



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

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

In Re: 20434426

Date: MAY 25, 2022

Appeal of Nebraska 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 an advanced degree professional, 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 Nebraska Service Center denied the petition, concluding that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner asserts that he is eligible for a national interest waiver.

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.

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.”

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).¹ *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion², 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

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 also *Poursina v. USCIS*, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS’ decision to grant or deny a national interest waiver to be discretionary in nature).

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. *See Id.* at 888-91, for elaboration on these three prongs.

II. ANALYSIS

A. Eligibility for the Requested Classification

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification.³ For the reasons discussed below, we withdraw the Director's conclusion that the Petitioner has established that he is an advanced degree professional.

The record includes employment verification letters and copies of the Petitioner's "bachelor's degree of [t]ourism [o]perator" and transcript from [REDACTED] University in Turkey, along with an "Education Evaluation" which concluded that his degree is the equivalent of a U.S. bachelor's degree in "tourism management." The Director determined that the Petitioner is an advance degree professional on the basis of his degree equivalency and more than five years of post-baccalaureate experience. As noted above, however, the definition of advanced degree at 8 C.F.R. § 204.5(k)(2) requires the experience to be "*in the specialty*." Here, the Petitioner's degree is in the field of tourism operator/management and the employment verification letters indicate that the Petitioner has been working mainly in the pharmaceutical industry⁴ since 2007, generally as a sales representative.

In light of the above, the Director should determine anew whether the Petitioner has sufficiently demonstrated that he qualifies for the underlying classification as an advanced degree professional consistent with the regulations at 8 C.F.R. § 204.5(k)(2) and (3)(i)(B).

B. The Proposed Endeavor

In *Dhanasar*, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." On the Form I-140, Immigrant Petition for Alien Worker, the Petitioner provided the following information:

Part 5 - Additional Information About the Petitioner

Section 11. Occupation: Sales and Marketing Manager

Part 6 - Basic Information About the Proposed Employment

Section 1. Job Title: Sales and Marketing Manager

Section 2. SOC Code: 12-2023

³ The Petitioner does not claim that he is an individual of exceptional ability.

⁴ The Petitioner worked for a furniture company as a sales representative for 7 months from 2014 to 2015.

Section 3. Nontechnical Description of Job: Plan, direct, or coordinate the actual distribution or movement of a product or service to the customer.

The Petitioner's "Professional Plan & Statement" (plan) submitted with the initial filing confirmed his intentions to work as a sales manager and indicated that his proposed endeavor "is to continue working with American companies. . . implementing resourceful sales strategies, designing marketing plans, maintaining positive relationships with [his] professional colleagues, and identifying any opportunities for business development through extensive research."

In response to the Director's request for evidence (RFE), the Petitioner indicated in an updated plan that he "intend[s] to continue his career as an [e]ntrepreneur. . . and [to] organiz[e] national and even local sports organizations and organiz[e] sports activities at the international level to increase international travel." The Petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Further, the purpose of an RFE is to elicit information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(1), 103.2(b)(8), 103.2(b)(12). 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). If significant, material changes are made to the initial request for approval, a petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The Director should, therefore, consider whether the information provided by the Petitioner in the RFE response provided more specificity to the proposed endeavor as initially described or changed the endeavor. In determining whether an individual qualifies for a national interest waiver, we must rely on the specific proposed endeavor to determine whether (1) it has both substantial merit and national importance and (2) the foreign national is well positioned to advance it under the *Dhanasar* analysis. Accordingly, the Director should determine whether the RFE response presented a new set of facts regarding the proposed endeavor, which is material to eligibility for a national interest waiver. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); see also *Dhanasar*, 26 I&N Dec. at 889-90.

III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to consider whether the Petitioner 1) qualifies for EB-2 classification as an advanced degree professional, the threshold determination in national interest waiver cases and 2) has provided sufficient and consistent information regarding his proposed endeavor to determine whether a waiver of the required job offer, and thus of the labor certification, would be in the national interest. The Director may request any additional evidence considered pertinent to the new determination.

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