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POURSINA V. USCIS: FEDERAL COURTS MAY NOT HAVE LAST WORD IN REVIEWING A DENIAL OF A NATIONAL INTEREST WAIVER

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Filing lawsuits in federal court to challenge erroneous denials of visa petitions by USCIS have become more frequent. There is more of a shot at a reversal when a federal judge reviews a denial of the USICS. Under the Administration Procedures Act, a court must set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A). Seeking review in federal court under the APA is far more powerful that appealing a denial to the USCIS's Administrative Appeals Office, which seldom reverses denials. Sometimes, however, a challenge in federal court can get nixed if the court finds that it has no jurisdiction to review a discretionary decision under §242(a)(2)(B)(ii) of the Immigration and Nationality Act.

In *Poursina v. USCIS*, the plaintiff sadly found out that a federal court had no jurisdiction to review a denial of his request for a national interest waiver under the jurisdiction stripping §242(a)(2)(B)(ii) because the granting of a national interested waiver is inherently discretionary.

INA 242(a)(2)(B) is reproduced below in its entirety:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-
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> (i) any judgment regarding the granting of relief under section 212(h),

> 212(i), 240A, 240B, or 245, or
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> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a) of this title

The Ninth Circuit in *Poursina v. USCIS* relied on INA 242(a)(2)(B)(ii), which requires that Congress must specify n the statutory provision that the decision must be in the discretion of the Attorney General or Secretary of Homeland Security. At issue is whether Congress specified that the issuance of a national interest waiver under INA 203(b)(2)(1)(A) is a discretionary decision.

If a national interest waiver is granted, a foreign national can waive the employer's sponsorship through a labor certification in the employment-based second preference. Specifically, INA § 203(b)(2)(1)(A) states that the "Attorney General may, when the Attorney General deems to be in the national interest, waive the requirements….that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States." Note that under the Homeland Security Act of 2002, Congress transferred this authority from the Attorney General to the Secretary of Homeland Security.

INA § 203(b)(2)(1)(A) does not contain magic words such as "in the discretion of the Attorney General" to place it within the purview of the jurisdiction stripping provision. Still, the Ninth Circuit in *Poursina v. USCIS* opined that words like "may" and "deems it so" suggested some measure of judgment, and thus discretion on the part of the Attorney General (now the DHS Secretary) in granting a national interest waiver. Moreover, the Ninth Circuit was also enamored by the fact that the invocation of "national interest" inherently exudes deference to the Executive Branch, *See* *Webster v. Doe*, 486 U.S. 592 (1988), and further invokes broader economic and national security considerations that are firmly committed to the discretion of the Executive Branch, *See* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

But assuming the Ninth Circuit's logic was correct, even within a discretionary decision that may be immune from judicial review under INA 242(a)(2)(B)(ii), there may be purely legal questions that are non-discretionary. Indeed, the precedent decision of the Appeals Administrative Office in *Matter of Dhanasar* imposed such objective criteria that required the DHS Secretary to measure the

national interest claim under those criteria rather than through the exercise of unbridled discretion. A person seeking a national interest waiver mush show:

> (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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

Notwithstanding these criteria that are similar to other undisputable objective regulatory criteria in determining who is extraordinary under INA § 203(b)(1)(A) and 8 CFR § 204.5(h)(3)(i)-(x), the Ninth Circuit in *Poursina v. USCIS* strangely held they fell short of a legal standard, and the *Dhanasar* standards expressly reserved the issuance of the waiver "as a matter of discretion." But is there not always some discretion in all agency adjudications? Even under the extraordinary ability standard pursuant to §203(b)(1)(A) there is discretion in determining whether fulfillment of the evidentiary criteria under 8 CFR § 204.5(h)(3)(i)-(x) can survive a final merits determination. *See* *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Yet, courts have always assumed jurisdiction over appeals challenging denials under extraordinary ability standard.

One should therefore be able to argue that a federal court is not forever precluded from reviewing a denial of a national interest waiver. If for example the USCIS does not apply the *Dhanasar* standard whatsoever in a future case, would that then pose a purely legal question or will a court, following *Poursina v. USCIS*, throw out the case under INA 242(a)(2)(B)(ii)? In fact, with respect to a denial of Poursina's second national interest waiver, Poursina claimed that he never received a request for evidence. The Ninth Circuit ultimately shot down that claim on the grounds that Poursina did not update his address with USCIS in time, but agreed that a constitutional claim, such as this, is not subject to INA §242(a)(2)(b)(ii)'s jurisdictional bar.

One Third Circuit case, *Pinho v. Gonzales*, 422 F.3d 193 (3d Cir. 2005) is especially noteworthy and discussed in David Isaacson's blog. Pinho's adjustment of status application was denied because he was found to be ineligible as a result of a disqualifying conviction. However, that conviction was vacated and the charges were dismissed, but the adjustment application was still erroneously

denied on the ground that his vacated guilty plea still met the definition of "conviction" under the INA. Pinho was not placed in removal proceedings and he sought review of the denial of his adjustment of status application in federal court under the APA despite the bar on review of discretionary decisions, including adjustment of status under INA §242(a)(2)(B)(i), which is the companion jurisdiction stripping provision to INA §242(a)(2)(B)(ii). The Third Circuit Court held that this denial was based on the legal question of whether Pinho was statutorily eligible for adjustment of status, and thus fell outside the purview of the jurisdiction stripping clause. The Third Circuit stated, "To treat all denials of adjustment as discretionary, even when based on eligibility determinations that are plainly matters of law, is to fundamentally misunderstand the relationship between the executive and the judiciary."

Hence, under *Pinho*, there may still be scope to review a denial of a discretionary national interest waiver denial in federal court if there was a legal error or a constitutional claim. It must be acknowledged that the facts in *Pinho* were different as that case clearly concerned statutory eligibility without any element of discretion. It remains to be seen whether a plaintiff can show legal error if the standards set forth in *Matter of Dhanasar* are not properly evaluated by the USCIS even though the application of those standards require discretion. This argument was not successful in *Poursina v. USCIS,* as the Ninth Circuit was of the opinion that the *Dhanasar* standards still smacked of discretion. Moreover, in *Kucana v. Holder*, 558 U.S. 233 (2010), the Supreme Court held that only decisions actually declared discretionary by statute can be immunized from judicial review and not decisions made discretionary by regulation. This would also apply in the reverse. A discretionary statute cannot be made non-discretionary by regulation, or by standards set forth by the AAO in precedent decision such as *Dhanasar*.

While *Poursina v. USCIS* may have immunized national interest waiver denials from judicial review, the holding should be limited to national interest waivers only and should not impact the ability to challenge denials of other visa petitions in federal court, such as H-1B, L, or EB-1 cases. The language of INA 214(c)(1) about how a nonimmigrant petition "shall be determined by the Attorney General" is even further away from explicit discretion than the national interest waiver language , and INA §203(b)(1)(A) regarding EB-1 cases doesn't even have that level of Attorney General authority specified. Thus, in an APA action challenging a religious worker denial under INA §203(b)(4), the Third

Circuit in *Soltane v. US Dep't of Justice*, 381 F.3d 143 (3rd Cir. 2004) held that the provision did not specify that the Attorney General had discretion. In *Residential Finance Corporation v. USCIS*, a federal district court in Ohio reversed a denial of an H-1B case and the court also overrode the objections of the government that it did not have jurisdiction under INA §242(a)(2)(B)(ii). None of the provisions governing approval of an H-1B petition specified that granting a petition is in the discretion of the Attorney General. The court in *Residential Finance* distinguished the facts from those in *CDI Information Services Inc. v. Reno*, 278 F.3d 616 (6th Cir. 2002) which refused to review the denial of an H-1B application for extension of stay as the grant of such an extension was within the discretion of the attorney general under INA §214(a)(1).

While one may disagree with the holding in *Poursina v. USCIS*, seeking review of a denial of a national waiver request in federal court is more likely to fail than the review of denial of other petitions. Even the DC Court of Appeals in *Zhu v. Gonzales*, 411 F.3d 292 (D.C. Cir. 2005) has agreed. The Ninth Circuit even refused to extend its holding in *ANA International v. Way*, 393 F.3d 886 (9th Cir. 2004), which held that the visa revocation statute, INA §205, was not subject to the jurisdiction stripping provision although it was linguistically similar to the national interest waiver statute as it did not contain any language suggesting discretion. Thus, unless another circuit court disagrees with *Poursina v. USICS* and *Zhu v. Gonzales,* an APA challenge seeking review of a national interest denial, without more, may not succeed. In a future case, an argument can be made that when the statute, which in this case INA § 203(b)(2)(1)(A) does not specify that the grant of a waiver is in the discretion of the Attorney General, the court should not be able to divine discretion from other words in the statute as the Ninth Circuit did in *Poursina v. USCIS*. This is especially so, when unlike the companion jurisdictional stripping provision under INA §242(a)(2)(B)(i), there is no specific mention of discretionary applications that immunize them from a court's jurisdiction such as an adjustment of status application or cancellation of removal. Until there is such success, prospective litigants should be made aware that the USCIS's Appeals Administrative Office rather than a federal court will likely have the final word when USCIS denies a national interest waiver request.