



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 17772822

Date: SEP. 1, 2021

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree and as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this employment-based, “EB-2” classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that although the Petitioner qualified for classification as a member of the professions holding an advanced degree, 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 immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will remand the matter to the Director for further action and consideration.

**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.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, 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).<sup>1</sup> *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion<sup>2</sup>, 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

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<sup>1</sup> In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm’r 1998) (*NYS DOT*).

<sup>2</sup> See also *Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS’ decision to grant or deny a national interest waiver to be discretionary in nature).

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 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.<sup>3</sup>

## II. ANALYSIS

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability.

### A. Member of the Professions Holding an Advanced Degree

In order to show an individual is a professional holding an advanced degree, the petition must be accompanied by “[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree.” 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, the Petitioner may present “[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.” 8 C.F.R. § 204.5(k)(3)(i)(B).

The Petitioner presented a diploma indicating that he received a Bachelor's degree in Law from [redacted] in Brazil in 2014, along with an evaluation from [redacted] equating this degree to a U.S. bachelor's degree. As the Petitioner has not established that he possesses a United States advanced degree or foreign equivalent degree, he must demonstrate that he also has at least five years of progressive post-baccalaureate experience in the specialty.

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<sup>3</sup> See *Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

The record contains a letter from the Brazilian State Office of Military Police, confirming the Petitioner's employment with their [redacted] Police Battalion from January 3, 2008 through September 5, 2018, at which time he was granted "Leave to Deal with Private Matters" by the General Commander for a two-year period. Based on this documentation, the Petitioner's post-baccalaureate experience in the specialty, which is calculated from the date his degree was awarded on April 8, 2014, amounts to four years and five months, thus falling short of the requisite five years of post-baccalaureate experience required under 8 C.F.R. § 204.5(k)(3)(i)(B). We further note that this letter simply states the job titles held by the Petitioner during the course of his employment with the [redacted] Police Battalion. It does not specify the duties he performed or the amount of time he spent in each position, nor does it sufficiently explain how his work experience was progressive.

Although the Petitioner holds a foreign bachelor's degree equivalent to a U.S. baccalaureate degree, he has not demonstrated at least five years of progressive post-baccalaureate experience in his specialty at the time he filed the Form I-140.<sup>4</sup> Accordingly, we withdraw the Director's finding that the Petitioner qualifies as a member of the professions holding an advanced degree.

#### B. Exceptional Ability

The Petitioner's letter accompanying the Form I-140 specifically stated that he was alternatively seeking classification as an individual of exceptional ability "with a degree of expertise significantly above that ordinarily encountered in law enforcement." The Petitioner indicated that he met five of the six regulatory criteria for individuals of exceptional ability and he provided evidence relating to the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (C), (D), and (F). The Director's decision did not address whether the Petitioner satisfies at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification.<sup>5</sup> Therefore, we will remand the matter for further consideration by the Director.

#### C. National Interest Waiver

The Petitioner identified his proposed endeavor as a "military instructor" on the Form I-140 petition and supporting documents, and stated that he intends "to continue using [his] expertise and knowledge in the field of law enforcement by working as a military instructor" in a personal statement submitted in support of the petition. He noted that "military instructors are former and current soldiers, recognized as skilled in their profession to teach new and veteran service members." He further noted that his professional background is in "national security, escort of dignitaries, military training, crisis management and public safety," and that he intended to "enhance public safety in U.S. communities, workplaces, schools, or anywhere else where [his] specialized skills, knowledge, and expertise are needed."

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<sup>4</sup> The Form I-140 was filed on June 6, 2019. The letter from the Petitioner's foreign employer, dated May 15, 2019, indicates that the Petitioner has been on personal leave from his position since September 5, 2018, and that such leave would continue through September 5, 2020. With respect to the Petitioner's five years of progressive post-baccalaureate experience in his specialty, he must demonstrate such experience at the time of filing. See 8 C.F.R. § 103.2(b)(1).

<sup>5</sup> In the request for evidence and again on appeal, the Director mistakenly stated that since the Petitioner had established that he was an advanced degree professional, there was no need to evaluate the evidence regarding the Petitioner's claimed exceptional ability.

The Director found the initial description of the proposed endeavor insufficient, and issued a request for evidence (RFE) requesting additional details and evidence. In response, the Petitioner stated that his proposed endeavor had changed since the time of the initial filing. He indicated that he intended to continue his career as a police officer and eventually as a border patrol officer, in addition to acting as an instructor to police and other law enforcement officers. According to the Petitioner, his main goal was to become a state trooper in either Colorado or Maryland, and ultimately to apply for work as a border patrol agent after becoming a U.S. citizen.

A petitioner, however, may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Rather than providing additional evidence in support of his proposed endeavor as a military instructor as requested, the Petitioner responded to the RFE with a completely new proposed endeavor involving three facets (working as a police officer, working as a police instructor, and ultimately working as a border patrol agent), none of which include duties relating to military instruction. Because a petitioner seeking a national interest waiver must, under the first prong of the *Dhanasar* framework, demonstrate the substantial merit and national importance of their proposed endeavor, a change in the nature of that endeavor from vague claims about being a military instructor to actively serving in the police force and ultimately as a member of the U.S. border patrol is material to eligibility for the waiver. The Director erroneously relied on the Petitioner's new proposed endeavor as police officer, police instructor and border patrol agent in analyzing the first prong of the *Dhanasar* framework.

We note that the first prong of the *Dhanasar* framework focuses on the specific endeavor that the individual proposes to undertake, rather than the substantial merit and national importance of the overall field in which the endeavor resides. *See Dhanasar*, 26 I&N Dec. at 889. Therefore, on remand, the Director should first consider whether the Petitioner provided sufficient detail in describing his proposed endeavor in military instruction in response to his RFE which requested such evidence. If the Director determines that the record includes sufficient information regarding the Petitioner's specific proposed endeavor, he should then analyze the evidence submitted in support of the Petitioner's proposed endeavor as a military instructor under the *Dhanasar* framework to determine whether he is eligible for a national interest waiver. Because the proposed endeavor submitted in response to the Director's RFE constitutes a material change, he should not consider this evidence in making that determination.

### III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to consider anew whether the Petitioner qualifies for EB-2 classification, the threshold determination in national interest waiver cases. The Director may request any additional evidence considered pertinent to the new determination.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and entry of a new decision.