



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

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

In Re: 12138604

Date: JUN. 08, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a physician, seeks second preference immigrant classification as a member of the professions holding an advanced degree and/or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 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 record did not establish that the Petitioner's proposed endeavor was of national importance. In addition, he found that the Petitioner did not show that on balance, it would be beneficial to the United States to waive the job offer requirement in the requested EB2 immigrant visa classification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further consideration and the 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.

Section 203(b) of the Act sets out this sequential framework:

- (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
  - (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

- (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien’s services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). This, however, is only the first step, and the successful submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for this classification.<sup>1</sup> When a petitioner submits sufficient evidence at the first step, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the beneficiary is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(i)(3)(i).

While neither the statute nor the pertinent regulations define the term “national interest,” we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.<sup>2</sup> *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national’s proposed endeavor has both substantial merit and national importance; (2) that

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<sup>1</sup> USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*, PM-602-0005.1 (Dec. 22, 2010).

<sup>2</sup> In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm’r 1998) (*NYSDOT*).

the foreign national 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 foreign national 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 foreign national. To determine whether he or she 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; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the 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, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) 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.<sup>3</sup>

## II. ANALYSIS

The Petitioner has previously been employed as a physician in her home country, both in general practice and weight loss and aesthetics. She has also worked as a technical head of staff focused on providing training and guidance on the operation, storage, and disposal of medical products.

### A. Eligibility for the Underlying EB-2 Classification

In her initial submission, the Petitioner claimed to be eligible as both a member of the professions holding an advanced degree, and as an individual of exceptional ability, and submitted evidence in support of these claims. Although the Director's request for evidence (RFE) noted that eligibility for a national interest waiver also required a showing of eligibility for the requested visa classification, he did not request additional evidence in support of the Petitioner's eligibility for the EB-2 classification. While this indicates that the Director believed the initial evidence to be sufficient, he did not state in his decision whether he had concluded that the Petitioner was eligible, and did not provide any analysis of the evidence submitted in support of the Petitioner's eligibility as either a member of the professions

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<sup>3</sup> See *Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

holding an advanced degree or an individual of exceptional ability. We are therefore remanding this matter to the Director to issue a new decision which includes a conclusion regarding the Petitioner's eligibility for the underlying EB-2 visa classification as well as an analysis of the evidence to support that conclusion.

When conducting the analysis of the Petitioner's eligibility for the EB-2 visa classification, the Director should consider in particular whether, in support of her qualification as a member of the professions holding an advanced degree, the Petitioner has submitted evidence demonstrating that she has at least five years of progressive experience in the specialty in which she intends to pursue her endeavor in the United States.<sup>4</sup> Similarly, if he determines that the Petitioner has not established her qualification as a member of the professions holding an advanced degree, the Director should consider whether she has submitted evidence to establish she has at least ten years of full time experience in an occupation in the endeavor she intends to pursue in the United States.

#### B. Eligibility for a National Interest Waiver

The Petitioner initially indicated on Form I-140, in the "petition letter" accompanying the petition, and in the first "professional plan and statement" she submitted that her proposed endeavor was to work as a medical researcher, "specializing in the areas of medicine, surgery, preventive medicine, ambulatory care, emergency medicine, nutrition, aesthetics, and clinical practice." She described her work in this proposed endeavor as follows:

- Fill a position as a Medical Researcher that is vacant due to a large demand for such professionals.
- Investigate cause, progress, life cycle, or mode of transmission of diseases or parasites.
- Educate patients, communities, and peers on proper techniques and treatments through extensive research.
- Teach principals of medicine and medical and laboratory procedures to physicians, residents, students, and technicians.
- Confer with health departments, industry personnel, physicians, and others to develop health safety standards and public health improvement programs.

In her response to the Director's request for evidence (RFE), she submitted a new "professional plan and statement" which made no mention of medical research, nor did the response letter from counsel. This new letter and statement indicated that she intends to continue to own and manage her medical supply business, as well as work towards completing the United States Medical Licensing Examination (USMLE) to allow her to obtain a medical license and practice family medicine. The

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<sup>4</sup> The Petitioner submitted an evaluation of her training, education, and experience which concludes that she holds the equivalent of a U.S. Doctor of Medicine degree "based upon a combination of Academics and a minimum of 5 years of Professional experience..." However, that evaluation states that her diploma from the University of [redacted] in [redacted] Brazil which conferred the title of "Doctor" (erroneously referred to as a bachelor's degree) "indicate[s] that [the Petitioner] satisfied requirements substantially like those required toward the completion of a Bachelor of Medicine from an accredited institution of higher education in the United States," and not that is the equivalent of an advanced degree from a U.S. college or university. She would therefore need to provide evidence of five years of progressive, post-baccalaureate experience in the specialty in which she proposes to pursue her endeavor.

Petitioner also stated in these documents she intends to become a franchisee for a medical clinic chain, and focus on opening clinics in medically underserved areas.

However, 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). Rather than providing additional evidence in support of her proposed endeavor as a medical researcher as requested, the Petitioner responded to the RFE with a completely new proposed endeavor involving three facets (obtaining a medical license to practice medicine, operating a medical supply company, and opening medical clinics as a franchisee), none of which include duties relating to medical research. Because a petitioner seeking a national interest waiver must, under the first prong of the *Dhanasar* framework, demonstrate the substantial merit and national importance of their proposed endeavor, a change in the nature of that endeavor from vague research goals to medical practice and business administration is material to eligibility for the waiver.

In addition, the first prong of the *Dhanasar* framework focuses on the specific endeavor that the individual proposes to undertake, rather than the substantial merit and national importance of the overall field in which the endeavor resides. *See Dhanasar*, 26 I&N Dec. at 889. Therefore, on remand, the Director should first consider whether the Petitioner provided sufficient detail in describing her proposed endeavor in medical research in response to his RFE which requested such evidence. If he determines that the record includes sufficient information regarding the Petitioner's specific proposed endeavor, he should then analyze the evidence submitted in support of the Petitioner's proposed endeavor as a medical researcher under the *Dhanasar* framework to determine whether she is eligible for a national interest waiver. Because the proposed endeavor submitted in response to the Director's RFE constitutes a material change, he should not consider this evidence in making that determination.

**ORDER:** The Director's decision is withdrawn and the matter is remanded for further consideration and the entry of a new decision consistent with the above analysis.