U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12459048

Date: JUNE 15, 2021

Appeal of Texas Service Center Decision

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

The Petitioner, a business executive, seeks classification as a member of the professions holding an advanced degree or, in the alternative, an individual of exceptional ability in the sciences, arts or business. *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 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 qualifies 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.

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. . . . [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.

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). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, USCIS may, as matter of discretion,[1] 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 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

[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).

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.[2]

II. ANALYSIS

The Director determined that the Petitioner qualifies as a member of the professions holding an advanced degree.[3] The remaining issue to be determined 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.

In Russia, the Petitioner worked for [redacted] companies and served as a [redacted] consultant. A licensed pilot, he flew recreationally and worked for a time as a helicopter pilot. The Petitioner has resided in the United States since 2015. He is a part owner of [redacted] which operates a flight school in Florida under the name [redacted] The Petitioner also incorporated several other apparently aviation-related companies, such as [redacted], and [redacted] but the record provides little information about the activities of these companies. The Petitioner served [redacted] first as its chief executive officer (CEO) and then as chief information officer (CIO).[4] As outlined below, we agree with the Director that the Petitioner has not sufficiently demonstrated eligibility for a national interest waiver under the *Dhanasar* analytical framework.

The Petitioner's proposed endeavor centers around his continued activities running [redacted] In response to a request for evidence, the Petitioner states that he "turned [redacted] into an industry leader in Florida, and he will continue to expand and grow [redacted] as the company's CIO." He asserts that his "proposed endeavor is executive in nature and has two main managerial objectives. First, he will manage and develop the aviation training program at [redacted] Second, he will also oversee and manage the development of an innovative training management software application."

A. Substantial Merit and National Importance of the Proposed Endeavor

For the reasons discussed below, we agree with the Director that the Petitioner has not sufficiently demonstrated the national importance of his proposed endeavor under the first prong of the *Dhanasar* analytical framework.[5]

The Petitioner asserts that he reversed [redacted]'s decline and turned it into a growing, profitable company, but the record does not show that the company's growth has had, or will have, an economic

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

[3] The Petitioner holds master's degrees in computer science from the [redacted] University, and in management from [redacted] University of Civil Aviation.

[4] The Petitioner states that he "joined [redacted] in April 2015 as the company's Chief Executive Officer." On Form G-325A, Biographic Information, the Petitioner states that he was "Unemployed" from May 2015 to March 2017, and became CEO of [redacted] in March 2017. USCIS records do not show that the Petitioner was authorized to work in the United States before 2017. [redacted] filed a nonimmigrant petition on the Petitioner's behalf in October 2015, seeking to classify him as an L-1 intracompany transferee; that petition was not approved until March 2017. [redacted] subsequently filed a nonimmigrant petition to classify the Beneficiary as an H-1B nonimmigrant.

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

impact that rises to the level of national importance. The Petitioner states that [redacted] has added jobs under his leadership, but the record does not show that the company has created a significant number of jobs. [redacted]'s 2016 tax return shows that the company paid $50,629 in salaries. Tax and payroll documents from 2017 show significant personnel turnover, with no more than six employees at any given time, and only three employees reported as receiving salaries in early December. A quarterly payroll report shows five employees during the first quarter of 2018, only three of whom earned amounts consistent with continuous, full-time employment. The record shows that the company relies on more contractors than employees, with few of them receiving payments commensurate with year-round, full-time work. Later submissions show three employees in 2019 and 2020, with contractors making up the bulk of [redacted]'s payroll.

On appeal, the Petitioner contends that he has significantly grown [redacted] adding 14 employees (mostly flight instructors) and 8 aircraft, and attracted "more than $1,000,000" in foreign capital. Setting aside the question of how many of these individuals are year-round employees rather than intermittent contractors, we note that, under section 203(b)(5) of the Act, an investment of $1,000,000 that creates 10 new jobs can qualify a foreign national for a fifth-preference immigrant classification. A comparable level of investment and job creation does not presumptively qualify a foreign national for benefits under a substantially higher-preference classification, along with an exemption from the job offer requirement that, by law, normally attaches to that classification.

A regional sales director for [redacted] states that the company has certified [redacted] as a [redacted] Training Center, and the Petitioner as a [redacted] Instructor Pilot. Whatever the aggregate impact of [redacted] training centers nationwide, the Petitioner has not shown that [redacted]'s individual participation in [redacted]'s program has national importance.

On appeal, the Petitioner states: "Consider that [redacted] is able to provide training in Airplanes and Helicopters, you can be sure that this company is completely unique and no one has the same level of service and set of available programs." The Petitioner cites no evidence to support what appears to be a claim that no other U.S. flight school offers training for both airplanes and helicopters. The Petitioner's vague and uncorroborated claims about the uniqueness of his own company have no evidentiary weight in this proceeding.

Some of the Petitioner's specific claims in this area concern credentials that his companies did not possess until after the filing date, such as certification "to train pilots for [redacted] airplanes," and some functions that the Petitioner did not claim or mention prior to the appeal. The purpose of an appeal is to establish error in the initial decision. *See* 8 C.F.R. § 103.3(a)(1)(v). If claims and evidence are never put before the Service Center Director, then the Director cannot have erred by failing to consider those claims and that evidence.

The above claim is one example of several ways in which the Petitioner's initial assertions about the nature of the proposed endeavor changed in response to the request for evidence, and again on appeal. Other modifications to the Petitioner's claims include the assertion that he created "an Air Operator [redacted]" which began operating in Florida in 2018, and therefore his family of companies can train pilots and then hire them, giving them experience to qualify them for later work with commercial airlines. The Petitioner provides little evidence about this facet of his businesses except to document the existence of companies other than [redacted]

In response to a request for evidence, the Petitioner added an element to his proposed endeavor which did not appear in his initial filing. Specifically, the Petitioner states that he will "manage the development of an aviation training software application" which "involves the development of software unique to the needs of aviation training schools." The Petitioner does not explain how this system would result in benefits of national importance. The Petitioner asserts that its systems "will give [redacted] a competitive advantage for recruiting students," which would not be the case if [redacted] made its software systems available to other flight schools. The Petitioner has not shown that it would be in the national interest (as opposed to [redacted]'s interest) for [redacted] to have "a competitive advantage" over other U.S. flight schools.

On appeal, the Petitioner states that the COVID-19 pandemic led him to "come up with a system of how to create and launch [redacted] . . . which can help pilots during this tough period." The Petitioner submits no evidence about this academy, and little information about it except its web address and the assertion that an unidentified "team . . . is working on this project now," "inviting [unnamed] professionals from industry to create their [redacted] courses."

The Petitioner's reliance on a significantly modified claim on appeal does not show that he met all eligibility requirements at the time of filing the petition as required by 8 C.F.R. § 103.2(b)(1). New facts cannot establish eligibility as of the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The Petitioner submits letters and a news article about a pilot shortage in the airline industry, but he also submits a report indicating that "[a]irline hiring is booming," "hiring in numbers not seen since the pre-9/11 era." The report indicated that the number of private pilots is declining, while the number of airline pilots had been steadily increasing, by thousands per year, since around 2010. The Petitioner does not establish that [redacted] trains enough new pilots to have a nationally significant effect on industry staffing trends.[6]

The record does not show that benefits to the regional or national economy resulting from the Petitioner's projects would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890. Also, 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 find the record does not show that the benefit from the Petitioner's proposed endeavor stands to sufficiently extend beyond his companies to impact the industry more broadly at a level commensurate with national importance. For all these reasons, the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework.

Since this issue is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the appellate arguments regarding the remaining issue, concerning whether, on balance, a waiver of the job offer requirement would be beneficial to the United States. *See INS v. Bagamasbad*, 429 U.S. 24,

[6] We note that, at the time of filing, [redacted] was certified to train private pilots, but its application for certification to train commercial pilots was still pending. Also, the Petitioner submits materials showing that many of [redacted]'s students are nonimmigrants, predominantly from Eastern Europe. Training foreign pilots who then return to their countries of origin does not alleviate a shortage of U.S. pilots. Rather, it reduces the number of training spots available to prospective U.S. pilots.

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

Because the Petitioner has not met the required first prong of the *Dhanasar* analytical framework, we conclude that he has not established eligibility for a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.