U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27366204

Date: JUL.07, 2023

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, a dietician, seeks classification as a member of the professions holding an advanced degree or of exceptional ability, Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this employment based second preference (EB-2) classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so. *See Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that a waiver of the required job offer, and thus of a labor certification, would be in the national interest. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petition 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.

Whilst 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). *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has

both substantial merit and national importance, (2) 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 the noncitizen 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, progress towards achieving the proposed endeavor, and the interest of potential customers, users, investors, or other relevant entities or individuals are also key considerations.

The third prong requires the petitioner to demonstrate that, on balance of applicable factors, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. USCIS may evaluate factors such as whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen to secure a job offer or for the petition 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. Each of the factors 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.

II. ANALYSIS

The Director observed that the Petitioner was eligible for EB-2 classification as an individual who is a member of the professions holding an advanced degree. But the Director ultimately concluded that the Petitioner's substantially meritorious proposed endeavor did not rise to a level of national importance as required by the first prong of *Dhanasar*. The Director also determined that the Petitioner was not well positioned to advance their proposed endeavor. And the Director concluded that on balance of applicable factors, a waiver of the requirement of a job offer, and thus a labor certification, would not be beneficial to the national interest.

On appeal, the Petitioner contends that the Director erroneously denied the petition under the preponderance of the evidence standard and instead imposed "novel substantive and evidentiary requirements beyond those set forth in the regulations." The Petitioner specifically assigned error alleging that the Director did not "give due regard" to the business plan, "definitive statement," letters of recommendation, and industry report and articles they submitted into the record. They state on appeal that the evidence they submitted in the record prior to and at appeal demonstrated that the Petitioner meets all three prongs under the *Dhanasar* framework and merits a discretionary waiver of the job offer, and thus the labor certification, in the national interest.

The Petitioner described their endeavor as a "dietician and nutritionist" who would "plan and conduct food service or nutritional programs to assist in the promotion of health and control of disease." Specifically, as described in their statements and their business plan, they would work "in the area of nutrition, specializing in nutrition, dietetics, nutritional education, institutional plans, strategic planning, entrepreneurship, lecturing and writing, food production, business management, and leadership." In support they submitted their professional plan and statement, resume, educational documents, industry reports and articles, work experience letters, recommendation letters, expert opinion letter, professional licensure, recognitions, and documentation to support the existence of a shortage of dietitians and nutritionists.[1]

The Director issued a request for evidence (RFE) to provide the Petitioner an opportunity to submit additional evidence to establish eligibility for a waiver of the job offer requirement, and thus of a labor certification, under the *Dhanasar* analytical framework. In response to the Director's RFE, the Petitioner submitted their "definitive statement" and a business plan in addition to resubmitting and updating materials initially submitted with their petition. The Petitioner elaborated that the thrust of their proposed endeavor was the provision of "nutritional services" through their future U.S. company [redacted] The Petitioner intended, by and through their future U.S. company to "offer [their] specialized research and services to U.S. citizens that wish to improve their overall health" through nutrition services. As an additional benefit, the Petitioner identified prioritization of the "domestic job market by employing American workers" in their proposed endeavor. The Petitioner's endeavor would essentially be a "nutrition clinic" based in a Small Business Administration (SBA) HubZone in [redacted] Florida, wherein individuals would engage with the Petitioner to receive nutritional counseling, healthy recipes, and supplements to support sleep, metabolism, and energy. The Petitioner stated that the endeavor served both "social and economic needs" because of an obesity crisis in United States adults and children. The Petitioner's endeavor would employ a two-part approach to their endeavor; education and the development of a line of natural supplement products.

To satisfy the first prong under the *Dhanasar* analytical framework, the Petitioner must demonstrate that their proposed endeavor has both substantial merit and national importance. The first prong focuses on the specific endeavor that the individual proposes to undertake. As stated above, the endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. The record, which contains the Petitioner's initial statement, definitive statement submitted with the RFE response, business plan, various reports, and articles, supports the Director's determination that the Petitioner's proposed endeavor to develop a nutritional services firm in Florida was substantially meritorious.

The Director concluded that the record did not demonstrate the Petitioner's proposed endeavor's national importance. In determining national importance, the focus is not on the importance of the industry in which the petitioner will work or even their past success. The focus is on "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec.at 889. In *Dhanasar* we said that "we look for broader implications." Broader implications are not necessarily geographically evaluated; implications within a field which demonstrate a national or even international influence of broader scale can rise to a level of national importance. And substantial

[1] While we may not discuss every document submitted, we have reviewed and considered each one.

positive economic impacts, such as a significant potential to employ U.S. workers particularly in an economically depressed area, can also help a proposed endeavor rise to a level of national importance.

The Petitioner stated that adults and children in the United States are currently experiencing an obesity epidemic. The Petitioner contends that their proposed endeavor providing nutritional services "is national in scope and will have broader implications" in the field "due to the ripple effects" of the endeavor's work with individuals seeking their services. The Petitioner states that their endeavor "will impact more than just [their] served individuals, and instead has the potential to reach the families and affiliates of said individuals, based on [their] guidance and practices" nationally and internationally. But the record does not adequately reflect by a preponderance of the evidence with material, relevant, or probative evidence how the Petitioner's nutritional services implicate broader considerations outside the immediate circle of those individuals and entities that have engaged the Petitioner for their services. The evidence does not sufficiently describe how the Petitioner's benefits of positively impacting the health and wellness of their individual clients would expand beyond the circle of those individuals to impact matters rising to a level of national importance.

As mentioned above, the Petitioner's endeavor would employ a two-part approach: education and the development of a line of natural supplement products. One of the two approaches identified by the Petitioner to proliferate their proposed endeavor was "education." The Petitioner intended to proliferate their knowledge of healthy nutritional practices through their website and their social network accounts on YouTube, TikTok, and Instagram. They intended to provide educational content to improve nutrition in adults and children. Essentially, the Petitioner intended to teach good nutritional habits to adults and children through various social media portals. We have previously stated in *Dhanasar* that teaching activities did not rise to a level of having national importance because teaching activities do not have an impact on a specific field more broadly. *Dhanasar* at 893. Based on the documentation and evidence that the Petitioner has submitted they have not shown that their proposed endeavor will sufficiently extend beyond the individual adults and children with obesity that the Petitioner targets in the [ ] Florida SBA HubZone.

The second of the Petitioner's two approaches, the development of a line of natural supplement products, similarly does not rise to a level of national importance. The impact of supplements ingested by an individual are experienced by that individual and do not impact a specific field more broadly. Whilst the evidence in the record does describe the nature and purpose of the supplements the Petitioner intends to develop, it does not demonstrate how the benefit of the supplements when ingested would impact the field in a manner of national importance. The record did not sufficiently demonstrate that the health benefits expected upon ingestion of the Petitioner's supplements would have broader implications on the field of endeavor rising to a level of national importance.

And the Petitioner's intention to base their company in a Small Business Administration (SBA) HUBZone does not elevate their endeavor's national importance. The HUBZone program's goal is to promote business growth in underutilized business zones with the goal of awarding 3% of federal contract dollars to companies that are HUBZone certified. Joining the HUBZone program makes a business eligible to compete for certain federal contracts in the "set-aside" category. There are several required qualifications to participate in the program, but the most dispositive requirement for purposes of our analysis is that the business seeking to participate in the HUBZone program must be at least 51% owned by U.S. citizens, a community development corporation, an agricultural cooperative, an

Alaska Native corporation, a Native Hawaiian organization, or an Indian tribe. Whilst it is unknown and the record is silent about what if any federal programs exist in the "set-aside" category for nutritional services companies like the one the Petitioner proposes, the record is crystal clear that the Petitioner's proposed endeavor would be wholly owned and controlled by the Petitioner and that the Petitioner is not a U.S. citizen, a community development corporation, an agricultural cooperative, an Alaska Native corporation, a Native Hawaiian organization, or an Indian tribe. So the fact that the Petitioner's proposed endeavor may be in a HUBZone at some point in the future is wholly irrelevant to whether the Petitioner's endeavor rose to a level of national importance.

USCIS may, in its discretion, use as advisory opinion statements from universities, professional organization, or other sources submitted in evidence as expert testimony. *See Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, the submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.* Moreover, letters from relevant third-party reviewers such as prospective investors, retailers, or other industry experts will generally be more persuasive to support the merits of an entrepreneur's business, business plan, product, or technology. The Petitioner commissioned a letter from [redacted] associate clinical professor of nutrition, [redacted] University. At the outset we observe that the letter's content lacks relevance when it comes to the evaluation of whether the Petitioner's business and services rise to the level of national importance. For example, in addressing the national importance of the Petitioner's endeavor, the writer discussed "opportunities in medical devices markets" in Latin America but did not explain how those opportunities relate or correspond to a nutritional services endeavor in the United States purporting to address obesity in adults and children. The letter overwhelmingly discusses the importance of the Petitioner's industry and occupation as well as the Petitioner's previous experiences. But this does not relate or correspond to the national importance of the Petitioner's proposed endeavor.[2] So the letter does not provide any meaningful analysis of the endeavor's broader implications or potential prospective economic impact rising to the level of national importance.

And whilst the Petitioner anticipates a hiring spree increasing their head count exponentially over five years and substantially increasing their expenditures on salary, it is not clear from the record how this job creation for the proposed endeavor itself would have a substantial prospective positive economic effect commensurate with national importance. The Petitioner stated that their endeavor "has significant potential to employ U.S. workers." Specifically the business plan anticipated that the endeavor would employ 38 employees generating over $580,0000 in tax revenue in five years of operation based on salary and over $16,200,000 based on sales tax revenue in the same period. But these aspirations did not demonstrate the national importance of the endeavor because they, whether realized or not, would not extend beyond the endeavor itself to have an impact on a level of national importance. The record also did not contain sufficient probative, material, or relevant evidence showing how the endeavor's hiring plan would influence the area's unemployment rate or how the endeavor's operations and revenue rose to a level of national importance.

The Petitioner has not met the first prong of the *Dhanasar* analytical framework. So we find that they have not established that they are eligible for or otherwise merit a national interest waiver as a matter

[2] Much of the documentation the Petitioner has submitted focuses on their individual accomplishments and expertise when attesting to the national importance and substantial merit of the proposed endeavor. It is important to note that the Petitioner's accomplishments and expertise are more relevant to the second prong of *Dhanasar*, which "shifts the focus from the proposed endeavor to the foreign national." *Dhanasar* at 889.

of discretion. And we need not reach a decision on whether, as a matter of discretion, the Petitioner is eligible for or otherwise merits a national interest waiver under the remaining prongs of the *Dhanasar* analytical framework. Accordingly, we reserve these issues. *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 alternate issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *also see* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). The Petitioner has not met their burden of proof with persuasive material, relevant, and probative evidence which by a preponderance demonstrates the national importance of their proposed endeavor. So their appeal must be dismissed.

ORDER: The appeal is dismissed.