U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28083317

Date: SEP. 20, 2022

Appeal of Texas Service Center Decision

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

The Petitioner, a business consultant, 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. 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 the Petitioner had not established eligibility for 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility for a national interest waiver, petitioners must 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. Section 203(b)(2)(B)(i) of the Act. In addition, petitioners must show the merit of a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver if:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

[1] *See also 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).

II. ANALYSIS

The Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. The sole issue to be determined in this appeal is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. The petition was filed on April 26, 2022; therefore, the Petitioner must establish that he is eligible for a national interest waiver as of that date. 8 C.F.R. § 103.2(b)(1).

As a preliminary matter, the Petitioner through counsel objects that the Director's request for evidence (RFE) did not detail every aspect of the determinations that she ultimately made in her denial when she concluded that he was ineligible for a national interest waiver. He asserts that the Director's RFE "appear[ed] to entirely depend on the perceived lack of a record of success or progress [in the endeavor] within the initial petition while primarily ignoring the other two [prongs] set forth in the *Dhanasar* decision. . . . the fact that these issues were first presented in the [denial] without providing the Petitioner due opportunity and fairness to rectify the perceived discrepancies in the evidence submitted with the initial filing [served] to the direct disadvantage of the Petitioner, and manifests as a critical error in the adjudicatory process for this case."

We carefully reviewed the evidence of record as well as the Director's RFE notice and conclude that the Petitioners assertions in this regard are misplaced. The Director explained in the RFE that while the Petitioner's endeavor has substantial merit, the evidence did not establish (1) that the work he proposes to do within his endeavor in the United States is of national importance, (2) that he is well positioned to advance his proposed endeavor, or (3) that on balance, it would be in the national interest of the United States to waive the requirements of a job offer, and thus of the labor certification. *Dhanasar, supra.* The Director discussed the deficiencies in the evidence initially provided, including the Petitioner's reference letters, his stated intentions about establishing a consulting business to pursue his proposed endeavor, his educational credentials and experiential history, and the consulting services that he intends to provide to companies in the United States. She also provided a lengthy, non-exhaustive list of documentation that the Petitioner could submit in his RFE response to establish that he merits a national interest waiver.

Furthermore, the regulation at 8 C.F.R. § 103.2(b)(8) permits the Director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the Director. Even if the Director had erred as a procedural matter, which she did not, it is not clear what remedy would be appropriate beyond the appeal process itself, which provided the Petitioner an opportunity to supplement the record and establish that he is eligible for a national interest waiver. While the Petitioner has submitted a brief, he has not supplemented the record with new evidence on appeal.

The Petitioner through counsel further asserts that the Director "failed to review the totality of the evidence presented and abide by the requisite standard of review" in denying the petition. Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing immigration benefit requests. *See Matter of Chawathe, 25 I&N Dec. at 375; see also Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Soo Hoo*, 11 I&N Dec. 151, 152 (BIA 1965). Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions. *See* 1 *USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-

manual. While counsel asserts on appeal that the Petitioner has provided evidence sufficient to demonstrate his eligibility for a national interest waiver, counsel does not sufficiently explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. The Petitioner has not sufficiently done so here. While we acknowledge counsel's arguments that the Director erred by imposing an improper stand of proof in analyzing the Petitioner's eligibility, without more, we will not further consider the Petitioner's arguments in this regard.

The Petitioner similarly contends that the Director ignored substantial evidence submitted in support of his petition and as a result did not reach a proper conclusion in denying his national interest waiver request. We incorporate our discussion above regarding the Director's explanations about the deficiencies in the initially submitted evidence and note that she provided similar discussion about the evidence submitted in the RFE response. The record does not reflect that the Director ignored evidence in analyzing the eligibility factors in this case, either in the RFE or denial.

However, we do agree with the Petitioner that the reasoning used by the Director in the denial is confusing when addressing certain aspects of this case. For instance, the Director incorporated her analysis of the evidence regarding the proposed endeavor's national importance within her discussion examining why the Petitioner had not established that he is well-positioned to advance the endeavor. In doing so, the Director came to conclusions that appear to conflate the evidentiary requirements for the distinct prongs within the *Dhanasar* framework.

The Director also offered conflicting statements regarding whether the Petitioner's proposed endeavor is of national importance under *Dhanasar's* first prong. First, she concluded in the denial that the proposed endeavor has both substantial merit and national importance. Later, she discussed the submitted evidence and determined that while the proposed endeavor has substantial merit, the Petitioner's did not show that his work therein has national importance. When denying a petition, the Director must fully explain the reasons for denial to allow the Petitioner a fair opportunity to contest the decision and provide the AAO an opportunity for meaningful appellate review. *Cf. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that the reasons for denying a motion must be clear to allow the affected party a meaningful opportunity to challenge the determination on appeal).

Because the Director presented confusing analysis and conflicting statements in her denial, we are remanding the case to the Director for further review and to provide an accurate and sufficient explanation of the grounds of denial regarding the evidence in this particular case so that the Petitioner more fully understands the Director's concerns. If the Director's determinations on remand are dispositive, she should clearly explain why the Petitioner does not qualify for a national interest waiver by separately analyzing the submitted evidence as it relates to each prong under the *Dhanasar* framework.

1. Substantial Merit and National Importance of the Proposed Endeavor

The first *Dhanasar* prong focuses on the specific endeavor that the Petitioner proposes to undertake. On appeal, the Petitioner asserts that the Director "conceded" that his proposed endeavor is of national importance in her denial. As discussed above, the Director presented conflicting conclusions regarding whether the Petitioner's proposed endeavor met the national importance requirement. The Petitioner also contends on appeal that "[t]he totality of the evidence and arguments presented across the initial petition, RFE response, and the instant appeal demonstrate that the Petitioner's endeavor has both substantial merit and national importance."

The Petitioner initally indicated that his proposed endeavor "will provide financial and technological consulting and advisory services to small and medium sized businesses, using Electric Data Exchange (EDI), to assist in their growth and development." He asserted that through his consulting services, his proposed endeavor "will advance the economy, technology, and employment, in furtherance of U.S. interests in a sustainable economy and post-pandemic economic recovery." He referenced an article he submitted from International Business Machines Corporation (IBM) which explains what EDI is, in part, as follows:

> EDI stands for electronic data exchange, and is the intercompany communication of business documents in a standard format [which] replaces paper-based documents, such as purchase orders or invoices. By automating paper-based transactions, organizations can save time and eliminate costly errors caused by manual processing.

In his initial personal statement he indicated that he will commence his proposed endeavor by "[o]pening an LLC company, which allows me to offer my consulting services related to the identification and implementation of business processes through the use of the EDI standard, as well as how to provide solutions that adapt to the needs of companies. . ." He submitted the articles of organization for his company [E-], which shows that E- was registered in [redacted] 2022 as a limited liability company in Florida. He further explained that he will initially be the only person employed by his consulting company, but that he has "a vision of hiring staff to service the local market that I am focusing on, the city of [redacted] since it has many commercial companies with import and export capacities, as well as many other companies, who are working every day to improve their processes and reduce their costs."

In response to the Director's RFE, the Petitioner provided a statement discussing his academic achievements and employment history, noting that he holds a bachelor's degree in computerized accounting, a master's degree in business administration, and has worked for fifteen years in various capacities in positions with job titles such as ecommerce coordinator, electronic catalog (data pool) coordinator, and senior application integration specialist. He emphasized that he has "worked in a global company [D-], where the EDI ANSI X12 standard is handled, [explaining that] ANSI (American National Standards Institute) is a method of coding data to facilitate EDI." He outlined some of the EDI-related projects that he worked on while employed by D-, noting among other things:

> [I]n 2006, I came to [D-], to help them standardize their IT processes related to EDI, and make use of all the experience acquired in the role of Team Lead Application Integration & Software Engineer EDI, to improve the [o]rder to case process, as well of the backlog of customers waiting to be added in the EDI standardization process. I

had the opportunity to reduce costs at the level of the applications used to do EDI and e-commerce, being able to use application integration techniques for EDI, achieving a reduction in the cost of operations in EDI, for more than $200,000 per year, which allowed me to lead the EDI team. . . . [I] was able to consolidate the EDI process into a single robust application [redacted] that could work for all existing edges within the business, without putting it at risk, in order to help in reducing the cost of activities related to the sale of products, as well as improving business relationships with retailers, brokers, banks, etc.

. . . .

[W]here I can help nationally within the United States [is] to provide all my knowledge on EDI and application integrations, to help minority business to get connected [through] EDI to any other business, helping them to reduce costs and make them more profitable. At the same time, by promoting this data strategy in the state of Florida, where I'm residing right now, I will be helping businesses to get connected and to comply with the data strategy to enable more efficient data access and analysis by given the tools and knowledge to help them to be more competitive and to reduce cost and make them more profitable.

The petition is supported by evidence detailing the benefits of EDI and its impact on commercial business processes; articles and reports about the empowerment of small and medium businesses through process improvements in the U.S., and the importance of entrepreneurship to our nation. The record therefore shows that the Petitioner's proposed endeavor which involves his work as an EDI business consultant has substantial merit. However, our de novo review of the record - including the Petitioner's brief submitted on appeal, raises important questions regarding whether the submitted evidence is sufficient to demonstrate that the Petitioner's proposed endeavor has national importance under *Dhanasar's* first prong. While we may not discuss every document submitted, we have reviewed and considered each one.

Regarding his claim of eligibility under *Dhanasar*'s first prong, the Petitioner submitted "personal plans" reflecting his intention to offer his business consulting services to U.S. businesses, as an independent consultant with his own consulting firm. He provided evidence, such as his academic credentials, training certificates, his resume, and letters from colleagues and his former employer to establish that he is trained and experienced in performing these services.

Turning to the reference letters, we observe that the letter authors outline the Petitioner's work accomplishments and put forth general statements that assert his services would be beneficial to the United States, but they do not address the national importance of his proposed endeavor. For instance, the Petitioner provided letters from colleagues and managers who worked with him on D-'s EDI projects. E-L-, the Petitioner's former manager at D- discusses the EDI-related tasks that the Petitioner performed for D-, and opines:

Due to [the Petitioner's] adaptability to new challenging environments, problem solving, quality delivering tasks, attention to details, analytical thinking, teamwork, and collaboration skills, I firmly believe that [his] exceptional abilities and substantial

> experience (both professional and educational) is at the top of his field and will substantially contribute to the continuing development of the United States. [He] will be able to help any company to standardize their internal processes, along with his ability to manage the EDI standard, which is very used in the United States. . . . I firmly believe his extraordinary talent will greatly benefit [the U.S.].

Notably, the Petitioner also provided letters from T-P- and V-V-, who worked with him on his EDI-related projects at D-. All three authors provided similar discussion about the tasks that the Petitioner performed for D-, then concluded their letters with the text from E-L-'s letter that we quote above. As a general concept, when a petitioner has provided material from different persons, but the language and structure contained within it is notably similar, the trier of fact may treat those similarities as a basis for questioning whether they sufficiently corroborate a petitioner's claims.[2] When letters contain such similarities, it is reasonable to infer that the petitioner who submitted the strikingly similar documents is the actual source from where the similarities derive.[3] When considered in the overall context, these striking similarities raise unanswered concerns regarding the credibility and probative value of these letters. The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, we note that the authors provide statements regarding the Petitioner's "exceptional abilities," his "attention to detail" and his "substantial experience" in the occupation that encompasses his proposed endeavor. They also allude to his ability to offer EDI services that are already "very" used in the United States, but they do not discuss or analyze the national importance of the specific endeavor in which the Petitioner will be engaged, should this petition be approved.

Similarly, the Petitioner has submitted other reference letters, including one from M-G-, D-'s human resource manager, who details the duties that he was tasked with at D-, and indicates that he possesses the same "skills" mentioned by his other work colleagues including "problem solving" and "adaptability to new and challenging environments." The letter from C-B-, another work colleague from D-, identifies the goals that the Petitioner helped D- reach, such as "improving port loads visibility [and] reporting capabilities." He notes that "loyalty, commitment, and creative thinking are words that define [the Petitioner] very well, and his honesty and responsibility are highly appreciated." While the letter writers hold the Petitioner in high regard, the submitted letters do not appear to provide sufficient information regarding the specific endeavor that the Petitioner will engage in or explain the national importance of his proposed work under *Dhanasar's* first prong.

In summary, the authors of these letters praise the Petitioner's skills, abilities and performance as an employee focused on EDI business process improvements during his tenure with D-. While important, the Petitioner's expertise acquired through his employment relates to the second prong of the *Dhanasar* framework, which "shifts the focus from the proposed endeavor to the foreign national." *Id.* The issue here is whether the specific endeavor the Petitioner proposes to undertake has national importance under *Dhanasar's* first prong. While we do not doubt that the Petitioner was a valued and high-performing employee during his employment with D-, the letters do not appear to sufficiently

[2] *Cf. Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006).
[3] *Cf. Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007).

illustrate how the Petitioner's specific endeavor in the United States will have national implications. It is the Petitioner's burden to prove by a preponderance of evidence that he is eligible for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. at 376. In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* The Director should consider whether this evidence adequately supports the Petitioner's contention that his proposed endeavor is of national importance.

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement under the *Dhanasar* framework, we look to evidence documenting the "potential prospective impact" of his work. The Petitioner maintains that his proposed endeavor will provide EDI-related consulting services through E-. The Director asked the Petitioner to provide a detailed description of the proposed endeavor and to support his statements with documentary evidence. She also requested a detailed business model or plan explaining how the Petitioner intends to continue his work in the United States. However, based on our review of the record, it appears that the Petitioner did not sufficiently address this aspect.

In the RFE response, he contends he will be "be able to help small and medum-sized companies in the United States, to adopt the EDI standard, and to improve all their internal processes. . ." But, the documentary evidence provided about how E- will operate, and the mechanisms through which E- will offer EDI-related services to its clients appears to be limited to E-'s January 2022 LLC registration with Florida, and a letter from one business owner indicating that he "foresee[s] employing [the Petitioner's] skills for our EDI implementation." The Petitioner did not provide a detailed description explaining *how* he will offer EDI-related services through E-, supported by documentary evidence as requested by the Director in the RFE. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

The Petitioner asserts that he will continue his career providing EDI-related services, and that he has years of work experience doing so. He also presents evidence that suggests that the field of EDI development is well established in the United States and elsewhere, such as the IBM article. But he does not explain how the provision of his services through E- will broadly impact the EDI-related field of endeavor in the U.S. 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. The Director should consider whether the Petitioner has offered sufficient information and evidence to demonstrate that the prospective impact of his proposed endeavor rises to the level of national importance.

The Director should analyze the Petitioner's evidence to determine if his proposed endeavor will have significant national or global implications with respect to his prospective EDI-related services, significant potential to employ U.S. workers, or other considerable positive economic effects. If the Director concludes that the Petitioner's evidence does not meet the national importance requirement of *Dhanasar*'s first prong, the decision should discuss the insufficiencies in the evidence and adequately explain the reasons for ineligibility.

2. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the petitioner. We analyze whether the petitioner is well positioned to advance their proposed endeavor, and we look at several factors in making this determination. We consider factors including, but not limited to their 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. *Matter of Dhanasar,* 26 I&N Dec. at 890.

On remand, the Director should analyze the evidence to determine whether the record sufficiently demonstrates the Petitioner is well positioned to advance the proposed endeavor. The Director should articulate the basis for finding whether the evidence shows or fails to show that he is well positioned to advance his endeavor.

3. Balancing Factors to Determine Waiver's Benefit to the United States

As to the third prong of *Dhanasar,* the Director concluded that the Petitioner did not establish 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." On remand, if the Director concludes that the Petitioner does not meet *Dhanasar's* third prong, the decision should address the Petitioner's arguments and evidence, and explain the relative decisional weight given to each balancing factor.

III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to consider anew whether the Petitioner qualifies for a national interest waiver as a matter of discretion. The Director should properly apply all three prongs of the *Dhanasar* analytical framework to determine if the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. The Director may request any additional evidence considered pertinent to the new determination.

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