



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

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

In Re: 28467041

Date: OCT. 16, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an entrepreneur, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and/or an individual of exceptional ability, 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 is eligible for, and 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 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).

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. ANALYSIS

As stated above, in order to be eligible for a national interest waiver, a petitioner must establish that they are eligible for the EB-2 classification, either as a member of the professions holding an advanced degree or as an individual of exceptional ability. The Director did not include a determination of the Petitioner’s eligibility for the EB-2 classification in their decision. However, because we conclude that she is not eligible for, and does not merit, a national interest waiver, and this is dispositive of the Petitioner’s appeal, we decline to reach and hereby reserve the issue of her eligibility for the EB-2 classification. *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).

In part because the Petitioner did not clearly articulate the nature of her proposed endeavor in her initial filing, the Director issued a request for evidence (RFE) seeking further information and evidence. Her response to the RFE included a business plan, in which the Petitioner indicated that she would be the majority owner and general manager for a [REDACTED] franchise. For the first time on appeal, she submits a business plan for a different enterprise, [REDACTED] for which she would serve as chief executive officer and lead marketing consultant. But a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998). As the nature of the proposed endeavor is the sole focus of the first prong of the *Dhanasar* analytical framework, it is material to eligibility for a national interest waiver. In addition, a petitioner must meet eligibility requirements for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). The Petitioner’s business plan for [REDACTED] dated after her petition was denied, cannot retroactively

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).

establish eligibility. Accordingly, we will not consider the Petitioner's new proposed endeavor on appeal, but will base our determination of her eligibility on the business plan and other supporting evidence in the record initially and submitted in response to the RFE.

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, serving as the majority owner and general manager for a [] franchise, was not of substantial merit or of national importance. On appeal, the Petitioner does not address the decision's conclusion regarding substantial merit, or provide arguments in favor of the substantial merit of her planned work for this company. While we note that the business plan projects the hiring of employees and sales at a certain level, the record does not include evidence showing that the Petitioner's ownership and operation of this franchise would be of substantial merit in the areas of entrepreneurialism or business.

Turning to the national importance of the proposed endeavor, the Director noted that the initial evidence was devoid of a detailed description of the endeavor. They concluded that the RFE response did not show that the proposed endeavor has national or global implications within the field of business, or that it has a significant potential to employ United States workers or will have other substantial positive economic effects.

In her appeal, the Petitioner bases her arguments on the business plan for [] not the plan she initially submitted for []. She makes assertions concerning the importance of small businesses in general, discusses her experience in sales and marketing positions, and then claims that [] will employ 15 workers and create a total of 48 new jobs. But these same arguments may be considered with relation to the evidence about []. For instance, whether the Petitioner's endeavor employs 15 workers or the 6 claimed for [] the Petitioner has not demonstrated that that proposed level of employment would constitute a significant potential to employ U.S. workers as envisioned in *Dhanasar*. *Dhanasar* at 890. The Petitioner does not suggest that her proposed business location lies within an economically depressed area, a potentially influential factor noted in *Dhanasar*. We also note that the projected employment figures presented in the [] business plan are not supported by relevant data or analysis. Further, while the Petitioner's work experience in sales and marketing, as well as entrepreneurship, may be considered when determining whether she is well positioned to advance her proposed endeavor under the second prong of the *Dhanasar* analytical framework, these factors are not relevant to whether her proposed endeavor is of national importance.

The Petitioner also focuses on the importance of the marketing and management consulting industry, similar to her focus on the economic impact of the pet care industry in her [] business plan. However, it is the Petitioner's specific proposed endeavor that is the focus of the first prong of the *Dhanasar* analytical framework, not the broader industry or field in which it will operate. The Petitioner has not shown that her planned ownership and management of a pet food and grooming

franchise would have substantial positive economic effects, or would have national or even global implications within that industry.

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

III. CONCLUSION

The Petitioner also argues on appeal that she meets *Dhanasar*'s second and third prongs by showing that she is well positioned to advance her proposed endeavor and that, on balance, a waiver of the job offer requirement would be in the national interest. However, as she does not meet the first prong of the *Dhanasar* analytical framework, she has not established her eligibility. As this is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the issue of her eligibility for the remaining prongs. *See Bagamasbad*, 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.