



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

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

In Re: 28513686

Date: OCT. 11, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner, an entrepreneur in the restaurant industry, 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 that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(B)(i).

The Director of the Nebraska Service Center denied the petition, concluding that, although the Petitioner demonstrated his eligibility for EB-2 classification as a member of the professions holding an advanced degree, he did not establish that a discretionary waiver of the classification's job offer requirement would be 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). While we conduct de novo review on appeal, *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that a remand is warranted in this case because the Director's decision is insufficient for review. The decision lacks sufficient analysis and discussion of the evidence in the record and reaches conclusory findings with respect to the Petitioner's eligibility for the requested national interest waiver. Accordingly, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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. *See* section 203(b)(2)(B)(i) of the Act. The record supports the Director's determination that the Petitioner qualifies as a member of the professions possessing an advanced degree.

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 USCIS may, as matter of discretion, 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.

The Director determined that the Petitioner established the substantial merit of the proposed endeavor and that he is well-positioned to advance it but concluded that the record did not establish the national importance of the endeavor and that, on balance, it would benefit the United States to waive the job offer requirement.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual proposes to undertake. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889.

The Director's decision acknowledges the Petitioner's initial evidence submitted in support of the first *Dhanasar* prong, and additional evidence he submitted with his response to a request for evidence, namely letters from his attorney, a resume, initial and updated business plans for his restaurant business, nine letters of recommendation, a letter from a potential investor, the initial financial results for his restaurant for 2022, an expert advisory opinion letter, and industry and media reports regarding the restaurant industry and immigrant entrepreneurship. However, in evaluating the national importance of the proposed endeavor, the Director simply summarized the claims made in counsel's cover letter, concluding that such claims were "generic in nature" and that "no evidence was submitted to support these statements." The Director referred to one fact stated in the business plan but did not otherwise address the detailed description of the proposed endeavor and the Petitioner's claims regarding its national importance, nor did they explain why the evidence described above was insufficient to meet the Petitioner's burden.

We agree that the unsubstantiated assertions of counsel do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). Here, however, the assertions made in counsel's letters specifically referenced supporting documentation that was part of the record. While such evidence may not support a determination that the Petitioner established the national importance of his proposed endeavor, the Director's conclusion that the Petitioner sought to rely on the unsubstantiated assertions of counsel is contrary to the evidence submitted and resulted in a lack of meaningful analysis of that evidence. As a result, the decision does not adequately explain the reasoning underlying the Director's adverse determination with respect to the first prong of the *Dhanasar* framework.

The Director's analysis of the third prong under the *Dhanasar* framework contained similar deficiencies. 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.

The Director listed these factors, but provided minimal analysis before concluding that the Petitioner had not shown how it would be beneficial to the United States to waive the labor certification requirement. Further, the analysis that the Director did include was more applicable to the first and second prongs of the *Dhanasar* framework. Specifically, the Director's determination under the third prong was based on a finding that the Petitioner did not demonstrate his proposed endeavor would "have a potential impact at the national or global level," did not show any potential for job creation, and did not establish any interest from potential customers or investors. The Petitioner did in fact provide evidence of interest from customers and investors, as well as evidence that his restaurant had hired workers and was operating for most of 2022. In addition, the Director did not consider the Petitioner's arguments that he is self-employed in a manner that generally does not adversely affect U.S. workers in weighing whether he met the third prong of the *Dhanasar* framework.

An officer must fully explain the reasons for denying a visa petition. *See* 8 C.F.R. § 103.3(a)(i). This explanation should be sufficient to allow the Petitioner a fair opportunity to contest the decision and to allow us an opportunity for meaningful appellate review. *See, e.g., Matter of M-P-* 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

Because the Director's decision did not sufficiently explain the reasons for denial, we will withdraw the decision. On remand, the Director should review the entire record, including the Petitioner's appeal, in considering whether he has established eligibility under each of the three prongs of the *Dhanasar* framework. On remand, the Director should consider the evidence provided in support of each prong and provide an analysis of that evidence to support their conclusion. The Director may also request any additional evidence considered pertinent to the determination prior to issuing a new decision. 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.