



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

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

In Re: 28951290

Date: NOV. 30, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a sales manager, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree, 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 merits, as a matter of discretion, a national interest waiver. 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.

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).

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).¹ Meeting

¹ 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).

at least three criteria, however, does not, in and of itself, establish eligibility for this classification.² 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 discretion³, 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

In his initial filing, the Petitioner sought classification as either a member of the professions holding an advanced degree or as an individual of exceptional ability. The Director determined that, based upon the Petitioner’s official academic records from [REDACTED] and an education credential evaluation, the Petitioner holds the foreign equivalent of a bachelor’s degree in marketing from an accredited college or university in the United States.⁴ However, the Director did not complete this analysis by evaluating the evidence of the Petitioner’s post-degree work experience, nor did they reach a conclusion regarding his eligibility for the EB-2 classification. Per the below, we conclude that the Petitioner is not eligible as an advanced degree professional.

The record shows that the Petitioner’s bachelor’s degree was conferred on September 14, 2015. Therefore, in order to establish his eligibility as an advanced degree professional, the record must show that he gained five years of progressive work experience in the fields of sales and marketing after that date. In addition, since a petitioner must establish eligibility for the requested benefit at the time the petition is filed, evidence of work experience gained after October 19, 2021 will not be

² 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>.

³ 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).

⁴ The education evaluation relied upon a combination of the Petitioner’s education and work experience in the field of marketing to reach its conclusion, and did not conclude that the Petitioner’s degree alone was the equivalent of a U.S. bachelor’s degree. As the regulations require five years of progressive experience to follow “[a] United States baccalaureate degree or a foreign equivalent degree,” and do not allow for the combination of a lesser degree and work experience to serve as the equivalent of a baccalaureate degree, the evaluation does not establish that the Petitioner holds the foreign equivalent of a U.S. bachelor’s degree. 8 C.F.R. § 204.5(k)(2). Nevertheless, the diploma and transcripts, together with information from the American Association of Collegiate Registrars and Admissions Officers (AACRAO) Electronic Database for Global Education (EDGE) database regarding the Brazilian education system and credentials, www.aacrao.org/edge, demonstrate that the Petitioner holds the foreign equivalent of a bachelor’s degree in social communications and marketing from an accredited college or university in the United States.

considered. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Here, the Petitioner submitted two letters describing his experience as a sales manager. The first, from [REDACTED] states that he was employed on a full-time basis from December 1, 2011 to June 16, 2016, or approximately 9 months after his bachelor's degree was conferred. The second letter, from [REDACTED] states that he was employed full-time from July 18, 2016 to June 6, 2019, or approximately 2 years and 11 months. Together, these letters show that the Petitioner has approximately 3 years and 8 months of post-baccalaureate work experience as a sales manager. Accordingly, they do not demonstrate the Petitioner's eligibility as a member of the professions holding an advanced degree.

As for the Petitioner's eligibility as an individual of exceptional ability, we note that when the Director issued their request for evidence (RFE), they noted deficiencies in the evidence relating only to the evidence of his eligibility as an advanced degree professional, and did not seek further evidence relating to his exceptional ability. The Director also did not address the Petitioner's eligibility as an individual of exceptional ability in their decision. On remand, the Director should evaluate the Petitioner's initial claims and evidence regarding the evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii). If the evidence is insufficient to establish eligibility, the Director should issue an RFE, explaining the deficiencies in the evidence and providing the Petitioner an opportunity to respond.

III. NATIONAL INTEREST WAIVER

The Petitioner proposes to serve as CEO of a company that will offer retail sales training courses to other companies. He submitted a business plan for this company which shows that he intends to hire four employees.

A. Substantial Merit and National Importance

The first prong of the *Dhanasar* analytical framework, 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.

While the Director determined that the Petitioner's proposed endeavor meets the first prong of the *Dhanasar* analytical framework, we note that they included no analysis explaining this conclusion. In fact, the Director made no determination of the endeavor's substantial merit, and while the decision lists a single recommendation letter to explain its conclusion that the endeavor is of national importance, the decision lacks any explanation of what content in this letter led to that conclusion. Per the regulation at 8 C.F.R. § 103.3(a)(1)(i), an officer must articulate the specific reasons for denial when issuing a denial decision. Here, the Director's lack of analysis and a conclusion regarding the substantial merit of the proposed endeavor, and the lack of analysis regarding its national importance, do not show that they properly weighed the evidence and applied the appropriate legal standards. We therefore withdraw the Petitioner's conclusion regarding the first prong.

On remand, the Director should review the record and determine whether it demonstrates that the Petitioner's proposed endeavor is of substantial merit, and articulate their reasons for that

determination. In addition, the Director should consider whether the record also demonstrates that the proposed endeavor is of national importance. In so doing, the Director should keep in mind that we look for broader implications of the specific endeavor that the Petitioner proposes to undertake, not the potential prospective impact of the entire field or industry in which the Petitioner proposes to engage. In addition, as the Petitioner intends to open and operate a business, the Director should consider whether the evidence shows that the business has a “significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area.” *Id.* at 890. Further, the Director should consider whether the proposed endeavor, to start and manage a company offering sales training services, potentially has national or even global implications within its field, or is otherwise of national importance due to its broader implications. When issuing their decision, the Director should articulate the reasons why the evidence of record does or does not support the endeavor’s national importance.⁵

B. Well Positioned to Advance the Proposed Endeavor

The second prong of the *Dhanasar* analytical framework shifts the focus from the proposed endeavor to the individual. To determine whether they are well positioned to advance the proposed endeavor, 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. *Id.* at 890.

Here, the Director concluded that the Petitioner was not well positioned to advance his proposed endeavor. But their analysis included factual errors and instances where the incorrect legal standards and requirements were applied. For example, the Director determined that the reference letters in the record show that the Petitioner is a skilled salesman, but did not show that he “has influenced the field to the level of major significance.” The phrase “contributions of major significance” is also later used in the Director’s second prong analysis.⁶ On remand, when evaluating the Petitioner’s work experience in his field as one of many factors to be considered under the second prong of the *Dhanasar* analytical framework, the Director should consider whether that experience shows a “record of success” in the Petitioner’s previous sales and entrepreneurial experience.

In addition, the decision makes references to the Petitioner’s “findings,” and whether the “information technology community” is applying those findings. As the Petitioner is not a researcher and has not worked in the field of information technology, on remand the Director should focus on whether the Petitioner is well positioned to advance his proposed endeavor as an entrepreneur and retail sales trainer.

⁵ We note that the decision includes analysis when evaluating evidence submitted in support of the second prong of the *Dhanasar* analytical framework that would more appropriately be considered under the first prong. For example, the Director’s comparison of the Petitioner’s proposed endeavor to that of Dr. Dhanasar’s proposed teaching endeavors is more suited to the analysis of whether that proposed endeavor is of national importance.

⁶ This phrase is used at 8 C.F.R. § 204.5(h)(3)(v) as part of one of the evidentiary criteria relating to a different classification, individuals of extraordinary ability, and is therefore inapplicable to the instant petition.

C. Whether on Balance a Waiver is Beneficial

The third prong requires a 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, we may evaluate factors such as: whether, in light of the nature of the individual's qualifications or the proposed endeavor, it would be impractical either for them to secure a job offer or to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from their contributions; and whether the national interest in their contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, establish 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. *Id.* at 890-91.

On remand, the Director should consider and evaluate the Petitioner's claims regarding this prong, including those made on appeal, to determine whether, on balance, a waiver of the job offer requirement, and thus of a labor certification, would be in the U.S. national interest.

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