



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

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

In Re: 25691407

Date: MAR. 08, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an information technology specialist, seeks employment-based second preference (EB-2) 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 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 that the Petitioner qualified for classification as a member of the professions possessing an advanced degree, but that he had not established the national importance of the proposed endeavor and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. 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.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. Alternatively, a 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).

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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.¹ 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.

If a petitioner demonstrates eligibility for the underlying EB-2 classification, 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 a three-prong framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion², 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

As noted, the Director determined that the Petitioner, who claims eligibility for the EB-2 classification as both an advanced degree professional and as an individual of exceptional ability, qualifies as a member of the professions holding an advanced degree. However, the Director determined that the record did not establish his eligibility under the first and third prongs of the *Dhanasar* framework, and therefore found him ineligible for a waiver of the job offer requirement.

For the reasons discussed below, we will withdraw the Director’s decision and remand the matter to the Director for entry of a new decision.

A. Member of the Professions Holding an Advanced Degree

We withdraw the Director’s determination that the Petitioner is a member of the professions holding an advanced degree. The Petitioner provided an official academic record establishing that he possesses a bachelor’s degree in computer science from a Brazilian university, completed in December 2004. The Petitioner also provided an evaluation of his education and work experience prepared by a credentials evaluator. The evaluator concluded that (1) the Petitioner’s foreign bachelor’s degree is the academic equivalent of a U.S. baccalaureate degree, and (2) based on a review of the 16 years of work experience described in the Petitioner’s resume, he possesses the equivalent of a master’s degree in information technology. In a request for evidence (RFE), the Director advised that the Petitioner established his

¹ USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens 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>.

² *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).

eligibility for classification as a member of the professions holding an advanced degree based on this evaluation and did not request additional evidence of his eligibility for EB-2 classification.

However, as noted, an individual who does not possess a U.S. academic or professional degree or foreign equivalent above that of a bachelor's degree must provide, in the alternative, evidence of a bachelor's degree or its foreign equivalent and "evidence in the form of letters from current or former employer(s)" showing their five years of progressive post-baccalaureate experience in the specialty. 8 C.F.R. § 204.5(k)(3)(i)(B). The Petitioner did not provide sufficient evidence to meet this requirement. He provided: (1) a letter from his current Brazilian employer documenting his employment as an information technology (IT) solutions architect from September 2019 through January 2020; and (2) a letter from a previous employer documenting his employment as a product owner from February 2017 until February 2018.

Although the Petitioner submitted other evidence intended to document his progressive post-baccalaureate experience, it was not in the form of letters from his former employers, and therefore does not meet the requirements of 8 C.F.R. § 204.5(k)(3)(i)(B). Specifically, in addition to the above-referenced evaluation, he provided: a letter from his accountant, who detailed the Petitioner's employment history since 2001, and a copy of his "Employment and Social Security Book" issued by the Brazilian Ministry of Labor, which identifies his employers, job titles and salaries from 2000 through January 2009.

Accordingly, the record as presently constituted does not contain sufficient evidence to support the Director's determination that the Petitioner is eligible for classification as a member of the professions holding an advanced degree.

B. Exceptional Ability

The Director's decision did not address, in the alternative, 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. The Petitioner indicated at the time of filing that he was submitting evidence under each of the six regulatory criteria, and the Director has not yet reviewed this evidence.

Therefore, we will remand the matter to the Director. On remand, the Director should consider the Petitioner's evidence to determine if he has met three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). If so, the Director should then conduct a final merits determination to conclude whether the Petitioner has achieved the level of expertise significantly above that ordinarily encountered for exceptional ability classification. *See* 8 C.F.R. § 204.5(k)(2).

Prior to issuing a new decision, the Director may issue a new RFE to allow the Petitioner an opportunity to submit additional evidence of his progressive post-baccalaureate experience that complies with 8 C.F.R. § 204.5(k)(3)(ii) and/or additional evidence in support of his exceptional ability claim.

C. National Interest Waiver

While the Director concluded that the Petitioner did not establish that a waiver of the required job offer would be in the national interest, the Petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or as an individual of exceptional ability. Since the Director's determination of this first threshold requirement is withdrawn, we also withdraw the Director's conclusion that the Petitioner had not established eligibility under the first and third prongs of the *Dhanasar* framework.

Further, we note that the Director's analysis of whether the Petitioner's proposed endeavor is of national importance, under the first prong, contains multiple references to a "business plan" submitted in response to the RFE. The record indicates that the Petitioner did not submit a business plan in response to the RFE. It is therefore unclear that the Director fully evaluated the RFE response, and that the Director's discussion of the business plan relates to the Petitioner. Further, the remainder of the Director's analysis of the Petitioner's eligibility under the *Dhanasar* framework contains few references to the evidence he provided in response to the RFE. An officer must fully explain the reasons for denying a visa petition to allow the 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 decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

On remand, if the Director determines the Petitioner demonstrates qualification for the underlying EB-2 visa classification, he should issue a new national interest waiver determination after considering all previously submitted evidence, including the Petitioner's claims on appeal.

III. CONCLUSION

We are remanding the petition for the Director to reconsider whether the Petitioner has satisfied the eligibility requirements for classification as a member of the professionals holding an advanced degree or, in the alternative, as an individual of exceptional ability. In addition, the Director should properly apply all three prongs of the *Dhanasar* analytical framework to determine if the Petitioner has established that a waiver of the job offer requirement would be in the national interest.

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