



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

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

In Re: 27440755

Date: JUL. 17, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a dental prosthesis technician, seeks classification as an individual of exceptional ability. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks 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 Act. 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 record did not establish that the proposed endeavor has national importance. 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

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.

“Exceptional ability” means a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(k)(2). An individual 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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.¹ If a petitioner does demonstrate meeting at least three criteria, USCIS then conducts a final merits determination to

¹ USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. *See generally* 6 USCIS Policy Manual F.5(B)(2), <https://www.uscis.gov/policy-manual>.

decide whether the evidence in its totality shows that the individual is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.

Once a petitioner demonstrates eligibility for the EB-2 classification, the petitioner must then establish eligibility for a discretionary waiver of the job offer requirement “in the national interest.” Section 203(b)(2)(B)(i) of the Act. While neither 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 a matter of discretion,² 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

The Petitioner claims to qualify for EB-2 classification as an individual of exceptional ability. The Director concluded that the Petitioner established at least five of the six criteria related to establishing exceptional ability, those at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(E).³ But the Director did not conduct a final merits determination and did not make a finding as to whether the Petitioner established that she is an individual of exceptional ability and thus eligible for EB-2 classification as a threshold issue for this category.

We also note that as to the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(E), the Director did not discuss the evidence in the record and how the evidence establishes that the Petitioner meets each of the criteria. Instead, the Director only stated the conclusion that these criteria were established. However, we note the following issues with the evidence in the record in regarding some of these criteria.

First, as to 8 C.F.R. § 204.5(k)(3)(ii)(D) (related to commanding a salary which demonstrates exceptional ability), the only evidence in the record related to this criterion are letters from dentists in Brazil who state they previously paid the Petitioner certain amounts per month during certain periods for dental prosthesis products. The Petitioner did not provide other supporting evidence to establish her income, such as W-2s (or the foreign equivalent) or tax documentation.⁴ In the Petitioner’s brief, the Petitioner provided URLs to several websites which she claims establish that these monthly payment amounts were significantly higher than the typical wages for the occupation in Brazil. However, the Petitioner did not provide documentary evidence related to this claim and did not provide a translation of the information

² 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).

³ The decision is unclear as to whether the Director intended to conclude that the Petitioner established the sixth criterion, 8 C.F.R. § 204.5(k)(3)(ii)(F), because the Director stated both that “the submitted evidence does meet this criterion,” and that “USCIS cannot conclude that the beneficiary meets this criterion.”

⁴ We note that this evidence was specifically requested by the Director in a request for evidence (RFE). Because the dentist letters appear to refer to paying the Petitioner not as an employee but as independent provider of dental products, the payment amounts referenced in the letters may reflect the gross income of the Petitioner’s business, and not the Petitioner’s personal income after business expenses.

contained on the websites, which are in Portuguese.⁵ We also note that the Petitioner's brief contains a table in which the Petitioner adds up the monthly payment amounts received from each dentist and refers to this number as her "average monthly remuneration." But this number is not representative of her average monthly income, because the record shows that the Petitioner was only working with one dentist at a time and never received those payments concurrently in the same month. Based on this inflated number, the Petitioner then claims that she received in one month more than the typical technician would earn in a year. On remand the Director should consider, as an initial matter, whether the evidence is sufficient to establish the Petitioner's income during the relevant period. If so, the Director should next consider whether the Petitioner has established that this income demonstrates this individual criterion. For example, the Director can consider whether the evidence is sufficient to establish a typical wage amount for the occupation as a valid point of comparison and that the difference between the Petitioner's wages and the typical wages is attributable to the Petitioner's skill to determine if she meets this individual criterion.⁶

Additionally, as to 8 C.F.R. § 204.5(k)(3)(ii)(E) (related to membership in a professional association), the Petitioner provided a paid invoice from the National Association of Dental Laboratories (NADL) for membership dues and a printout of an email that provides the Petitioner's NADL "member number." The Petitioner states that NADL is "the unified voice of the dental laboratory industry" and states that it provides programs, services, and networking opportunities for dental laboratories. However, it is not clear from the record whether the membership relates to the Petitioner herself or to a laboratory business entity. Moreover, the record does not establish the requirements for membership with this association. On remand, the Director should consider whether the Petitioner has established that she herself is a member of this association and that it is a "professional association." *See* 8 C.F.R. § 204.5(k)(2).

Finally, as to 8 C.F.R. § 204.5(k)(ii)(F) (related to recognition for achievements and significant contributions to the field), the Petitioner submitted three letters of recommendation from dentists who previously employed or partnered with the Petitioner. Each of the letters describes the typical amount of work that was expected per month of the Petitioner in terms of prosthesis, crowns, or other dental products and each speaks highly of the Petitioner's professionalism and skills as a technician. However, the letters do not describe achievements or significant contributions to the dental prosthesis field by the Petitioner, nor do they describe the Petitioner as receiving such recognition from governmental entities or professional organizations. As stated above, the decision is unclear as to whether the Director intended to conclude that the Petitioner established this criterion. On remand, the Director should make a clear finding as to this criterion considering the above.

In sum, the Director should consider on remand whether the evidence in the record establishes at least three of the regulatory criteria related to exceptional ability and, if necessary, fully explain how the evidence in the record does or does not establish each criterion. If the evidence does establish at least three of the criteria, the Director should then conduct a final merits determination to decide whether

⁵ Any document containing foreign language submitted to USCIS must be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3).

⁶ Conversely, the Director may want to ensure the difference is not attributable, for example, to differences in the number of hours worked, additional pay for overtime, fluctuations in currency and inflation, or other factors that may increase the Petitioner's earnings but would be unrelated to whether she demonstrates exceptional ability.

the evidence in its totality shows that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field and would, as a result, meet the exceptional ability standard as a threshold issue prior to considering eligibility for a national interest waiver.

As to the Petitioner's eligibility for a national interest waiver, the Director concluded that the Petitioner established the substantial merit of the proposed endeavor but not its national importance, and as such did not establish eligibility under the first prong of the *Dhanasar* framework. However, prior to the decision in this matter the Director stated in a request for evidence (RFE) that the record establishes both the substantial merit and national importance of the proposed endeavor. Because of this, the RFE requested additional evidence related to exceptional ability and to the second and third prongs of *Dhanasar* but did not request additional evidence to establish the first prong. The Director's decision did not analyze or make findings as to whether the Petitioner established eligibility under the second or third prongs, but then denied the matter instead on the Petitioner not establishing national importance.

On appeal, the Petitioner points out this discrepancy between the conclusions in the RFE and the decision and the resulting "lack of clarity" as to what evidence is required for approval. We agree with the Petitioner that the Director's decision lacked sufficient clarity on this basis. The Petitioner was not afforded an opportunity to provide additional evidence to potentially establish national importance, if needed, prior to the Director's decision. Moreover, because the Director did not make a finding as to the Petitioner's eligibility for EB-2 classification or whether the Petitioner established prongs two and three of the *Dhanasar* framework, the decision rests entirely upon finding a deficiency that is contrary to what was stated in the RFE, and that the Petitioner did not previously have an opportunity to address. Therefore, we will withdraw the Director's decision.

In addition to noting this discrepancy on appeal, the Petitioner also provides further arguments and briefing related to the potential national importance of the proposed endeavor. Where a petition is denied based on a deficiency of proof, and the petitioner was not put on notice of the deficiency with a reasonable opportunity to address it before the denial, then we will remand the matter to allow the Director to consider and address the new evidence or information. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). Therefore, we will remand the matter for the Director to consider the Petitioner's arguments in the first instance. In addition to considering the information presented on appeal, the Director may consider requesting additional evidence, particularly related to whether the Petitioner meets the exceptional ability standard and related to the first *Dhanasar* prong, if needed. On remand, the Director should review the entire record and consider whether the Petitioner has established EB-2 eligibility and then eligibility under each of the three prongs of the *Dhanasar* framework.

III. CONCLUSION

Accordingly, the matter will be remanded to the Director to determine if the Petitioner has established eligibility for the underlying classification, eligibility for a national interest waiver, and to enter a new decision. The Director may request any additional evidence considered pertinent to the new determination if needed. 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.