U.S. Citizenship and Immigration Services

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

In Re: 29583410

Date: JAN. 29, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, a physical therapist, seeks classification as a member of the professions holding an advanced degree or 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 employment based second preference (EB-2) 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. *See 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 Director of the Nebraska Service Center denied the petition, concluding that the record did not establish 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 dismiss the appeal.

## I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 immigrant 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.

The regulation at 8 C.F.R. § 204.5(k)(2) defines exceptional ability as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." To demonstrate exceptional ability, a petitioner must submit at least three of the types of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii):

(A) An official academic record showing that the alien 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;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply, the regulations permit a petitioner to submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

And 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. Whilst neither the statute nor the pertinent regulations define the term "national interest," we set forth a three-prong analytical framework for adjudicating national interest waiver petitions in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen 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 noncitizen 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 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 noncitizen. To determine whether the noncitizen 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, progress towards achieving the proposed endeavor, and the interest of potential customers, users, investors, or other relevant entities or individuals are also key considerations.

The third prong requires the petitioner to demonstrate that, on balance of applicable factors, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. USCIS may evaluate factors such as whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen to secure a job offer or for the petition to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the noncitizen's contributions; and whether the national interest in the noncitizen's contributions is sufficiently urgent to warrant forgoing the labor certification process. Each of the factors 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.

## II. ANALYSIS

### A. The Petitioner Is Not An Individual of Exceptional Ability[1]

We disagree with the Director's conclusion that the Petitioner qualifies for EB-2 permanent immigrant classification as an individual of exceptional ability and hereby withdraw it. Although the evidence in the record reflects the Petitioner has provided an official academic record showing they have a degree from a university in Costa Rica, the remaining evidence in the record does not sufficiently demonstrate the Petitioner's eligibility for EB-2 nonimmigrant classification as an individual of exceptional ability.[2]

> *Evidence in the form of letter(s) from current or former employer(s) showing that the noncitizen has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

The letters purporting to support the Petitioner's work experience in the specialty do not adequately reflect at least 10 years of full-time experience. The Petitioner submitted letters from the legal representative of [redacted] the legal representative of [redacted] and legal representative of [redacted] The authors of the letters attested that they represented the employers the Petitioner provided their services to for an aggregate period of 10 years.

The regulation requires the Petitioner earn 10 years of full-time work experience. The letters the Petitioner submitted do not specify whether the Petitioner's employment with the companies they worked for was full-time. This omission looms even larger when the evidence in the record reflects that there was substantial overlap in the Petitioner's period of employment with [redacted] as reflected in the respective letters the Petitioner submitted into the record. So we cannot conclude that the Petitioner has the requisite 10 years of full-

[1] On appeal, the Petitioner asserts they have "*never* referenced or submitted evidence to establish that the Petitioner held an advanced degree." (emphasis in original). So we will not evaluate the Petitioner's eligibility for EB-2 classification as an advanced degree professional.

[2] The Petitioner's nursing license did not serve as sufficient evidence of a license to practice as a physical therapist under 8 C.F.R. § 204.5(k)(3)(ii)(C). And the Petitioner did not submit evidence that they have commanded a salary, or other remuneration for services, which demonstrates exceptional ability under 8 C.F.R. § 204.5(k)(3(ii)(D).

time experience in their occupation because the letters do not contain sufficient detail to establish that the Petitioner worked in full-time employment.

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

The Petitioner submitted evidence of their membership in the [redacted] the [redacted] (Nurses Association), and the [redacted] (Therapists Association). But membership in these associations is not sufficient to demonstrate the Petitioner's membership in professional associations as required by the regulation.

The Petitioner's membership in [redacted] is not sufficient evidence of membership in a professional association. Membership in the [redacted] is open not only to physical therapists, but also physical therapist assistants and students of physical therapy. Consequently, it appears the [redacted] is not a professional association limited to the physical therapist profession.

And the Petitioner's membership in the [redacted] (Nurses Association) is also not sufficient evidence to reflect the Petitioner's membership in professional associations. A profession as defined at section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), includes but is not limited to architects, engineers, lawyers, physicians, surgeons, teachers in elementary or secondary schools, colleges, academies, or seminaries. The U.S. Department of Labor maintains a non-dispositive list of professional occupations that customarily requires a bachelor's or higher degree. *See* Update to Appendix A to the Preamble-Education and Training Categories by O*NET-SOC Occupations; Labor Certification for Permanent Employment of Immigrants in the United States and Procedures To Establish Job Zone Values When O*NET Job Zone Data Are Unavailable, 86 Fed. Reg. 63070 (Nov. 15, 2021). The occupation of nurse is not included in the statutory list, nor does it appear as an occupation that customarily requires a bachelor's or higher degree. Additionally, the DOL's *Occupational Outlook Handbook* (*Handbook*) reflects that "nurses usually take one of three education paths: a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program." *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Registered Nurses (Nov. 27, 2023), https://www.bls.gov/ooh/registered-nurses.htm. So a nurse is not a member of the professions per the statute. because nursing does not customarily require a bachelor's degree as a minimum requirement for entry into the occupation. Consequently, it appears the [redacted] (Nurses Association) is not a professional association limited to the physical therapist profession.

And the Petitioner's membership in the [redacted] (Therapists Association) is insufficient evidence of their membership in a professional association. The minimum requirement for membership in the Therapists Association is "a university degree duly accredited by the national authorities." But membership is open not only to physical therapists, but also to other occupations which do not customarily require a bachelor's degree as a minimum requirement for entry to the occupation such as respiratory therapists. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Respiratory Therapists (Sept. 06, 2023), https://www.bls.gov/ooh/respiratory-therapists.htm. Consequently, it appears the [redacted] (Therapists Association) is not a professional association limited to the physical therapist profession.

*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 submitted several letters of recommendation to demonstrate that they have been recognized for achievements and significant contributions to their field by peers, governmental entities or professional or business organizations. But the evidence the Petitioner submitted did not meet the standard of proof because it did not satisfy the basic standards of the regulations. *See Matter of Chawathe*, 25 I&N Dec. at 374 n.7. The regulation requires evidence of recognition of achievements and significant contributions. When read together with the regulatory definition of exceptional ability, the evidence of recognition of achievement of significant contributions should show expertise significantly above that ordinarily encountered in the field.

The Petitioner's letters of recommendation are written by "previous employers, colleagues, educators, and previous patients." The Petitioner asks us to conclude the writers' conclusions alone constitute recognition of achievements and significant contributions. But these statements are not supported by any evidence in the record which reflects that these letters represent noteworthy achievements and significant contributions. The letters described the Petitioner's character, work ethic, and other positive qualities like their "compassion" and "devotion." In general, the letter writers indicated the Petitioner was a person of genial character and a conscientious worker. But the Petitioner's genial character and good work ethic are not achievements or significant contributions to their field of endeavor.

Aside from these effusive descriptions of the Petitioner's character, the letters mention the Petitioner's work with elderly patients and their dual qualification as a physical therapist and nurse. But it is not evident in the record how performing the duties of a physical therapist for elderly individuals is an achievement and significant contribution to their field significantly above that ordinarily encountered in the field. One of the letters submitted by the Petitioner mentioned their work with palliative patients improving the patients' lives as they reached end of life. Whilst laudable, it is not evident that performing expected duties of a physical therapist to a sub-set of vulnerable patients is an achievement or significant contribution to the field of physical therapy significantly above that ordinarily encountered in the field. Or in another words, the record does not adequately describe how treating palliative patients with physical therapy requires expertise significantly above that ordinarily encountered in the field such that it amounts to an achievement and significant contribution to physical therapy as a discipline.

In sum, the evidence does not adequately identify any achievements or significant contributions significantly above that ordinarily encountered in the Petitioner's field that would be worthy of recognition. So we cannot conclude that the Petitioner meets this ground of eligibility.

The Petitioner has established eligibility in one of the six criteria contained at 8 C.F.R. § 204.5(k)(3)(ii). They cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(k)(3)(ii). So we need not provide a final merits determination to evaluate whether the Petitioner has achieved the required level of expertise required for exceptional ability classification. Consequently, we conclude

the Petitioner has not demonstrated their eligibility for permanent immigrant classification in the EB-2 category.

B. Eligibility for Discretionary Waiver of the Job Offer, And So a Labor Certification, in the National Interest.

We now turn to the Petitioner's appeal of the Director's decision concluding the record did not establish that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. On appeal, the Petitioner asserts that their proposed endeavor is substantially meritorious and nationally important, that they are well-positioned to advance their proposed endeavor, and that on balance of applicable factors it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification so that they can undertake their proposed endeavor. But the evidence the Petitioner has submitted into the record is not relevant, material, or probative to support their assertion of eligibility for a national interest waiver under the *Dhanasar* analytical framework. So we conclude that a favorable exercise of discretion to waive the job offer requirement, and thus a labor certification, is not warranted.

1. The Proposed Endeavor

The Petitioner indicated "physical therapist" as the proposed job title on their Form I-140, Immigrant Petition for Alien Worker. They intended to "utilize [their] expertise, skill and passion as a physical therapist and nurse to benefit the lives of others via employment at Illinois Spine, a chiropractic clinic.[3] They elaborated that their endeavor would involve performing a role as a physical therapist with knowledge and experience they gained as a nurse and physical therapist in their home country. The Petitioner noted that they would work with the elderly as well as people from underrepresented and lower socioeconomic backgrounds. The Petitioner contended that their proposed endeavor would also address a shortage of physical therapists.

2. Substantial Merit and National Importance

a) Substantial Merit

We withdraw the Director's conclusion that the Petitioner proposed endeavor did not have substantial merit. An endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. *Dhanasar* at 889. The Petitioner described their endeavor as a "physical therapist." The record before us contains evidence of the characterization of the Petitioner's proposed endeavor as a "physical therapist" which falls within the range of areas we concluded could demonstrate endeavor of substantial merit. So the record supports the substantial merit of the Petitioner's proposed endeavor.

[3] Although we conclude, like the Director, that the Petitioner has not demonstrated eligibility for a discretionary waiver of the job offer requirement, and thus of a labor certification, in the national interest we do not agree with the Director's rationale concluding that "[e]mployment as a physical therapist is not an endeavor." The Director is correct in so far that a petitioner proposing an endeavor that simply continued their ongoing employment on a permanent indefinite basis, and without a thorough description, would likely face significant obstacles in demonstrating their proposed endeavor's substantial merit and national importance. But that does not preclude adequately described and substantiated proposed endeavors undertaken as part of a petitioner's employment from evaluation of eligibility for a discretionary waiver of the requirement of a job offer, and thus a labor certification, in the national interest under the *Dhanasar* analytical framework.

b) National Importance

Alongside demonstrating its substantial merit, a petitioner must also showcase the national importance of their proposed endeavor. The Director concluded that the Petitioner's proposed endeavor did not have the required national importance to meet the first prong of the *Dhanasar* framework. We agree.

In support of their claim of eligibility for a discretionary waiver of the job offer requirement, and thus of a labor certification, under *Dhanasar* the Petitioner submitted copies of their educational documents, letters of recommendation, personal statement, and articles describing the importance of the health workers, physical therapists, and an aging population.[4]

The Petitioner essentially argues their endeavor is nationally important because they, based on their previous experience and achievements, will undertake and execute it. The Petitioner described their endeavor in terms of performing the duties of a physical therapist competently. The main basis of the Petitioner's claim of eligibility for the act of discretion to waive the requirement of a job offer, and thus a labor certification, in the national interest comes from the Petitioner's claims regarding their past career as a physical therapist in their home country, their dedication to their field, and the competent and successful way they have accomplished their duties in the past. But the performance of duties of a physical therapist on a broad level, even successfully or competently, do not implicate matters rising to a level of national importance. These facts are not relevant to the question of whether a proposed endeavor can exert potential positive impact rising to a level of national importance. When evaluating the national importance of a proposed endeavor, the relevant question is not the performance of the proposed endeavor which the individual will operate; instead, we focus on "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. So we are not concerned with the individual petitioner when evaluating the first prong of the *Dhanasar* analytical framework. We are focused on a petitioner's proposed endeavor. And to demonstrate the national importance of a proposed endeavor under *Dhanasar's* first prong, we look to its potential prospective impact. In *Dhanasar* we said that "we look for broader implications." *See Dhanasar*, 26 I&N Dec. at 889. Broader implications are not necessarily evaluated from a narrow frame of reference such as geography; implications within a field which demonstrate a national or even international influence of broader scale can rise to a level of national importance. And substantial positive economic impacts, such as a significant potential to employ U.S. workers particularly in an economically depressed area, can also help a proposed endeavor rise to a level of national importance. The success of the endeavor, or attributes that could tend to make the endeavor more successful, are consequently not as important as determining whether the proposed endeavor itself stripped away from a petitioner has attributes that would highlight the prospective positive impact of its broader implications or positive economic effects rising to a level of national importance. And it is here that the Petitioner's endeavor, such that it is, is deficient. The Petitioner's endeavor is at its core the performance of their job duties in the operation of a business, [redacted] But the record does not adequately support how the performance of these duties by the Petitioner would potentially prospectively impact the Petitioner's field in a manner that rose to the level of national importance, either through the proposed endeavor's broader implications or its positive economic impact. They do not identify what specific broader considerations would emanate from their specific performance of physical therapist duties that would implicate matters in the field at a level rising to national

[4] While we may not discuss every document submitted, we have reviewed and considered each one.

importance. For example, the Petitioner does not sufficiently link in the record how their performance of physical therapist duties at Illinois Spine would increase employment in an area with historic unemployment.

And it is also unclear from the evidence in the record that a single instance of performing the job duties of physical therapist described by the Petitioner would have a significant impact on the field beyond its immediate sphere of influence, which is the business they would work for. The evidence in the record does not highlight how the prospective potential impact of the work of one physical therapist at [redacted] could have broader implications implicating issues rising to a level of national importance. Again the Petitioner tries to highlight their endeavor's broader implications by linking the endeavor to their experience performing general duties as a physical therapist in their home country with nursing facets to elderly individuals. And again simple past performance of the duties of the endeavor, even successfully or competently, does not confer broad benefits rising to a level of national importance because it is not clear from the record how they ascend to a level of national importance.[5] What can be concluded from the record is that the performance of duties of physical therapist would benefit only the company employing the Petitioner and utilizing their services,[redacted] This is akin to how the benefit of someone's teaching is generally only directly beneficial to the students being taught and not wider population. In *Dhanasar* we discussed how teaching would not impact the field of education broadly in a manner which rises to national importance. *Dhanasar* at 893. By extension, activities which only benefit a single employer would not rise to a level of national importance. The record does not contain any meaningful analysis of the broader implications or potential prospective economic impact rising to the level of national importance stemming from the Petitioner's specific performance of the duties of a physical therapist. And the letters of recommendation containing testimonials of the services the Petitioner performed do not describe how their performance of those duties connect to broader implications rising to national importance or any nationally important economic impact. In sum the record supports the conclusion that the potential impact of the Petitioner's endeavor would benefit only companies that employ the Petitioner.

Moreover, the record does not contain adequate evidence to identify any positive economic impact rising to a level of national importance from the Petitioner's endeavor. In *Dhanasar*, we suggested that a Petitioner may be able to demonstrate the national importance of an endeavor by demonstrating "significant potential to employ U.S. workers…in an economically depressed area…" *See Dhanasar* at 890. Here, the evidence in the record does not identify any hiring plans or any locality or economically depressed area that could benefit from the Petitioner's proposed endeavor.

A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *also see* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). The Petitioner has not met their burden of proof with persuasive material, relevant, and probative evidence which by a preponderance demonstrates the national importance of their proposed endeavor.

[5] It is important to note that the Petitioner's accomplishments and expertise are more relevant to the second prong of *Dhanasar*, which "shifts the focus from the proposed endeavor to the foreign national." *Dhanasar* at 889.

## III. CONCLUSION

The Petitioner has not demonstrated their categorical eligibility for EB-2 permanent immigrant classification. And the record contains insufficient evidence to establish they met the first prong of the *Dhanasar* analytical framework. Moreover, because the Petitioner has not established that the proposed endeavor has national importance, as required by the first *Dhanasar* prong, they are not eligible for a national interest waiver. We reserve our opinion regarding whether the record satisfies the second or third *Dhanasar* prong. *See INS v Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

We conclude the Petitioner has not established that they are eligible for or otherwise merit a national interest waiver as a matter of discretion. So the petition will remain denied and the appeal is hereby dismissed.

**ORDER:** The appeal is dismissed.