U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19628396

Date: OCT. 3, 2023

Appeal of Texas Service Center Decision

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

The Petitioner is seeking classification as an individual of exceptional ability in business, 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). 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 Petitioner did not establish that he is an individual of exceptional ability or that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The matter is now before us on appeal.

On appeal, the Petitioner asserts that the Director erred in denying the petition and submits additional evidence to establish his eligibility for the benefit sought. Further, since filing the appeal, we encountered new information that undermines the Petitioner's claims as an individual of exceptional ability that merits a national interest waiver. *See* section 203(b)(2)(A) of the Act; *see also Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). On December 1, 2022, we issued a notice of our intention to dismiss the appeal (NOID) because the record did not establish the Petitioner's eligibility for the requested benefit. We issued this NOID to advise the Petitioner of derogatory information being considered and to provide an opportunity for him to rebut and present information to establish his eligibility for the immigration benefits sought. 8 C.F.R. § 103.2(b)(16)(i).

The Petitioner did not respond to the NOID within the time period provided. 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. 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) [Noncitizens] who are members of the professions holding advanced degrees or [noncitizens] 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* (emphasis added), ...
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> (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 [a noncitizen's] services in the sciences, arts, professions, or business be sought by an employer in the United States.

Exceptional ability in the sciences, arts, or business is defined in 8 C.F.R. § 204.5(k)(2) as a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. To qualify as an individual of exceptional ability, 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, of which an individual must meet at least three.

The submission of sufficient initial evidence does not, however, in and of itself establish eligibility. If a petitioner satisfies these initial requirements, we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. In making this determination, the truth is to be determined not by the quantity of evidence alone but by its quality. *See Matter of Chawathe,* 25 I&N Dec. at 369. *See also Kazarian v. USCIS,* 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if it satisfies the required number of criteria, considered in the context of a final merits determination); *6 USCIS Policy Manual* F.5, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

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. at 884.[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, USCIS may, as matter of discretion,[2] 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 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

[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 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).

of a job offer and thus of a labor certification. *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ISSUES

The Petitioner indicates in the petition that he is "an entrepreneur in the cyber intelligence and technology industry" who is employed in the United States [redacted] Through his prospective endeavor, he will [redacted] (N-) and [redacted] (O-). He further explains that while "[N-] devotes tremendous efforts into researching and developing innovations in technology and cybersecurity and marketing them to government and law enforcement entities. . . . [O-] will market its cybersecurity technology suite primarily to other businesses. . . .[O-] hopes to tackle one of the biggest threats to U.S. industry – cyberattacks. . . ."

A. U.S. Department of Commerce Entity List

During the pendency of this appeal, we encountered new information that raises questions about whether the Petitioner qualifies as an individual of exceptional ability, who will substantially benefit prospectively the United States, and otherwise merit a national interest waiver as a matter of discretion. *See* section 203(b)(2)(A) of the Act; *see also Dhanasar*, 26 I&N Dec. at 889.

Specifically, N- was added to the U.S. Department of Commerce, Bureau of Industry and Security (BIS)'s "Entity List"[3] based on a decision by the End-User Review Committee (ERC)[4] in accordance with the regulations at 15 C.F.R. § 744. The ERC concluded that N-:

> [H]as been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States and *those acting on behalf of such entities*. Specifically, investigative information has shown that [N-] developed and supplied spyware to foreign governments that used this tool to maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers.

86 Fed. Reg. 60759 (emphasis added). Consequently, N- is subject to a licensure requirement for "[a]ll items subject to the EAR (*see* § 744.11 of the EAR)," with a "presumption of denial" for licensure review. *Id.*

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[3] BIS published a final rule, *Addition of Certain Entities to the Entity List*, 86 Fed. Reg. 60759, 60760 (Nov. 4, 2021) (to be codified at 15 C.F.R. pt. 744) (86 Fed. Reg. 60759), amending 15 C.F.R. § 744 of BIS' Export Administration Regulations (EAR).

The Entity List (supplement no. 4 to 15 C.F.R. § 744) identifies entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States. 86 Fed. Reg. 60759.

[4] ERC is composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, and makes all decisions regarding additions to, removals from, or other modifications to the Entity List. *Id.*

The Petitioner emphasizes that [redacted] (H-), [redacted] technology that forms the cornerstone of the products that N- markets to "foreign governments to remotely monitor nefarious actors who would otherwise be difficult or impossible to track down or prosecute." He states that through his proposed endeavor he will "provide substantial prospective benefit to the safety, security [and] economy of the United States," asserting that "[N-] has become a critical partner in worldwide efforts to fight terrorism and crime."

However, N- was added to the Entity List "based on specific and articulated facts" that N- has "developed and supplied spyware to foreign governments that used this tool to maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers." 86 Fed. Reg. 60759. N-'s addition to the Entity List indicates that the U.S. government has determined that N-'s products have been developed, marketed and used in ways that are contrary to the national security or foreign policy interests of the United States, which casts doubt on the Petitioner's assertion that his prospective endeavor has "broad implications for U.S national security and [will] help the nation combat terrorism and rival the technology of competing world powers."

We informed the Petitioner in our NOID that he must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies, noting that doubt cast on any aspect of his evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). However, the Petitioner did not respond to our NOID and left our concerns regarding these issues unanswered.

Further, N-, through its Entity List designation, is subject to EAR licensure requirements that may limit its ability to conduct commercial transactions within the United States, and in some instances abroad. The Petitioner indicates that [redacted] will continue his work with N- to market its products to U.S. "government and law enforcement entities." In our NOID, we asked the Petitioner to explain how he will effectively market N-'s cybersecurity products to U.S. government and law enforcement entities given these commercial transaction constraints, but he did not provide narrative or documentary evidence to overcome our concerns.

Likewise, the Petitioner states that as O-[redacted] "bring the cybersecurity advances we enabled for government to the newest risk terrain, business cybersecurity." While O- has not been added to the Entity List, according to BIS' Frequently Asked Questions (FAQs), O- may also be subject to EAR licensure requirements which may limit its ability to conduct commercial transactions within the United States and abroad. Specifically, BIS' FAQ #134 provides, in pertinent part:[5]

> Subsidiaries, parent companies, and sister companies are legally distinct from listed entities. Therefore, the licensing and other obligations imposed on a listed entity by virtue of its being listed do not *per se* apply to its subsidiaries, parent companies, sister companies, or other legally distinct affiliates that are not listed on the Entity List. If, however, such a company, or even an unaffiliated company, acts as an agent, a front, or a shell company for the listed entity in order to facilitate transactions that would not otherwise be permissible with the listed entity, then the company is likely

[5] For more information about BIS FAQs, *see* https://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-exports-faqs/.

violating, *inter alia*, General Prohibition 10, EAR section 764.2(b) (causing, aiding, or abetting a violation) and possibly other subsections of 764.2 as well.

Though discussed in our NOID, the Petitioner has failed to address how he will market O-'s cybersecurity products (which he indicates have been developed in large part based on N-'s technologies) to U.S. businesses, given these potential EAR-related commercial transaction constraints. To substantiate his assertions that his proposed endeavor has both substantial merit and national importance, and that he is well positioned to advance the proposed endeavor, we asked the Petitioner in our NOID to provide independent, objective evidence addressing the impacts that N-'s Entity List designation and underlying EAR licensure requirements will have on O-'s prospective business operations. *See Dhanasar*, 26 I&N Dec. at 889; *see also Matter of Ho*, 19 I&N Dec. at 591.

While we provided the Petitioner with an opportunity to supplement the record with evidence to address the aforementioned determinations by the U.S. government which may adversely impact his eligibility for the immigration benefits that he seeks in this petition, he elected not to do so. 8 C.F.R. § 103.2(b)(16)(i). Based on the evidence provided by the Petitioner in the record and the derogatory evidence that we outlined in our NOID, we conclude that the Petitioner has not established more likely than not that he is an individual of exceptional ability whose proposed endeavor has both substantial merit and national importance, and that he is well positioned to advance the proposed endeavor. For these reasons, the petition may not be approved. For efficiency's sake, we incorporate the above discussion and analysis regarding this derogatory information into each of the bases in this decision for dismissing the appeal.

B. Individual of Exceptional Ability

Based on a review of the record in its totality, we conclude that the record, as currently constituted, does not establish that the Petitioner qualifies as an individual of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii).

The record indicates the Petitioner is "an entrepreneur in the cyber intelligence and technology industry" who is employed in the United States [redacted] plans to largely concentrate efforts on two companies, N- and O-. The Director denied the petition, concluding that the Petitioner did not fulfill any of the regulatory criteria under 8 C.F.R. § 204.5(k)(3)(ii) to show he is an individual of exceptional ability. Because the Petitioner does not indicate or establish that he qualifies as a member of the professions holding an advanced degree, the record must establish that he qualifies as an individual of exceptional ability. A petitioner must provide documentation that satisfies at least three of six regulatory criteria to meet the initial evidence requirements for this classification. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).

1. Regulatory Criteria at 8 C.F.R. § 204.5(k)(3)(ii)

On appeal, the Petitioner asserts that he met four of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B), (D), (E), and (F) at the time of filing the petition. However, the Petitioner does not discuss the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) and (C) on appeal or in the evidence offered on appeal, and the record does not establish his eligibility under these criteria. As the Petitioner does not contest the Director's conclusion that he did not meet these regulatory criteria, we consider these issues waived

on appeal. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012), (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived).

The record also does not reflect that he satisfies at least three of the other regulatory criteria.[6]

> *Evidence in the form of letter(s) from current or former employer(s) showing that the [individual] has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B).

The petition was filed in March 2019; the Petitioner stated that [redacted] with O- comports with the duties and responsibilities of those employed in the [redacted] occupation. *See* U.S. Department of Labor, *Occupational Outlook Handbook*, [redacted] https://www.onetonline.org/link/summary[redacted] Thus, the record must establish that he had at least ten years of full-time experience[redacted] March 2019. 8 C.F.R. § 103.2(b)(1).

In response to the Director's request for evidence (RFE), the Petitioner outlined his work experience as follows:

- [redacted] of [C-] (February 2007-2010);
- [redacted] of N- (June 2009 - June 2019), and its U.S. branch, [W-] (April 2015 – September 2017);
- [redacted] at [F-] (January 2013 – present);
- [redacted] of [K-] (January 2014 – December 2019); and
- [redacted] of O- (2017 – present).

The Director concluded that he did not meet this criterion, indicating that while letters had been submitted from the Petitioner's current and former employers, the letters did not sufficiently detail his dates of employment; indicate whether the employment was full-time; provide his job titles; or sufficiently describe his job duties. The Director also explained that the Petitioner did not adequately address how the evidence required under the criteria at 8 C.F.R. § 204.5(k)(3)(ii) *does not readily* apply to his occupation. On appeal, the Petitioner maintains that the evidence establishes that "over the course of the past decade or more [I have] held high-level positions[redacted]."

We have reviewed and collectively considered the evidence in the record, including the letters from the Petitioner's colleagues, his personal and company financial documentation, as well as media articles about N- and O- which suggest that he has recently been employed[redacted] However, while the letters cover a period of more than ten years, they do not establish that all of the Petitioner's claimed employment was[redacted] We agree with the Director that the letters do not provide sufficient detail regarding the dates of employment or job duties for us to determine that he had the requisite work experience[redacted] at the time of filing the petition.

The Petitioner also provided letters from[redacted] H-, who describes [redacted] C- and N-. However, the Petitioner has not sufficiently explained how the job duties inherent in developing software and

[6] While we may not discuss every document submitted, we have reviewed and considered each one.

cybersecurity tools are akin to those typically performed [redacted] While the record reflects that he [redacted] in recent years, he did not provide a timeline sufficient to illustrate the various positions he held during his tenure with each of his companies and the specific job duties that he performed therein, supported by probative evidence. *Matter of Chawathe,* 25 I&N Dec. at 376.

In our NOID, we asked the Petitioner to provide evidence that comports with the evidentiary requirements specified in 8 C.F.R. §§ 204.5(g)(1); 204.5(k)(3)(ii)(B) to establish that his claimed employment was [redacted] covering a period of at least ten years prior to the date of filing of this petition. 8 C.F.R. § 103.2(b)(1). However, he has elected not to respond to our request. Without more, the Petitioner has not established that he had at least ten years of work experience in [redacted] Therefore, this criterion has not been met.

Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

On appeal, the Petitioner contends that his membership in [redacted] [G-] which he describes as "an elite professional association that demands outstanding achievements of its members" meets the regulatory standards for this criterion. He points to a letter from [redacted] [Z-] to support his assertions. Z- indicates that he and the Petitioner [redacted] F-, a capital investment firm.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires "[e]vidence of membership in professional associations." *See* 6 *USCIS Policy Manual, supra*, at F.5(B). The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "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." The Director determined that Z-'s letter was insufficient to establish that G- is a professional association. We agree.

We asked the Petitioner in our NOID to provide evidence to establish that G- qualifies as a professional association, but he did not respond to our request. Beyond Z-'s letter and the Petitioner's own statements, the record does not contain sufficient documentary evidence about G- to demonstrate its eligibility requirements for membership or its mission. This criterion has not been met.

Although the Petitioner asserts his eligibility for the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(D) and (F) on appeal, the record does not currently establish that he has fulfilled the initial evidentiary requirement of three out of six criteria under 8 C.F.R. § 204.5(k)(3)(ii). As he is ineligible for the EB-2 classification, we will not address the additional criteria.

2. Final Merits Determination

If a petitioner satisfies the initial regulatory requirements at 8 C.F.R. § 204.5(k)(3)(ii), we then consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See* 6 *USCIS Policy Manual* F.2, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5. In this case, even if the Petitioner met at least three criteria under 8 C.F.R. § 204.5(k)(3)(ii), the derogatory information outlined above raises important questions regarding whether his work [redacted] N- and O- "will substantially benefit prospectively the

national economy, cultural or educational interests, or welfare of the United States," as required by Section 203(b)(2)(A) of the Act.

Although neither the statute nor the regulations specifically define the statutory phrase "substantially benefit," it has been interpreted broadly. Whether a person's employment meets this requirement requires a fact-dependent assessment of the case. *Cf Matter of Price*, 20 I&N Dec. 953 (Assoc. Comm. 1994) (golfer of beneficiary's caliber will substantially benefit prospectively the United States given the popularity of the sport in the EB-1 individual of extraordinary ability context); 6 *USCIS Policy Manual* F.2, https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2. In order to determine whether a petitioner establishes eligibility as an individual of exceptional ability in the final merits determination, USCIS must evaluate all the evidence together when considering the petition in its entirety for the final merits determination, given the high level of expertise required for this immigrant classification. *See* 6 *USCIS Policy Manual*, *supra*, at F.5(B).

On appeal, the Petitioner points to his recommendation letters stating they "describe [in] granular detail, [the writers'] experiences with [him] and describe [his] precise contributions to the business of cyber-intelligence and technology." He indicates that his "entrepreneurship skills in conjunction with [his] technical abilities make [him] uniquely exceptional." He contends that the Director erroneously concluded that the record "did not show that [he] had invented any cyber security product or tool." We agree that the record reflects the Petitioner's involvement in the development of the products created and marketed by N-. For instance, H- attested within his letters that the Petitioner played a critical role in the technological development of the software and cybersecurity tools that N- and O- continue to produce and market to this day, and some of the submitted media articles also discuss his involvement in the development of N-'s products.

Additionally, the record contains publications that discuss the Petitioner's insights and investments in information technology businesses to establish his eligibility for the EB-2 classification as an individual of exceptional ability. The Petitioner asserts in the RFE response that press coverage shows that "[his] expertise is highly sought after and highly relevant in an environment that is increasingly reliant on technology and cybersecurity."

The record contains copies of media articles discussing among other things, the start-up of O- in the United States, and the Petitioner's investment in and involvement with N- and other technology firms. He indicates that his "work has been covered by CNN, Reuters, Globes, Business Wire, MIT Technology Review, C-Tech, TechGraph and others." He contends that "the substance of those publications contain praise of [his] work." However, we encountered recent media articles during the pendency of this appeal which identify serious concerns on the part of many individuals and organizations about the use of N-'s tools to maliciously target journalists, activists, and other persons, which appear to contradict the Petitioner's assertions about his favorable media coverage.

For instance, a 2021 Washington Post article, details how the use of N-'s tools according to "an investigation by the Washington Post and 16 media partners."

Washington Post 2021), https://www.washingtonpost.com/investigations/interactive/2021

Another article, published in 2022 by the Washington Post discusses a Washington Post 2022), https://www.washingtonpost.com/technology/2022/ The article explained that *Id.*

In 2022, Reuters reported about Reuters, 2022). https://www.reuters.com/world/ According to the article, *Id.*

While the Petitioner contends that "press coverage by internationally acclaimed media outlets on my work and my thoughts is further evidence of the recognition of my achievements and significant contributions to the cyber intelligence and technology industry," recent media articles do not substantiate his assertions regarding his EB-2 eligibility as an individual of exceptional ability. Rather, the recent articles, such as those discussed above, report on ways in which the tools he developed for N- and plans to market in the United States through N- and O-, have been used to compromise the privacy, safety and security of unsuspecting individuals and organizations.

In our NOID, we provided the Petitioner with an opportunity to supplement the record with evidence to address the derogatory information put forth in recent media articles that we encountered after the filing of the appeal, but the Petitioner has not done so. 8 C.F.R. § 103.2(b)(16)(i). Doubt cast on any aspect of the Petitioner's [evidence] may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

Considering the totality of the evidence, including the derogatory information identified and discussed in our NOID, which the Petitioner did not respond to, the Petitioner has not established more likely than not that he is an individual of exceptional ability who will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, through his expertise N- and O- in the cybersecurity and technology business. Section 203(b)(2)(A)

of the Act.[7] For this additional reason, the Petitioner has not established his eligibility for the EB-2 classification. *Matter of Chawathe,* 25 I&N Dec. at 376.

C. National Interest Waiver

For the following reasons, we determined that the record does not establish, more likely than not, that the Petitioner qualifies for a national interest waiver under section 203(b)(2)(A) of the Act and the *Dhanasar* framework.

1. Form ETA 9089, Application for Permanent Employment Certification, with Parts J, K, L or ETA 750B[8]

The Petitioner did not submit a signed Form ETA 9089, Parts J, K, and L. According to 8 C.F.R. § 204.5(k)(4)(ii), a petitioner must submit a Form ETA-750B, Statement of Qualifications of Alien, to establish that exemption from the job offer would be in the national interest with the petition. The Director requested the submission of this initial evidence in the RFE and ultimately denied the petition, in part, because he did not comply with this regulatory requirement. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. 8 C.F.R. § 103.2(b)(1).

2. Substantial Merit and National Importance of the Proposed Endeavor

The Director concluded that the Petitioner's proposed endeavor has substantial merit but also determined that he did not establish its national importance. We withdraw the Director's determination that the Petitioner's proposed endeavor has substantial merit but agree with his ultimate conclusion that the record does not establish that it has national importance.

According to the *Dhanasar* framework we must focus on the specific endeavor that a petitioner proposes to undertake to determine whether it has substantial merit and national importance. *See Dhanasar* at 889. The Petitioner referenced the recommendation letters in the RFE response and indicated that "[m]y prominent peers in the field of cybersecurity and technology are unanimous in agreement regarding the substantial merit and national importance of my ongoing work."[9] He asserts that the letter from [redacted] H- "confirms that I have developed cybersecurity products that have created a safer world," and points to H-'s assertion "[o]ur product has made the world safer and has armed governments to combat some of the worst actors all over the globe. . . . [the Petitioner's] continued stay in the United States is in the U.S. national interest so that he can continue cultivating the close and ongoing security relationship that he has already facilitated through [N-]."

On appeal, the Petitioner resubmits a letter from [redacted] CEO of [redacted] who discusses the prospective benefit to the nation of [redacted] O-, as follows:

[7] We incorporate the derogatory information presented in recent media articles into the record to determine the Petitioner's eligibility for a national interest waiver.

[8] Form ETA 750 was replaced by ETA Form 9089 in March 2005.

[9] While we discuss a sampling of the letters submitted in support of the petition, we have reviewed and considered each one.

> [redacted] [O-], [the Petitioner] pivoted from investing in [N-'s] cyber-offensive approach to exploring a cyber-defensive approach. By bringing a suite of cyber intelligence tools under one platform, [O-'s] revolutionary technology will contribute to the cyber security industry in ways that directly address issues faced in the U.S. today. [O-'s] technology can help the U.S., for instance to triumph in the [] cyber-conflict by allowing it to detect penetration, fraud, and other cyber-related threats with a single tool. To that end, [the Petitioner's] presence in the U.S. to foster the development and expansion of [O-'s] technological capabilities is imperative to the national interest.

The Petitioner states that his proposed endeavor will "provide substantial prospective benefit to the safety, security [and] economy of the United States," asserting that "[N-] has become a critical partner in worldwide efforts to fight terrorism and crime." However, N-'s addition to the Entity List indicates that the U.S. government has determined that N-'s products have been developed, marketed and used in ways that are contrary to the national security or foreign policy interests of the United States, which casts doubt on his contention that the prospective endeavor has "broad implications for U.S national security and [will] help the nation combat terrorism and rival the technology of competing world powers." In our NOID, we asked the Petitioner to provide independent, objective evidence to reconcile the inconsistencies in the record regarding the substantial merit and national importance of his proposed endeavor, but he elected not to do so. *See Matter of Ho*, 19 I&N Dec. at 591.

According to the evidence in the record, the Petitioner plans to market products he helped develop through N- and O-. However, N-, through its Entity List designation, is subject to EAR licensure requirements that may limit its ability to conduct commercial transactions within the United States, and in some instances abroad – which strongly suggests that the U.S. government has determined otherwise.[10] *See* 15 C.F.R. § 744.11 of the EAR.

In our NOID, we raised questions and concerns regarding the derogatory information contained in recent reporting which we discuss above, which focus on ways in which the tools the Petitioner helped developed for N- and plans to market in the United States through N- and O- have been used to compromise the privacy, safety and security of unsuspecting individuals and organizations. If a petitioner fails to resolve inconsistencies after USCIS provides an opportunity to rebut or explain, then the inconsistencies may lead USCIS to conclude that the facts stated in the petition are not true. *Matter of Ho,* 19 I&N Dec. at 591.

Additionally, we observed in the NOID that social media and information technology firms in the United States recently filed lawsuits against N- to prevent the future use of N-'s products in their cellular devices, applications, and social media platforms, among other things.

For example, [redacted] recently announced that it had filed a lawsuit against N- "to hold it accountable for the surveillance and targeting [redacted] and to seek "a permanent injunction to ban [N-] from using any [redacted]

[10] BIS' program guidance raises similar questions and concerns regarding the cybersecurity products that the Petitioner intends to market in the United States through O-, given how these potential EAR-related commercial transaction constraints may also apply to O-.

[redacted] press release [redacted] 2021), https://www[redacted]/newsroom/2021/[redacted]

Similarly, [redacted] filed a lawsuit in [redacted] 2019 claiming that, '[redacted] and seeks "a permanent injunction to prevent [N-] from accessing its platform." [redacted] et al., [redacted] 2020), https://www.justsecurity.org/[redacted]

We acknowledge that these litigation matters are ongoing, that N- denies allegations put forth by [redacted] and has made its own counter claims in filings that are currently being considered by the U.S courts. However, the privacy, safety and security concerns about the Petitioner's products expressed by these social media and information technology firms within these litigation matters are at odds with his assertions that his "peers in the field of cybersecurity and technology are unanimous in agreement regarding the substantial merit and national importance of my ongoing work." [11] *Matter of Ho*, 19 I&N Dec. at 591.

We notified the Petitioner of our intention in the NOID to dismiss the appeal, in part, with a determination that the Petitioner has not established, more likely than not, that his proposed endeavor has substantial merit and national importance. We provided an opportunity for him to supplement the record with evidence to address the derogatory information put forth in recent litigation matters that we encountered after the filing of the appeal which adversely impact his eligibility for a national interest waiver. However, the Petitioner did not respond to our NOID and left our concerns regarding these issues unanswered. *Id.*

Because the evidence of record does not establish that the Petitioner's proposed endeavor has substantial merit or that it is of national importance under the first prong of the *Dhanasar* precedent decision, the Petitioner has not demonstrated eligibility for a national interest waiver.

3. Well Positioned to Advance the Proposed Endeavor

The second *Dhanasar* prong shifts the focus from the proposed endeavor to the foreign national. To determine whether a petitioner 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. *See Dhanasar* at 890.

The Petitioner provided evidence, such as letters of recommendation, media articles, and historical material about the information technology businesses that he has focused on, which collectively suggest that he possesses skills, knowledge, and a record of success in starting up and operating

[11] We incorporate the derogatory information presented in recent litigation matters into the record to determine the Petitioner's eligibility for the EB-2 classification as an individual of exceptional ability.

information technology businesses. However, for the following reasons, the record does not sufficiently demonstrate how these positive factors will translate into achieving progress towards his proposed endeavor in the United States.

On appeal, the Petitioner indicates that he is "well positioned to advance [his] proposed endeavor by continuing to grow [O-]." As evidence to show that O- is "in charge of cybersecurity operations for prominent companies, including several in the U.S.," he provides contracts between [redacted] and the New York Port Authority (NPA) for the provision of software, and services such as training, wireless monitoring, and automated attack mitigation for NPA's internet operations. However, he has not documented the relationship, between O- and [redacted] Therefore, we cannot determine how [redacted] contractual arrangements with NPA are indicative of O-'s "further business plans in the U.S."

Additionally, on appeal the Petitioner contends that O- "has grown rapidly since its founding over three years ago," and offers a list of O-'s "significant clients," such as British Telecom, the First International Bank of Israel, and Bell Canada. The record does not contain documentation from these entities that describe O-'s current or prospective business arrangements with them, or evidence that would otherwise substantiate that these "clients" intend to contract with O- for their cybersecurity products and services.

The Petitioner also provided a list of O-'s employees and implies that O-'s employee roster "has grown three-fold, from about 25 to over 80 [employees]." While the record contains an employee list and the Petitioner's paystubs, it does not include payroll or tax records to show that these individuals are employed by O-. The employee list reflects the name and job title for each person, but only 10 of the 82 persons listed have "USA" noted as their "territory" - the rest appear to be employed elsewhere. Therefore, he has not established the level of employment that O-'s U.S. prospective business activities have or will engender.

In the RFE response, the Petitioner provided a letter from [redacted] who indicates that he is "an expert in computer science and technology." He contends that O- has "interest from large corporate entities like Bank of America and Discover who are seeking a platform of the type that we are developing." However, the record contains no material from these entities to show their interest in O-'s products and services. Without more, this documentation does not substantiate the Petitioner's assertions regarding O-'s ongoing business expansion in the United States; the interest of O-'s potential customers in its services; or otherwise establish the progress that he has or will make towards achieving his proposed endeavor.

The Petitioner states that through his prospective endeavor, he [redacted] N- as well as for O-, but he has not sufficiently detailed how he will conduct business on N-'s behalf in the United States. In a letter submitted with the RFE response, [redacted] [P-], managing director of [redacted] discusses N-'s business prospects in the United States, as follows:

> While I cannot speak to the specifics of [N-] and its related companies' clients, I know that they are an invaluable partner to the United States and our allies. Speaking to [the Petitioner] and other [N-] [redacted] I believe that leading intelligence and law enforcement agencies around the globe and in the United States use this technology to tackle intractable security problems. State and local government law enforcement

> organizations utilize [N-'s] superior technology to assist their efforts against terrorist and major criminal organizations.

It is not apparent how P- came to have knowledge of the interest in N-'s products by government entities in the United States, beyond his discussions with N-'s executives. P-'s unsupported assertions that N- is "an invaluable partner to the United States," and that "leading intelligence and law enforcement agencies [in] the United States use this technology" do little to illuminate the Petitioner's plans for N-'s business operations here.

[redacted] H-, further explains in his letter that "[N-'s] products have brought about tremendous security benefits to the global community, including the law enforcement interests of the United States. Although, for a variety of contractual and other legal reasons, I cannot disclose a list of [N-] clients. . . ." Similarly, [redacted] a U.S. Air Force veteran and president of one of N-'s subsidiaries, states in his letter:

> [N- has] developed an advanced intelligence tool that filled a major gap within the national security apparatus of the U.S. and other western governments. . . . [The Petitioner's] efforts led directly to the success that [N-] has had, via [its subsidiary], in the U.S. market. [His] business leadership has been critical in bringing the tools required to harness technology to prevent terrorism and apprehend criminals to the law enforcement and counterterrorism professionals who use them. . . . [He] was integral in establishing ties to U.S. governmental customers that use [N-'s] products to achieve their missions. . . . Given the proprietary and sensitive nature of law enforcement and counterterrorism work, most of the successes of [N-'s] products must remain a secret.

Notably, the Director requested documentary evidence, such as correspondence from N-'s prospective clients or customers, and copies of contracts, agreements, and licenses to show that the Petitioner is well positioned to pursue the proposed endeavor. But the Petitioner did not provide the requested evidence in his RFE response. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, a petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf Matter of Marques,* 16 I&N Dec. 314 (BIA 1977) (holding the "respondent had every right to assert his claim under the Fifth Amendment[; however], in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application.)" Beyond statements such as those discussed above, the record does not contain evidence to establish that (1) U.S. government entities are prospectively interested in N-'s products; or (2) progress has or will be made towards achieving the Petitioner's proposed endeavor with regard to his plans to expand N-'s U.S. business operations.

Moreover, we again take note that N-, through its Entity List designation, is subject to EAR licensure requirements that may limit its ability to conduct commercial transactions within the United States, and in some instances abroad. It is not apparent how the Petitioner will effectively market N-'s cybersecurity products to U.S. government and law enforcement entities given these commercial transaction constraints. As previously discussed, BIS' program guidance also raises questions and concerns regarding how the Petitioner will market O-'s cybersecurity products, (which he indicates

have been developed in large part based on N-'s technologies) to U.S. businesses.[12] *See* 15 C.F.R. § 744.11 of the EAR.

The questions and concerns that we raised in our NOID regarding these important issues have gone unanswered as the Petitioner did not provide probative evidence regarding his eligibility in response to our NOID. 8 C.F.R. § 103.2(b)(16)(i). *Matter of Ho*, 19 I&N Dec. at 591. As the evidence of record is insufficient to demonstrate that the Petitioner is well positioned to advance his proposed endeavor, he has not satisfied the *Dhanasar's* second prong, and is ineligible for a national interest waiver.

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

On the third *Dhanasar* prong, the Director concluded that the Petitioner did not show that there is an urgent national interest in his specific proposed endeavor, or that he will offer contributions of such value, that over all they will benefit the nation, even if other U.S. workers were available. We agree.

On appeal, the Petitioner asserts that his letters of recommendation "describe[] in great detail the software tools that [I have] developed and continu[e] to develop. . . . Former military personnel even explained how [my] cybersecurity innovations and companies would have broad implications for U.S. national security and [will] help the nation combat terrorism and rival the technology of competing world powers. Beyond a shadow of a doubt, [I have] shown that [my] work is sufficiently urgent and potentially beneficial to the United States."

As discussed, the N-'s addition to the Entity List indicates that the U.S. government has determined that N-'s products have been developed, marketed, and used in ways that are contrary to the national security or foreign policy interests of the United States. We acknowledge that he has enjoyed successes [redacted] information technology businesses, but these positive factors when considered in the context of the lack of sufficient evidence about how he will prospectively pursue his endeavor [redacted] N- and O-, along with the derogatory information in the record that we have discussed in detail in our NOID and above, are insufficient to demonstrate on balance, that it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. The Petitioner has not satisfied *Dhanasar's* third prong.

III. CONCLUSION

The burden of proof in these proceedings rests solely with the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361. We conclude that the Petitioner has not established he qualifies as an individual of exceptional ability; or, that he is eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[12] As previously explained, the Petitioner failed to address these concerns. *Matter of Ho*, 19 I&N, Dec. at 591.