



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

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 26383222

Date: JUNE 27, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a nurse and caregiver, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. 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 record did not establish that the Petitioner is eligible for or otherwise merits a national interest waiver as a matter of discretion. 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 U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree.¹ 8 C.F.R. § 204.5(k)(2). A U.S. bachelor's degree or a foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. *Id.*

¹ Profession shall include, but not be limited to, architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) of the Act.

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).² Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.³ If a petitioner does so, 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.⁴

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 eligibility for 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 USCIS may, as matter of discretion⁵, 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

The Petitioner proposes to work in the United States as a home healthcare nurse. She earned a diploma specializing in nursing from [REDACTED] Institute in Uzbekistan in 1988 and has worked as a nurse and home health nursing assistant. The Director determined that the Petitioner established her eligibility as a member of the professions holding an advanced degree, however, she did not establish that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

We note that in her petition, the Petitioner asserted that she is eligible for the EB-2 classification as an individual of exceptional ability and did not claim eligibility as a member of the professions holding an advanced degree. For the reasons discussed below, we conclude that the Petitioner has not established her eligibility for either EB-2 classification.

A. Member of Professions Holding an Advanced Degree

The Director concluded that the Petitioner qualifies for classification as a professional holding an advanced degree based on her submission of her diploma and academic transcript showing she earned

² If these types of evidence do not readily apply to the individual’s occupation, a petitioner may submit comparable evidence to establish eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

³ 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>.

⁴ See *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); see generally 6 USCIS Policy Manual, *supra*, at F.5(B)(2).

⁵ 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).

the foreign equivalent of a U.S. baccalaureate degree, as well letters from her former employers showing she has more than five years of progressive post-baccalaureate experience in the specialty. See 8 C.F.R. § 204.5(k)(3)(i)(B). However, after review of the record, we disagree.

The diploma and academic transcripts do not indicate the Petitioner earned the foreign equivalent of a U.S. baccalaureate degree. The diploma and academic transcripts state that the Petitioner entered the vocational training program in 1986 and completed her studies in 1988. The Petitioner also submitted an academic evaluation of her diploma stating, “The diploma is the academic equivalent of an associate of applied science degree in nursing from a regionally accredited community/junior college in the United States.” The Petitioner’s academic records and the academic evaluation reflect the Petitioner completing the foreign equivalent of two years of postsecondary education, instead of earning the foreign equivalent of a U.S. baccalaureate degree.

Because the Petitioner has not established that she holds a U.S. baccalaureate degree or foreign equivalent degree, the Director’s determination that she is eligible to be classified as a member of the professions possessing an advanced degree is withdrawn.

B. Individual of Exceptional Ability

Because the Director determined that the Petitioner established her eligibility as a member of the professions possessing an advanced degree, the Director did not evaluate her claim that she qualifies as an individual of exceptional ability.

The Petitioner claimed that she meets three of the six evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). For the reasons provided below, we conclude that the Petitioner does not meet the initial evidentiary requirements for classification as an individual of exceptional ability.

An official academic record showing that the individual has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(A).

As discussed above, the Petitioner submitted a copy of her diploma and academic transcripts for her diploma specializing in nursing from [redacted] Institute in Uzbekistan. Based on these documents, the Petitioner has established that she meets the criterion.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

To meet this criterion, the Petitioner submitted a printout of her membership profile as an individual member with the American Society of Aging and a receipt indicating payment for her membership on September 12, 2022. Her membership profile indicates she was an individual member of the American Society of Aging since September 12, 2022, with expiration September 11, 2023.

However, the Petitioner has not demonstrated being a member of the American Society of Aging at the time of filing the petition. The petition was filed on August 25, 2021, which is prior to the Petitioner becoming a member of the American Society of Aging in September 2022. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the

time the petition is filed. See 8 C.F.R. § 103.2(b)(1).⁶ Also, the record does not include evidence demonstrating the American Society of Aging is a professional association, as required under the criterion.

The Petitioner has not demonstrated her membership in a professional association under the criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8 C.F.R. § 204.5(k)(3)(ii)(F).

The Petitioner indicates she meets this criterion based on her “educational background, professional experience, and superb skills” contributing to her field. To support her claim, the Petitioner submitted her academic diploma and transcripts, certificates of her completion of training courses, and letters of recommendation from her patients and employers.

The academic records, certificates of training, and letters of recommendation show the Petitioner received training for her nursing and caregiving employment. The letters also attest to the Petitioner being a competent, reliable caregiver and nurse who is attentive to her patients. While the record shows the Petitioner has training as a nurse and caregiver, and that her employers and patients value the care she provides to her patients, it does not demonstrate that the Petitioner has been recognized for achievements and significant contributions to the industry or field, as required under the criterion.

Therefore, the Petitioner has not demonstrated she meets this criterion.

The Petitioner has not established that she meets at least three of the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F). Since the Petitioner did not satisfy the initial evidence requirements, we need not conduct a final merits analysis to determine whether the evidence in its totality shows that she is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). Nevertheless, we advise that we have reviewed the record in the aggregate and conclude that it does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability.

C. Substantial Merit and National Importance

The first prong of the Dhanasar analytical framework, substantial merit and national importance, focuses on the specific endeavor that a petitioner proposes to undertake. The Director’s decision concluded that “The first prong, substantial merit and national importance, is met.” However, the decision does not sufficiently explain the basis for this determination.

In the petition, the Petitioner indicated that she intended to be an entrepreneur in the field of nursing. The Director sent the Petitioner a request for evidence asking that she provide additional details of her endeavor and evidence demonstrating her proposed endeavor has substantial merit and national importance. With the reply, the Petitioner submitted a business plan stating she “endeavors to provide

⁶ See Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971) (holding that a petitioner must establish eligibility at the time of filing; an immigrant petition cannot be approved after a petitioner becomes eligible under a new set of facts).

high-quality nursing services to patients in the [United States].” The business plan further states, “she will be able to provide home care to patients as well as organize teaching courses in order to transfer knowledge.”

The Director should analyze the evidence to determine whether the record sufficiently demonstrates the endeavor has substantial merit and national importance. The endeavor’s merit may be demonstrated in a range of areas, such as business, entrepreneurialism, science, technology, culture, health, or education.⁷ In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Matter of Dhanasar*, 26 I&N Dec. at 889. The Director should focus on what the Petitioner will be doing rather than the specific occupation. An endeavor having significant potential on the broader implications for a field or region, generally may rise to the level of having national importance for the purpose of establishing eligibility for a national interest waiver.⁸ The Director should review the record to determine whether the Petitioner has demonstrated her proposed endeavor has significant potential on the broader impact in the field.

If the Director concludes that the Petitioner’s documentation does not meet the substantial merit or national importance requirements of *Dhanasar’s* first prong, the decision should discuss the insufficiencies in the evidence and adequately explain the reasons for ineligibility.

D. Well Positioned to Advance the Proposed Endeavor

In the second prong, the focus shifts to the petitioner and their positioning 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.

For *Dhanasar’s* second prong, the Director concluded that while the record shows the Petitioner “has gained skills and experience in her field of endeavor,” it did not demonstrate that the Petitioner is well positioned to advance the proposed endeavor. However, the decision did not sufficiently explain the basis for the determination. While the decision states that the Petitioner submitted letters of recommendation and the Petitioner’s diploma, it does not provide an analysis of that evidence. Also, the decision does not mention or indicate it considered other evidence submitted by the Petitioner, including an expert opinion evaluation and her training certificates.

On appeal, the Petitioner argues that the Director erred in finding the evidence was not sufficient to establish the Petitioner is well positioned to advance the proposed endeavor. The Petitioner argues she “clearly established the ability to carry forward the proposed endeavor” and describes the Petitioner’s professional experience and client testimonials.

An officer must fully explain the reasons for denying a petition in order to allow a petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. See 8 C.F.R. § 103.3(a)(1)(i); see also *Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a

⁷ See generally 6 USCIS Policy Manual, *supra*, at F.5(D)(1).

⁸ See generally 6 USCIS Policy Manual, *supra*, at F.5(D)(1).

decision must fully explain the reasons for denial to allow the respondent a meaningful opportunity to challenge the determination on appeal). Here, the Director's decision did not adequately address the evidence submitted with the petition or in response to the request for evidence. The Director should analyze the evidence to determine if the Petitioner is well positioned to advance the proposed endeavor.

Accordingly, we withdraw the Director's determination that the Petitioner does not meet the second prong of the Dhanasar framework. Any new determination by the Director must consider all of the evidence offered for prong two, including the Petitioner's academic record, certifications and trainings, memberships, the expert opinion letter, and letters of recommendation. The Director should analyze the specific content of the record to determine if this documentation renders her well positioned to advance the proposed endeavor. If the Director concludes that the Petitioner's documentation does not meet Dhanasar's second prong, the decision should discuss the insufficiencies in the evidence and adequately explain the reasons for ineligibility.

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

As to the third prong of Dhanasar, the Director stated the law and the relevant considerations in performing the third prong's balancing analysis and concluded that the Petitioner "has not established 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." However, the Director did not discuss the evidence weighed in balancing those considerations or address the Petitioner's specific claims, if any, as to the third prong. Without a proper evaluation of the factors identified in Dhanasar's third prong, the Director's determination for this prong was in error. If the Director concludes that the Petitioner's documentation does not meet this prong, the decision should address the Petitioner's arguments and evidence, and explain the relative decisional weight given to each balancing factor.

III. CONCLUSION

Accordingly, we are remanding the petition to the Director to determine if the Petitioner has established eligibility for an EB-2 visa classification and for a national interest waiver, and to enter a new decision. The Director may request any additional evidence considered pertinent to the new determination. 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.