



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

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

In Re: 28539245

Date: NOV. 07, 2023

Appeal of Texas Service Center Decision

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

The Petitioner seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced, as well as a national interest waiver of the job offer requirement attached to this 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 merited 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 dismiss the appeal.

## 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.

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

Profession is defined as 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.<sup>1</sup> 8 C.F.R. § 204.5(k)(3).

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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.

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.

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish that they merit 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 U.S. Citizenship and Immigration Services (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. EB-2 CLASSIFICATION

The Petitioner initially claimed eligibility for the EB-2 classification as both an advanced degree professional and an individual of exceptional ability, but in responding to the Director’s request for evidence (RFE) he focused on the former. The Director did not address the Petitioner’s EB-2 eligibility in their RFE, and concluded that he met the requirements as an individual of exceptional ability in their decision. But the Director’s very brief analysis did not conclude that the Petitioner met the requisite three evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii), did not include a final merits determination, and incorrectly stated that the exceptional ability requirements arise from the *Dhanasar* decision. We therefore withdraw the Director’s conclusion regarding the Petitioner’s eligibility for the EB-2 classification.

Because per the below discussion we conclude that the Petitioner is not eligible for, and does not merit, a national interest waiver, and this is dispositive of his appeal, we decline to reach and hereby reserve the issue of his eligibility for the EB-2 classification as an individual of exceptional ability or as a member of the professions holding an advanced degree. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make “purely advisory findings” on issues that are unnecessary to the ultimate decision); *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).

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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 their 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 aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5>.

<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).

### III. NATIONAL INTEREST WAIVER

The record shows that the Petitioner was the co-owner of a trucking company in Brazil for several years. Prior to this, he earned a Title of Nutritionist degree from the [ ] University [ ]. He proposes to start a trucking company in [ ] Florida to provide freight transportation and warehousing services to U.S. businesses including wholesalers and agricultural companies. The Petitioner plans to direct the operations of this company as its logistics director and CEO.

#### A. Substantial Merit and National Importance

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual 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. *Dhanasar*, 26 I&N Dec. at 889.

The Director determined that the Petitioner's proposed endeavor is of substantial merit, but based this upon his education and experience in the industry. The first prong does not focus on a petitioner and their educational and employment history, but on the specific proposed endeavor. In responding to the Director's RFE, the Petitioner referenced his expertise and skills in the freight transportation industry, not the merit of the services he would provide through his proposed endeavor. While we acknowledge that small businesses in general have merit in the area of business, the Petitioner did not submit evidence that his specific proposed endeavor would be of substantial merit per the *Dhanasar* analytical framework. We therefore withdraw the Director's conclusion regarding this requirement.

As for the national importance of the proposed endeavor, the Director concluded that the Petitioner had not demonstrated that his direction of a small freight transportation company would have broader implications in the logistics industry, that the impact of this role would extend beyond the company and its clients, and that the endeavor would have significant potential to employ U.S. workers or have other substantial positive economic effects.

On appeal, the Petitioner copies sections of his response to the Director's RFE into his appeal, essentially repeating the same arguments rejected by the Director. One of the ways in which he asserts his proposed endeavor will be of national importance is through job creation. According to the business plan initially submitted by the Petitioner, his company would employ 27 workers, including truck drivers, freight handlers, mechanics, and logistics assistants, by the end of its fifth year of operations, and have a payroll of more than \$1.5 million. The plan also projects net profits of nearly \$250,000 by the third year of operations. A revised plan submitted with the Petitioner's RFE response also asserts that indirect jobs will be created through his proposed endeavor.

An endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, may well be understood to have national importance. *Id.* at 890. We first note that the projections for job creation included in both versions of the business plan are not well supported, as it is unclear how the Petitioner arrived at those figures. The plans refer to general trends in the logistics and trucking industry, such as supply chain issues and a shortage of truck drivers, that affect hiring and employment in the overall industry, but

they do not present or discuss factors and economic conditions specific to the Petitioner's proposed business.

In addition, even if the job creation projections were well-supported, the Petitioner has not established that the employment of 27 workers (and the projected additional 58 indirect jobs) in the [ ] Florida area is significant to the extent that it would be of national interest. There is no suggestion in the record that [ ] or the specific location where the business would be located, is an economically depressed area, nor does the evidence indicate that level of job creation would potentially have substantial positive economic effects for the area or region.

The Petitioner also asserts that through his proposed endeavor he will "inspire and help other logistics and transportation companies adjust their business practices to the demands of the ever-changing market and improve the quality of their services." But he does not articulate, in the business plans or elsewhere, how he intends to affect the business practices of his competitors, or specifically what adjustments he would help them to make. These assertions, without details and supporting evidence, are insufficient to establish that his proposed endeavor would potentially impact the logistics industry at a broader level.

After presenting its copied RFE response, the Petitioner goes on to state that United States Citizenship and Immigration Services (USCIS) "has consistently stated that one way to estimate the prospective impact of one's work is by evaluating the individual's past achievements." We first note that he does not support this statement with citations to published decisions or references to policy documents. Second, as we noted above, this statement is in direct conflict with the analytical framework we laid out in *Dhanasar*, wherein the first prong looks only to the potential prospective impact of the specific proposed endeavor, whereas the second prong focuses on the Petitioner and his positioning to advance that endeavor. The Petitioner's qualifications and previous achievements are not relevant to the determination of the national interest of his proposed endeavor.

For all of the reasons discussed above, the Petitioner has not established that his proposed endeavor is of substantial merit and national importance, and he therefore does not meet the requirements of the first prong of the *Dhanasar* analytical framework.

#### IV. CONCLUSION

The Petitioner also argues on appeal that he meets *Dhanasar*'s second and third prongs by showing that he is well positioned to advance his proposed endeavor and that, on balance, a waiver of the job offer requirement would be in the national interest. However, as he does not meet the first prong of the *Dhanasar* analytical framework, he has not established his eligibility for a national interest waiver. As this is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the issue of his eligibility for the remaining prongs. See *Bagamashad*, 429 U.S. at 25; see also *Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

**ORDER:** The appeal is dismissed.