in the United States are grounded by the resources and operations of [the Petitioner's] foreign group of companies [which were] already in existence at the time of filing. [The Petitioner] seeks to bring to the United States services and products already developed by his group of companies in Brazil, while expanding operations in the United States for the development of new business solutions for the American market. [The Petitioner] used COVID-19 as an illustration of new technologies developed to service the needs of businesses during the pandemic. His argument for eligibility as meriting a national interest waiver was not based on the pandemic, as alleged by USCIS in the denial.

After carefully considering the evidence of record, we agree with the Petitioner that he did not specifically change his endeavor based solely on the implications of COVID-19. However, while the Petitioner initially provided evidence of S-'s incorporation in the United States in 2016, and the existence of his foreign companies as evidence of his qualifying work experience for EB-2 classification purposes, his initial descriptions of the proposed endeavor did not include plans to operate and expand S-'s business operations in the U.S. Instead, the Petitioner initially indicated that he would work with U.S. companies as a marketing manager by "designing marketing strategies" on their behalf, and "maintaining positive working relationships with peers to facilitate" their growth. He also indicated that he would provide consulting services to U.S. companies and investors who wish to develop cross-border projects in Brazil and other Latin America markets, focusing on "helping U.S. companies seize new business and investment opportunities in Brazil and Latin America."

We therefore agree with the Director that the Petitioner's revised plan to market his foreign company's COVID-19 related kiosk equipment through his U.S. company presented after the filing date cannot

retroactively establish eligibility. Notably, S-'s business plan forecasts that the sale and rental of these products will account for a large part of S-'s revenues in the coming years. For instance, the business plan estimates that the sale and rental of the Covid-19 related kiosks will account for over $1,077,000 (56%) of its revenue during the one-year duration of "Phase 1" of the plan, and over $4,457,000 (29%) of its revenue during the three-year duration of "Phase 2" of the plan. Based on the evidence provided we conclude that the Petitioner impermissibly changed the substantive nature of his proposed endeavor after the filing of the petition. A petitioner may not make material changes to a petition that has already been filed to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *see also 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.

It appears the Petitioner sought to address the Director's concerns regarding what organization would utilize his marketing skills and how his services would rise to the level of national importance, but in so doing, he has significantly changed his proposed endeavor. Here, the Petitioner does not adequately explain how he would allocate his time between performing marketing management services (which was his initially stated endeavor), and his proposed activities newly presented in the RFE response and reiterated on appeal, such as providing entrepreneurial oversight over the expansion of his own U.S. business. Similarly, the Petitioner initially put forth statements suggesting that he would devote much of his endeavor to "facilitating business operations of U.S. corporations and U.S. investors interested in making investments and developing productive relationships in the Brazilian and Latin American markets." While the Petitioner provides narrative in the RFE response and on appeal alluding to his intention to pursue these activities, the Petitioner does not sufficiently explain how he intends to provide these consulting services either within the context of S-'s business operations, or through some other means.

Accordingly, we conclude that both the focus of his endeavor as well as his field of endeavor have materially changed. 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. 8 C.F.R. § 103.2(b)(1). For these reasons, the petition may not be approved.

Moreover, even if the Petitioner had presented his plans to expand his U.S. business at the time of filing, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of this endeavor under the first prong of the *Dhanasar* analytical framework. In denying the petition, the Director concluded that the Petitioner had not demonstrated the national importance of his particular proposed endeavor, as the Petitioner's evidence did not show that his proposed work through S-'s operations would have broader implications at a level indicative of national importance.

The business plan provides a hiring plan for years one through five of operation "after [S-'s] incorporation," which forecasts that in year one it will hire 38 employees, and that employment will increase to 486 employees in year five, "generating a total payment of $6,901,015" in wages during the first five years of S-'s operation. As noted, the Petitioner incorporated S- in 2016, but he has not provided corroborative evidence, such as tax returns and payrolls records to substantiate the current number of individuals that S- employs. While the Petitioner emphasizes on appeal that he intends to make the expansion of S-'s business operations the focal point of his proposed endeavor, the evidence

of record does not sufficiently illuminate the nature of S-'s historical business operations, such that we can determine the manner in which its expansion will prospectively impact the United States.

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement we look to evidence documenting the "potential prospective impact" of his work. Although the Petitioner's statements reflect his intention to operate a business that will provide valuable Covid-related health screening devices and marketing services to his clients, he has not offered sufficient information and evidence to demonstrate that the prospective impact of his proposed endeavor rises to the level of national importance. In *Dhanasar* we determined 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. Here, we conclude the record does not show that the Petitioner's proposed endeavor stands to sufficiently extend beyond his business and its clientele to impact U.S. businesses or the U.S. economy more broadly at a level commensurate with national importance.

Because the documentation in the record does not establish the national importance of his proposed endeavor as required by the first prong of the *Dhanasar* precedent decision, the Petitioner has not demonstrated eligibility for a national interest waiver. Further analysis of his eligibility under the third prong outlined in *Dhanasar*, therefore, would serve no meaningful purpose. It is unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976); *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 he has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.