



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

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

In Re: 22685327

Date: OCT. 17, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification as a member of the professions holding an advanced degree and as an individual of exceptional ability, 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).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established that he qualifies as an individual of exceptional ability and that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further review of the record and issuance of a new decision.

**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) Aliens who are members of the professions holding advanced degrees or aliens 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, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(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 an alien’s services in the sciences, arts, professions, or business be sought by an employer in the United States.

Section 101(a)(32) of the Act provides that “[t]he term ‘profession’ shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.”

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

*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.

In addition to the definition of “advanced degree” provided at 8 C.F.R. § 204.5(k)(2), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) provides that a petitioner present “[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.”

To demonstrate eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

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. 884 (AAO 2016).<sup>1</sup> *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion<sup>2</sup>, 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 of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national 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.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she 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.

The third prong requires the 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, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate 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.<sup>3</sup>

## II. ANALYSIS

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability. At initial filing, the Petitioner indicated in his cover letter that he "is seeking to obtain immigrant classification under the EB-2 National Interest Waiver category based on Exceptional Ability in Aeronautical Engineering." Although the Petitioner asserted that he met "at least four of the criteria," his cover letter claimed eligibility for only three criteria: official academic record under 8 C.F.R. § 204.5(k)(3)(ii)(A), 10 years of full-time experience under 8 C.F.R. §

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<sup>1</sup> 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*).

<sup>2</sup> See also *Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

<sup>3</sup> See *Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

204.5(k)(3)(ii)(B), and recognition for achievements and significant contributions under 8 C.F.R. § 204.5(k)(3)(ii)(F).

In response to the Director's request for evidence (RFE), the Petitioner maintained eligibility as an individual of exceptional ability and claimed eligibility for the same three criteria. In addition, the Petitioner stated:

[He] holds the equivalent of a U.S. Bachelor's degree in AerospaceEngineering [sic] from the in [sic] Mexico. He also holds more than twenty years of post graduate progressive experience in his filed [sic]. Therefore, she [sic] holds an Advanced Degree and qualifies as an alien holding an advanced degree according to 8 C.F.R. 204.5(k).

The record reflects that the Petitioner listed evidence to support his claims referencing copies of his degree and transcripts, an educational evaluation, and experience documentation.<sup>4</sup> In denying the petition, the Director cited to the Act and regulations relating to professions holding an advanced degree and stated that "[t]he evidence of record does not show that the petitioner received an [sic] United States advanced degree or a foreign equivalent degree or a United States baccalaureate degree or a foreign equivalent degree." The Director, however, did not address the Petitioner's specific claims and evidence and explain why the documentation did not demonstrate the Petitioner's eligibility as a member of the professions holding an advanced degree.

#### A. Member of the Professions Holding an Advanced Degree

In order to qualify as a member of the professions, an individual must meet "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 into the occupation." 8 C.F.R. 204.5(k)(2).<sup>5</sup> Further, in order to show an individual holds an advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, a petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

In light of the above, the Director should first determine whether the Petitioner's occupation is a member of the professions. If so, the Director should then consider whether the Petitioner's degree qualifies as the foreign equivalent of a baccalaureate degree followed by at least five years of progressive experience in the specialty. If the Director concludes that the Petitioner is not an advanced degree professional, he should then determine whether the Petitioner qualifies as an individual of exceptional ability.

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<sup>4</sup> Although the Petitioner's RFE response asserted his receipt of a bachelor's degree in Mexico, the evidence contained in the record relates to Venezuela.

<sup>5</sup> Section 101(a)(32) of the Act states "[t]he term 'profession' shall include but not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries."

## B. Exceptional Ability

In denying the petition, the Director concluded that the Petitioner met the criteria relating to an official academic record under 8 C.F.R. § 204.5(k)(3)(ii)(A) and a license to practice the profession or certification under 8 C.F.R. § 204.5(k)(3)(ii)(C), and the Director determined that the Petitioner did not satisfy the criteria relating to 10 years of full-time experience under 8 C.F.R. § 204.5(k)(3)(ii)(B) and recognition for achievements and significant contributions under 8 C.F.R. § 204.5(k)(3)(ii)(F).

The record, as indicated above, does not reflect that the Petitioner claimed eligibility for the license to practice the profession or certification criterion under 8 C.F.R. § 204.5(k)(3)(ii)(C) at either at initial filing or in response to the Director's RFE. However, the Director determined that the Petitioner fulfilled this criterion without indicating which evidence, if any, he evaluated or sufficiently explaining why he made his determination regarding this criterion. Instead, the decision simply states that "[t]he petitioner submitted sufficient evidence to meet this criterion." On remand, the Director should determine whether the Petitioner satisfies the license to practice the profession or certification criterion in light of the Petitioner never claiming eligibility for it. Moreover, the Director should review the Petitioner's arguments made on appeal and decide whether any additional criteria have been fulfilled. If the Petitioner meets three criteria, the Director should then conduct a final merits determination to conclude whether the Petitioner has achieved the level of expertise significantly above that ordinarily encountered for exceptional ability classification.

## C. National Interest Waiver

The Director did determine that, although the Petitioner did not meet the first and third prongs of *Dhanasar*, he had fulfilled the second prong. On remand, the Director should review the Petitioner's arguments and evidence submitted on appeal and decide whether any additional *Dhanasar* prongs have been satisfied.

## III. CONCLUSION

To meet the requirements for a national interest waiver, an individual must first qualify for the underlying EB-2 visa classification. We are therefore remanding the petition for the Director to consider whether the Petitioner has satisfied the eligibility requirements for classification as a member of the professions holding an advanced degree or as an individual of exceptional ability. In addition, the Director should properly apply the *Dhanasar* analytical framework to make a determination as to whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. As such, we will remand the matter for further consideration of the record, including claims on appeal, and entry of a new decision.

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