



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

Non-Precedent Decision of the  
Administrative Appeals Office

In Re: 22646545

Date: FEB. 21, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, business manager, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and/or an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this classification. See 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 record did not establish the Petitioner's eligibility under the Dhanasar analytical framework. 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, 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. Section 203(b)(2)(B)(i) of the Act.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation

that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).<sup>1</sup> Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.<sup>2</sup> We will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they must then establish that they merit a discretionary waiver of the job offer requirement “in the national interest.” Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term “national interest,” Matter of Dhanasar, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. Dhanasar states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,<sup>3</sup> grant a national interest waiver if the petitioner demonstrates that:

- 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.

## II. ANALYSIS

### A. EB-2 Classification

The Director issued a decision that does not correspond to the Petitioner. We therefore withdraw the Director’s decision and remand the matter for entry of a new decision consistent with the Petitioner’s identity, proposed endeavor, and evidence.

When providing a new decision, the Director may wish to consider factors related to the Petitioner’s qualifications for the underlying EB-2 classification. The Director issued a request for evidence (RFE), which states that the Petitioner “holds a Bachelor’s Degree in Mechanical Engineering or foreign equivalent degree followed by at least five years of progressive experience in the specialty and thus qualifies as a member of the professions holding an advanced degree.” The Director may wish to evaluate what affect, if any, the Petitioner’s education in engineering has on his eligibility as an advanced degree professional in business management. If the Director determines the Petitioner qualifies as an advanced degree professional, the Director may wish to specify the profession or specialty in which the Petitioner qualifies. When making this determination, the Petitioner may consider evidence of the Petitioner’s education in business administration.<sup>4</sup> If the record does not support a finding that the Petitioner qualifies as an advanced degree professional, the Director may

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<sup>1</sup> If these types of evidence do not readily apply to the individual’s occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

<sup>2</sup> USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. See generally 6 USCIS Policy Manual F.5(B)(2), <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5>.

<sup>3</sup> 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).

<sup>4</sup> The Petitioner submitted evidence of a University of [redacted] master’s in business administration degree (MBA). Apart from the MBA, the Petitioner provided evidence that he completed graduate courses in business administration, including a foreign “latu senso;” however, the evidence does not establish that these discrete courses amount to a business administration degree.

also examine whether the evidence establishes that the Petitioner satisfies at least three of six categories of evidence at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F). If the Petitioner establishes eligibility under at least three criteria, the Director may then proceed to a final merits determination on whether the Petitioner has established eligibility as an individual of exceptional ability.

When evaluating whether the Petitioner has at least five years of progressive post-baccalaureate experience in the field, the Director may consider in which field the Petitioner gained the experience. In addition, the Director may wish to evaluate the quality of the employment experience evidence, particularly the letter from the Petitioner's accountant. It is not apparent how the Petitioner's accountant would have the knowledge or authority to speak on behalf of the Petitioner's prior employers concerning the Petitioner's employment dates, duties, and salary. Finally, the Director may also wish to determine whether the accountant letter and the Petitioner's employment booklet support a finding that his experience is progressive in nature.

#### B. The Proposed Endeavor

Initially, the Petitioner provided very little detail concerning his proposed endeavor. He asserted that he would work in business management and "lead American companies to success in developing new projects or assisting in critical projects which will benefit the U.S. economy." The Petitioner stated that he will "apply my knowledge to solving problems more efficiently and helping create innovations that can be implemented and bring important economic results. I intend to continue managing, maintaining good working relationships, and identifying any opportunities for new business in the fields of Civil Engineering and Business." To support his petition, he provided printouts from the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) for the occupations of training and development specialists; financial managers; administrative services managers; and human resources specialists.<sup>5</sup> The Petitioner did not sufficiently explain the relevance of these separate occupations in relation to his proposed endeavor. This is important, as we held in *Dhanasar* that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." *Dhanasar*, 26 I&N Dec. at 889. The Director issued an RFE, notifying the Petitioner that, among other shortcomings, he provided insufficient detail about his specific proposed endeavor.

In his RFE response, the Petitioner submitted evidence of his proposed endeavor, including a business plan to create a new business called "[redacted]"<sup>6</sup> He also provided various articles and reports on supply chains and chief executive occupations. The Petitioner explained that he intends to provide consulting in the specific areas of supply chain; logistics; financial management and investments; and organizational and turnaround management. The evidence provided in the RFE response appears to change the focus of the Petitioner's endeavor and the Petitioner did not acknowledge or explain this change. We cannot determine whether the Petitioner intends to work as a business manager, entrepreneur, chief executive officer (CEO), supply chain manager, consultant,

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<sup>5</sup> The Handbook is an informative source on the duties and educational requirements of a wide variety of occupations. The Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, may be accessed at <https://www.bls.gov>. We do not, however, maintain that the Handbook is the exclusive source of relevant information.

<sup>6</sup> The Petitioner did not provide evidence of when he created this company or whether it exists yet. However, [redacted] associate professor at the University of [redacted], stated in his opinion letter that the Petitioner's business "is in an advanced stage of planning and is ready to be launched in the U.S. market."

or some combination of these occupations. As these occupations vary widely, we cannot determine how the Petitioner proposes to allocate his time, nor has he identified a specific proposed endeavor.

The purpose of the RFE is to elicit further information that clarifies whether a petitioner has established eligibility for the benefit sought. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, the Petitioner cannot materially change the proposed endeavor. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit sought at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after a petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Furthermore, a petitioner 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). If significant changes are made to the initial request for approval, the Petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, the Director may reexamine the evidence to determine whether the Petitioner provided a consistent and sufficiently detailed proposed endeavor and whether the record supports a finding that he established eligibility for a national interest waiver.

### III. CONCLUSION

We remand the matter for the Director to issue a decision that corresponds to this Petitioner. In formulating the new decision, the Director may reconsider the threshold issue of whether the Petitioner established eligibility for the underlying EB-2 classification. If the Director determines the Petitioner is eligible for the classification, the Director must then consider whether the Petitioner is eligible under the Dhanasar analytical framework. The Director may request any additional evidence considered pertinent to the new determination and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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