



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

Non-Precedent Decision of the  
Administrative Appeals Office

In Re: 28282446

Date: SEP. 13, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, an electrical engineer, 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 Nebraska 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. 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.

An advanced degree is any U.S. academic or professional degree or a foreign equivalent degree above that of a bachelor's degree.<sup>1</sup> 8 C.F.R. § 204.5(k)(2). A U.S. bachelor's degree or a foreign equivalent

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<sup>1</sup> 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.

degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. *Id.*

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>2</sup> Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.<sup>3</sup> 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.<sup>4</sup>

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 discretion<sup>5</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

The Petitioner proposes to work in the United States as the chief executive officer, security systems engineer, and electrical engineer for his recently established business. The business, [REDACTED] [REDACTED] would provide residential and commercial custom electronics design and integration services.

The Director did not make a determination whether the Petitioner is eligible for the underlying EB-2 classification. The Director found that the record did not establish that the Petitioner is eligible for or otherwise merits a national interest waiver as a matter of discretion.

### A. EB-2 Classification

In his petition, the Petitioner asserted that he is eligible for the EB-2 classification as an advanced degree professional and as an individual of exceptional ability. However, the Director did not evaluate the Petitioner's claims. On appeal, the Petitioner argues that the Director erred in not addressing

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<sup>2</sup> 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).

<sup>3</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>.

<sup>4</sup> 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).

<sup>5</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).

whether he qualifies as an individual of exceptional ability and does not claim that he is an advanced degree professional.

To establish eligibility as an advanced degree professional, the Petitioner submitted his diploma, academic transcripts, an academic evaluation.

To establish eligibility as an individual of exceptional ability, the Petitioner submitted evidence to meet four of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner asserts he meets the following criteria: academic record in the area of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(A); license or certification for the profession under 8 C.F.R. § 204.5(k)(3)(ii)(C); membership in professional associations under 8 C.F.R. § 204.5(k)(3)(ii)(E); and recognition for achievements and significant contributions to the field under 8 C.F.R. § 204.5(k)(3)(ii)(F).

On remand, the Director should evaluate the documentation to determine whether the Petitioner meets the requirements for the underlying EB-2 classification as either an advanced degree professional or as an individual of exceptional ability.

## B. 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, "Therefore, the evidence does not demonstrate that your endeavor has substantial merit and national importance." Although the Director's decision lists some of the evidence in the record and stated the law and relevant considerations in determining whether the Petitioner meets the first prong of Dhanasar, the decision does not explain the basis for this determination.

On appeal, the Petitioner argues that the Director's decision erred by not considering evidence submitted, and instead made conclusory statements finding his proposed endeavor does not have substantial merit and national importance. The Petitioner further argues that the Director did not "evaluate the merits" of the Petitioner's proposed endeavor described in the evidence submitted. The Petitioner points to evidence submitted with the petition and with his reply to a request for evidence, arguing that the documentation submitted establishes his proposed endeavor has substantial merit and national importance.

We agree with the Petitioner that the decision does not sufficiently explain the reasons the documentation does not demonstrate the substantial merit and national importance of the Petitioner's proposed endeavor. 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 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). In determining the Petitioner did not establish the substantial merit and national importance of his proposed endeavor, the Director's decision did not meaningfully address the evidence submitted with the petition or in response to a request for evidence.

The endeavor's merit may be demonstrated in a range of areas, such as business, entrepreneurialism, science, technology, culture, health, or education.<sup>6</sup> The Petitioner submitted his Counsel's letter, his

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<sup>6</sup> See generally 6 USCIS Policy Manual, *supra*, at F.5(D)(1).

statement, and a business plan indicating that his proposed endeavor is to be the chief executive officer, security systems engineer, and electrical engineer for his residential and commercial custom electronics design and integration company, [REDACTED]. On remand, the Director should analyze the evidence to determine whether the record sufficiently shows that the Petitioner's proposed endeavor is of substantial merit.

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. The Director should keep in mind that it is the national importance of the Petitioner's specific proposed endeavor that must be shown, not the importance of the overall field of electrical engineering. 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.<sup>7</sup> The Director should review the record to determine whether the Petitioner has demonstrated his proposed endeavor has significant potential on the broader impact in the field. On remand, the Director should analyze the evidence to determine whether the record sufficiently demonstrates the endeavor has national importance.

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.

### C. Well Positioned to Advance the Proposed Endeavor

For *Dhanasar's* second prong, the Director concluded, "the evidence does not establish how you are well positioned to establish your [sic] company in the United States." However, the Director's decision did not provide a sufficient analysis of the evidence to explain the basis for this determination.

The second prong shifts the focus from the proposed endeavor to the petitioner. We analyze whether the petitioner is well positioned 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.

The Director's decision references the Petitioner's business plan and a recommendation letter from the Petitioner's potential client stating these are not sufficient to show sufficient interest in the Petitioner's endeavor. The Director did not acknowledge or analyze the additional documentation submitted to show the Petitioner is well positioned to advance his proposed endeavor, including his resume, academic credentials, membership certificate, training certifications, reference letters from previous clients, articles written by the Petitioner, articles referencing the Petitioner, a patent application, the business' corporate documents, and a lease agreement.

On remand, the Director should analyze the evidence to determine whether the record sufficiently demonstrates the Petitioner is well positioned to advance the proposed endeavor. The Director should

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

articulate the basis for finding whether the evidence shows or fails to show that he is well positioned to advance his endeavor.

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

The third prong requires a 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, we may evaluate factors such as: whether, in light of the nature of the individual's qualifications or the proposed endeavor, it would be impractical either for them to secure a job offer or to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from their contributions; and whether the national interest in their contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, establish 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. *Matter of Dhanasar*, 26 I&N Dec. at 890-91.

The Director 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." Although the Director's decision noted that the Petitioner being "self-employed is a positive factor," it did not state the law or the relevant considerations weighed in performing the third prong's balancing analysis. Also, the Director did not discuss the other evidence weighed in balancing those considerations or meaningfully address the Petitioner's specific claims as to the third prong.

On remand, if the Director concludes that the Petitioner does not meet *Dhanasar's* third 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 for the Director to consider whether the Petitioner has satisfied the eligibility requirements for the underlying EB-2 classification as an advanced degree professional or 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 requirement of a job offer, and thus a labor certification, would be in the national interest. 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.