



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

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

In Re: 27415726

Date: AUG. 14, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur specializing in corporate wellness, sports marketing and management, and sports coaching 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 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 Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for the underlying visa classification, or is eligible for or otherwise merits a discretionary waiver of the job offer requirement “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. Section 203(b)(2)(B)(i) of the Act. 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.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

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:

- (A) An official academic record showing that the [noncitizen] 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 [noncitizen] 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 [noncitizen] 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.

8 C.F.R. § 204.5(k)(3)(ii).<sup>1</sup>

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides, “If the above standards do not readily apply to the beneficiary’s occupation, the petitioner may submit comparable evidence to establish the beneficiary’s eligibility.”

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.<sup>2</sup> We then consider the totality of the material provided in a final merits determination and assess whether the record shows that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.<sup>3</sup> See *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination). This two-step analysis is consistent with our holding that the “truth is to be determined not by the quantity of evidence alone but by its quality,” as well as the principle that we examine “each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.” *Matter of Chawathe*, 25 I&N Dec. at 376.

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<sup>1</sup> In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

<sup>2</sup> See generally 6 USCIS Policy Manual F.5(B)(2), <https://www.uscis.gov/policy-manual>.

<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, *supra* at F.5(B)(2).

Once a petitioner demonstrates eligibility for the underlying classification, the petitioner 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>4</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

### A. Member of the Professions Holding an Advanced Degree

We withdraw the Director’s determination that the Petitioner does not qualify as a member of the professions holding an advanced degree. To qualify as a member of the professions, an individual must meet “one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.” 8 C.F.R. 204.5(k)(2).<sup>5</sup> The Director reasoned that a baccalaureate degree is not the minimum requirement for entry into the Petitioner’s occupation of fitness trainer. However, the record does not indicate that the Petitioner’s occupation is a fitness trainer, but instead indicates he intends to work as the general manager of his business in the field of corporate wellness, sports marketing, and sports coaching.

The Petitioner’s business plan explains that he proposes to manage a business he established in Florida named, [REDACTED]. Although the record indicates certain aspects of the business include fitness and sports training, the Petitioner’s reply to a request for evidence states that his endeavor is the management of the business specializing in sports marketing projects, corporate wellness, and sports coaching. Therefore, the Director’s decision based on the Petitioner having the occupation of fitness instructor is misplaced. We find that the Petitioner has provided sufficient evidence showing that he is a member of the professions and that the entry into his occupation has the minimum requirement of a bachelor’s degree or its foreign equivalent.

The Petitioner submitted evidence to demonstrate he meets the requirements of an advanced degree, including his diplomas, academic transcripts, an educational evaluation, and documents relating to his experience in the field. On remand, the Director should evaluate the documentation to determine whether the Petitioner demonstrates he meets the requirements of an advanced degree.

### B. Exceptional Ability

The record indicates the Petitioner submitted evidence to demonstrate he is a person of

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<sup>4</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).

<sup>5</sup> Section 101 (a)(32) of the Act states “[t]he term ‘profession’ shall include but not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.”

exceptional ability. However, the Director's decision did not address 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.

On appeal, the Petitioner cites to USCIS policy arguing that if the Petitioner failed to demonstrate requirements for exceptional ability, the Director should have articulated the specific reasons for the failure in the request for evidence or the decision.<sup>6</sup> The record shows that the request for evidence explained the reasons the Petitioner did not meet each criterion based on the evidence initially submitted with the petition and provided him an opportunity to submit additional evidence. Although the Petitioner submitted additional evidence relating to the criteria, the Director's decision did not address this documentation and did not make a determination as to the Petitioner's eligibility for the classification based on exceptional ability. Since the Director's decision concluded that the Petitioner was not a member of the professions holding an advanced degree, they should have considered the Petitioner's alternative argument and evidence that he met the classification as a person of exceptional ability.

On remand, if the Director finds that the Petitioner does not meet the requirements of an advanced degree, they should consider the Petitioner's arguments and evidence submitted with the petition and in the reply to the request for 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).

### C. 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 that, "While the evidence is sufficient to establish the substantial merit of the [P]etitioner's proposed endeavor, the evidence does not establish the national importance of the [P]etitioner's particular proposed endeavor." However, the decision does not sufficiently explain the basis for this determination.

On appeal, the Petitioner argues that the Director's decision lacked specific reasons regarding the rejection of evidence presented, thereby impairing the Petitioner's ability to understand the decision. We agree with the Petitioner. 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). Here, the Director's decision did not address the evidence submitted with the petition or in response to the request for evidence in the determination that the Petitioner did not establish his proposed endeavor has national importance.

The Director should analyze the evidence to determine whether the record sufficiently demonstrates the endeavor has substantial merit and national importance. The endeavor's merit may be

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<sup>6</sup> See generally 6 USCIS Policy Manual, *supra*, at F.5(B)(2).

demonstrated in a range of areas, such as business, entrepreneurialism, science, technology, culture, health, or education.<sup>7</sup> 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. 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>8</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.

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.

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

In the second prong, the focus shifts to the petitioner and their positioning 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.

For *Dhanasar's* second prong, the Director concluded that the Petitioner "has not established that [he] is well positioned to advance the proposed endeavor." However, the decision did not sufficiently explain the basis for the determination. While the decision states that the Petitioner submitted letters of recommendation and an expert opinion, it does not provide an analysis of that evidence explaining the reasons they fail to establish that the Petitioner is well positioned to advance the proposed endeavor. Also, the decision does not mention or indicate it considered other evidence submitted by the Petitioner, including his academic record, his professional experience documents, his trainings and certifications, his memberships, and a second expert opinion.

On appeal, the Petitioner argues that he demonstrated by a preponderance of the evidence that he is well positioned to advance the proposed endeavor. The Petitioner analyzes the evidence relating to his experience and expertise to show his ability to advance his 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 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).

Accordingly, we withdraw the Director's determination that the Petitioner does not meet the second prong of the *Dhanasar* framework. Any new determination by the Director must consider all of the evidence offered for prong two, including the Petitioner's academic record, certifications and trainings, memberships, the expert opinion letter, and letters of recommendation. The Director should analyze the specific content of the record to determine if this documentation renders him well

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

<sup>8</sup> See generally 6 USCIS Policy Manual, *supra*, at F.5(D)(1).

positioned to advance the proposed endeavor. If the Director concludes that the Petitioner's documentation does not meet Dhanasar's second prong, the decision should discuss the insufficiencies in the evidence and adequately explain the reasons for ineligibility.

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

As to the third prong of Dhanasar, the Director stated the law and the relevant considerations in performing the third prong's balancing analysis and 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." However, the Director did not discuss the evidence weighed in balancing those considerations or address the Petitioner's specific claims, if any, as to the third prong. Without a proper evaluation of the factors identified in Dhanasar's third prong, the Director's determination for this prong was in error. If the Director concludes that the Petitioner's documentation does not meet this 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 an EB-2 classification either as a member of the professions holding an advanced degree 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.