U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25672545

Date: JUN. 08, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a management consultant, seeks classification as a member of the professions holding an advanced degree or of exceptional ability. *See* 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) immigrant 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.

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. 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. LEGAL FRAMEWORK

To establish eligibility for a national interest waiver, a petition must first demonstrate qualification for the underlying EB-2 immigrant classification as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act.

The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." To demonstrate exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

And 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

A. Categorical Ineligibility for EB-2 Classification

In the first instance, we find that the Petitioner has not provided relevant, material, or probative evidence to demonstrate their categorical eligibility for classification as an EB-2 immigrant. The Petitioner attests that they are eligible for EB-2 classification as a noncitizen of exceptional ability. In support they presented evidence of their completion of a course in business administration from a foreign institution, ten years of full-time experience in the field, membership in a professional organization, and recognition in their field through the receipt of "awards."[1]

The Petitioner has not presented evidence of an official academic record showing their degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to their area of exceptional ability. A petitioner must file a benefit request such as this immigrant petition with all required initial evidence. *See 8* C.F.R. § 103.2(b)(1). When seeking classification as a noncitizen of exceptional ability, an official academic record showing receipt of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability is mandatory. The record at present contains a translation of what the Petitioner purports to be their educational credential. The regulation at 8 C.F.R. § 103.2(b)(3) requires that any document containing a foreign language be accompanied by a full English translation and the translator's certification that they are competent to translate the foreign language into English. But here the original foreign language document is not present. Nor is it clear that the educational credential the translation purports to be a true and accurate English version of is an official academic record of a degree, diploma, certificate, or similar award. And it is not readily apparent whether the foreign institution listed in the unsupported translation is in fact a college, university, school, or other institution of learning as required by the regulations.[2]

Also, the recommendation letters submitted by the Petitioner are not sufficiently material, relevant, or probative to the question of whether the Petitioner has the required ten years of full-time experience in the field. The regulations at 8 C.F.R. § 204.5(g)(1) require that "letter(s) from current or former employer(s) or trainer(s)" include "the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received." The letters submitted by the Petitioner do not appear to have been written by former employers or representatives of former employers. They are not on the former employers' letterhead. Experience letters are required initial evidence pursuant

[1] The Petitioner has demonstrated by a preponderance of the evidence that they meet the criteria contained at 8 C.F.R. § 204.5(k)(3)(ii)(E).

[2] Since provision of this missing initial evidence would not have any beneficial effect on the disposition of the Petitioner's requested benefit, we will not request it prior to rendering our decision.

to the regulations. *See* 8 C.F.R. § 204.5(g)(1). When required evidence is missing or unavailable, the regulations permit the submission of secondary evidence upon a demonstration of nonexistence or unavailability. *See* 8 C.F.R. § 103.2(b)(2)(i). There is no evidence in the record addressing the unavailability of experience letters in the manner specified in the regulations. Moreover, even if the experience letters were compliant with the regulations, the duties ascribed to be performed by the Petitioner were not performed in the management consultant occupation that the Petitioner identifies as their proposed endeavor.

The Petitioner presents evidence of awards they have earned over the course of their career. But there is no context provided for the awards reflecting whether the awards represent achievements or significant contributions in the proposed endeavor's field. In fact, in the Petitioner's own words, the awards are for "his contributions to the companies he served" and not from peers, government entities, professional, or business organizations in recognition of achievements and significant contributions to the industry or field. So the evidence does not demonstrate the Petitioner's eligibility under the regulatory criteria.

The Petitioner has established eligibility in only one of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). They cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). So we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. The Petitioner is ineligible for the EB-2 immigrant classification as a noncitizen of exceptional ability.

B. Eligibility for Discretionary Waiver of the Job Offer Requirement and thus of a Labor Certification

Ordinarily, only after determining the Petitioner's eligibility under the EB-2 category can the Director proceed to determine whether a discretionary waiver of the job offer requirement, and thus a labor certification, is warranted. Section 203(b)(2)(B)(i) of the Act. But since the Director's decision here made specific findings about the Petitioner's eligibility for a national interest waiver in their decision, we will discuss the Petitioner's ineligibility for a discretionary waiver of the job offer requirement, and thus of a labor certification, notwithstanding their categorical ineligibility for the EB-2 permanent immigrant classification.

The three-prong analytical framework in *Dhanasar* permits us to consider, as a matter of discretion, whether to grant a national interest waiver if a petitioner demonstrates that their proposed endeavor has both substantial merit and national importance; that they are well-positioned to advance their proposed endeavor; and on balance waiving the job offer requirement would benefit the United States.

The Director determined that the Petitioner's proposed endeavor had substantial merit. But the Director concluded that the proposed endeavor did not have the required national importance to meet the first prong of the *Dhanasar* framework. We agree.

In *Dhanasar* we focused the first prong of our analysis on the potential impact of a Petitioner's specific proposed endeavor to consider its national importance. The national importance of an endeavor is rooted in its potential impact and whether it has national or global implications within the field of endeavor. The broader implications, national and/or international, can inform us of the proposed endeavor's national importance. That is not to say that the implications are viewed solely through a

geographical lens. Broader implications can reach beyond a particular proposed endeavor's geographical locus and focus. The relevant inquiry is whether the broader implications apply beyond just narrowly conferring the proposed endeavor's benefit. And substantial positive economic effects can also elevate a proposed endeavor to one of national importance, for example when those effects have significant potential to employ U.S. workers or other positive economic effects particularly in an economically depressed area.

The Petitioner's endeavor proposes to provide their management consulting services providing marketing, sales, and personnel training advice to retail businesses in the State of Florida. Specifically, the Petitioner will provide "marketing and sales solutions tailored to each client's requirements" by performing "services to businesses" such as "point of sale marketing," "personnel training," and "marketing and sales strategic planning." Essentially, the Petitioner aims to "serve as a one-stop shop for all marketing and sales consulting-related services." The Petitioner's endeavor is in the State of Florida and will target small and medium businesses in the brick-and-mortar retail sector attempting to overcome the growth of e-commerce.

In support of their claims regarding the proposed endeavor's broader implications and potential prospective economic impact, the Petitioner submitted their business plan, a personal statement, letters purporting to be written by experts in the management consulting field, and management consulting/marketing industry reports.

From the outset, the Petitioner's business plan couches their endeavor in terms of targeting their services to individual "businesses" and "clients" specifically in the State of Florida. The Petitioner's personal statement refers to these individual "businesses" and "clients" under the category of "small businesses." The record contains documentation reflecting the prevalence of small and medium-size business in the United States. The Petitioner highlights the pandemic as well as the growth in e-commerce as explanations for a downward sales trend for small businesses in the retail sector and points to management consulting as a service through which these troubles can be addressed on the road back to profitability or net positive operations. The business plan states that the Petitioner's service will benefit the "overall U.S. economy" by "create[ing] a qualified workforce" and "employment opportunities."

The Petitioner essentially argues that the ripples of their management consulting work with small businesses in the State of Florida will have broader implications rising to a level of national importance. However, the Petitioner does not connect their work in the State of Florida to any broader implications to the field outside of the work they are specifically doing in the State of Florida. As we said above, it is not required that the benefit of the Petitioner's proposed endeavor extend beyond the State of Florida's geographical bounds. Broader implications can reach beyond a particular proposed endeavor's geographical locus and focus. But the relevant inquiry is whether the broader implications apply beyond just narrowly conferring the proposed endeavor's benefit. The Petitioner has not demonstrated how conferring the benefit to their clients grows beyond their clients alone, who are overwhelmingly based in the State of Florida.

The Petitioner argues that the services of management consultants will help small and medium sized business compete better, serve their customers better, grow their staffing, pay greater taxes, and thereby strengthen the U.S. economy. The Petitioner's plan, in summary, provides "marketing and

sales solutions tailored to each client's requirements" by performing "services to businesses" such as "point of sale marketing," "personnel training," and "marketing and sales strategic planning" to increase their emphasis on customer service both in marketing as well as business operations for their longevity and sustainability. But other than describing a potential to raise the marketability of individual clients who have engaged the Petitioner and their business for their advice, the Petitioner's business plan does not sufficiently demonstrate the potential prospective economic impact of the Petitioner's proposed endeavor to their field at large. The Petitioner's business plan also does not clearly demonstrate how improving the customer service of small businesses in the State of Florida connects to broader implications in the world of small businesses at large rising to a level of national importance.

And whilst the Petitioner anticipates a hiring spree doubling their head count and nearly doubling 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 Director issued a request for evidence (RFE) advising the Petitioner that they would need to provide additional evidence addressing the national importance of the proposed endeavor. In response, the Petitioner provided two letters purportedly written by experts in the field of management consulting and submitted several letters from entities that engaged the Petitioner's services. [3]

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 letters submitted by the Petitioner were specifically commissioned for purposes of these proceedings and not contemporaneously with the Petitioner's business operations addressing the merits of the entrepreneurial endeavor. Moreover, the letters' authors are not industry experts. One is an accounting professor, and the other is a marketing professor; neither appears to be an expert in the Petitioner's proposed endeavor of management consulting. Both describe in nearly identical terms that they have "extensive experience reviewing the academic and professional credentials of international applications, students, and prospective faculty" at their respective employers. The record does not make clear how their experience and individual qualifications render these writers industry experts such that their opinions could shed light on the endeavor's national importance. Setting aside the authors' credentials, we observe that much of the letters' 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, both letters overwhelmingly discuss the importance of the Petitioner's industry and occupation as well as the Petitioner's previous experiences. Neither provides any meaningful analysis of the endeavor's broader implications or potential prospective economic impact rising to the level of national importance. Similarly, the letters from entities that engaged the Petitioner's services do not

[3] The Petitioner's appeal repeats their previous arguments and largely resubmits previously submitted evidence.

describe how the benefits they have received connect to broader implications rising to national importance or any nationally important economic impact.[4]

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.

III. CONCLUSION

Because the identified reasons are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the remaining *Dhanasar* prongs. *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).

The Petitioner is not eligible for EB-2 classification as an immigrant of exceptional ability. And they have not met the requisite first prong of the *Dhanasar* analytical framework. So we conclude that they have not established that they are eligible for or otherwise merit a national interest waiver of the job offer requirement, and thus of a labor certification. Accordingly the appeal will be dismissed.

ORDER: The appeal is dismissed

[4] 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.