



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

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

In Re: 12458465

Date: JUN. 21, 2021

Appeal of Texas Service Center Decision

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

The Petitioner seeks second preference 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 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 Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. On appeal, the Petitioner submits additional documentation and a brief asserting that he is eligible for a national interest waiver.

While we conduct *de novo* review on appeal, we conclude that a remand is warranted in this case because the Director's decision is insufficient for review. In order to qualify for a national interest waiver, the Petitioner must first show that he qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. As presently constituted, the record does not establish whether the Petitioner qualifies for the underlying second preference immigrant classification.

I. LAW

To establish eligibility for a national interest waiver, *a petitioner must first demonstrate qualification for the underlying EB-2 visa classification* (emphasis added), 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.

Section 101(a)(32) of the Act provides that “[t]he term ‘profession’ shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.”

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).

Furthermore, 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. 884.¹ *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion,² grant a national interest waiver when the below prongs are met.

¹ 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*).

² See also *Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS’ decision to grant or deny a national interest waiver to be discretionary in nature).

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.³

II. ANALYSIS

A. Eligibility for the Requested Classification

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability.

The Petitioner's August 2018 letter accompanying the Form I-140 petition stated that he qualifies as an advanced degree professional based on a combination of his academic background and progressive professional experience. The letter also stated that the Petitioner was alternatively seeking classification as "a professional of Exceptional Ability in his field of expertise."

The Petitioner maintains that he has established eligibility as an advanced degree professional. Specifically, he states that "[a]ccording to your [request for evidence (RFE)] letter, USCIS finds [the Petitioner] to be a member of the professions holding an advanced degree." On appeal, the Petitioner again states that "the Service approved that the petitioner qualifies for the requested classification as a member of the professions holding an advanced degree." Contrary to the Petitioner's assertions, however, neither the Director's decision nor the RFE renders a finding as to whether the Petitioner qualifies as an advanced degree professional, or alternatively as an individual of exceptional ability.

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

Instead, the Director conducted an analysis of the *Dhanasar* framework, without first determining whether the Petitioner qualified for the underlying EB-2 visa classification.

B. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. The Director's decision did not render findings as to whether the Petitioner satisfies prong one of the *Dhanasar* analytical framework.⁴

III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to first consider whether the Petitioner qualifies for EB-2 classification, the threshold determination in national interest waiver cases. If the Director concludes that the Petitioner is qualified for the requested classification, he should then properly apply all three prongs of the *Dhanasar* analytical framework to make a determination as to whether 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.

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

⁴ On appeal, the Petitioner states "because the Service did not question the fulfillment of this prong either in the RFE, nor in the Service Denial Decision, the Petitioner is assuming the Service implicitly recognized that the proposed endeavor has substantial merit and national importance, although the Service should have explicitly analyzed this prong in the Service Denial Decision."