



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

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

In Re: 24227528

Date: MAY 08, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a civil engineer, seeks classification as a member of the professions holding an advanced degree or 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 employment based second preference (EB-2) classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). 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. *See 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).

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that a waiver of the required job offer, and thus of the labor certification, 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). 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. 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.

Whilst 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). *Dhanasar* states that USCIS may as a matter of discretion grant a national interest waiver of the job offer, and thus of the labor certification, to a petitioner

classified in the EB-2 category if they demonstrate that (1) the noncitizen's proposed endeavor has both substantial merit and national importance, (2) the noncitizen 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 the noncitizen 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 noncitizen. To determine whether the noncitizen 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, progress towards achieving the proposed endeavor, and the interest of potential customers, users, investors, or other relevant entities or individuals are also key considerations.

The third prong requires the petitioner to demonstrate that, on balance of applicable factors, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. USCIS may evaluate factors such as whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen to secure a job offer or for the petition to obtain a labor certification; whether, in light of the nature of the noncitizen's qualification or the proposed endeavor, it would be impractical either for the noncitizen 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 noncitizen's contributions; and whether the national interest in the noncitizen's contributions is sufficiently urgent to warrant forgoing the labor certification process. Each of the factors 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.

II. ANALYSIS

The Director found that the Petitioner qualifies as a member of the professions holding an advanced degree.¹ The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus of a labor certification, would be in the national interest.

The Director denied the petition, concluding that whilst the Petitioner was well positioned to advance their substantially meritorious proposed endeavor, the proposed endeavor was not of national importance such that, on balance, a waiver of the requirement of a job offer and labor certification would be beneficial to the United States. We reach the same decision as the Director, albeit on another basis.

¹ The Petitioner's master's degree in business administration is an advanced degree but their inconsistent statements with respect to their proposed endeavor raises questions regarding the applicability of their advanced degree to their proposed endeavor. The record reflects that the Petitioner has earned a bachelor's degree in civil engineering but does not contain evidence that the Petitioner has at least five years of progressive work experience in the specialty. The Petitioner should take note of this potential ineligibility and be prepared to address it in future immigration proceedings.

A. Substantial Merit and National Importance

It was unclear at the outset what the Petitioner proposed as their endeavor in the national interest of the United States. The Petitioner did not initially submit a Form ETA 750 Part B or ETA Form 9089 and did not fully complete the Form I-140. And the Petitioner obliquely indicated with supporting documentation such as their curriculum vitae, the opinion of an adjunct professor of mathematics at the [] College of New York, numerous educational and training certificates, letters of recommendation and photos of the Petitioner purportedly showing them performing the duties of a civil engineer that their proposed endeavor was to work as a civil engineer who would provide services to American employers. So the Director issued a request for additional evidence (RFE) to consider the merit of the proposed endeavor, its national importance, as well as their eligibility for a waiver of the job offer requirement and thus of a labor certification under the remaining prongs of the *Dhanasar* framework.

The Petitioner's response significantly departed from the proposed endeavor they indicated in their initial filing. The proposed endeavor morphed into the Petitioner effectively serving as the chief executive officer of their own entrepreneurial business. In the RFE response, the Petitioner transformed their proposed endeavor from a civil engineer offering services to American employers to an owner/operator of a concrete batching plant. The Petitioner submitted a business plan for a concrete batching plant and reformatted their curriculum vitae and resubmitted it as a resume. They also resubmitted the opinion of the adjunct professor of mathematics and the recommendation letters. The addition of the Petitioner's entrepreneurial business did not enhance or clarify the Petitioner's proposed endeavor to be a civil engineer providing services to American employers. It transformed the proposed endeavor into a wholly different one. A petitioner must establish eligibility for the benefit they are seeking at the time the petition is filed. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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). The Petitioner's RFE response constituted a materially different endeavor wherein they employed first line supervisors, production workers, office staff, a "tutor," truck drivers and "helpers." The Petitioner's materially significant transformation into an entrepreneur rendered their proposed endeavor ill-defined and amorphous. The Petitioner's reversal introduced ambiguity into their proposed endeavor which prevented analysis into its substantial merit or national importance.

The *Dhanasar* framework cannot be applied to two dueling proposed endeavors. A petitioner must identify the specific endeavor they propose to undertake. *See Matter of Dhanasar*, 26 I&N Dec. at 889. So it is not possible to determine the substantial merit and national importance of an endeavor when a Petitioner cannot consistently articulate the nature of the endeavor.

B. Well Positioned to Advance the Proposed Endeavor

And we must withdraw the Director's conclusion that the record established that the petitioner was well positioned to advance the proposed endeavor under the second prong the *Dhanasar* framework, for the same reasons. In evaluating whether a petitioner is well positioned to advance their proposed endeavor, we review the following and any other relevant factors:

- A petitioner's education, skill, knowledge, and record of success in related or similar efforts;

- A petitioner's model or plan for future activities related to the proposed endeavor that the individual developed, or played a significant role in developing;
- Any progress towards achieving the proposed endeavor; and
- The interest or support garnered by the individual from potential customers, users, investor, or other relevant entities or persons.

It is not clear how an individualized consideration of the multifactorial analysis under *Dhanasar*'s second prong would demonstrate how well positioned the Petitioner is to advance their proposed endeavor in light of the competing proposed endeavors the Petitioner put forward. The Petitioner's inconsistent statements cast significant doubt on their ultimate proposed endeavor which undermines their eligibility for the benefit. *See Matter of Ho*, 19 I&N Dec. 582 at 591 ("Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition"). But, even if we were to take the attestations at face value, the record as currently constituted would still not reflect how the Petitioner's prior performance of the duties described in the experience letters is either a similar effort as that of their proposed endeavor or how it constitutes a record of success. They similarly do not demonstrate the development of a plan or model for future activities that the Petitioner has developed or played a significant role in developing. The record does not reflect any progress to achieving the proposed endeavor other than establishing their company. The establishment of their company alone is not strong evidence of progress. Finally, the recommendation letters the Petitioner submitted are not material, relevant, or probative evidence in the record of interest or support in the endeavor the Petitioner proposed in their petition. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); *also see* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). The Petitioner has not met their burden of proof with persuasive material, relevant, and probative evidence which by a preponderance demonstrates the national importance of their proposed endeavor. So the evidence in the record raises questions about how well situated the Petitioner would have been to advance their petition's proposed endeavor.

C. Whether on Balance a Waiver Would Be Beneficial

The third prong requires a petition 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. On appeal, the Petitioner asserts that the national interest in their proposed endeavor is sufficiently urgent to warrant a waiver, and that the United States would benefit from their contributions to the field of endeavor. We agree with the Director that the record does not satisfy the third *Dhanasar* prong. The absence of a well-defined proposed endeavor can render balancing the benefit to the United States to waiving the job offer requirement and consequently a labor certification impossible.

As the Petitioner has not established that they meet the first or second prong of the *Dhanasar* framework, they have not shown that they are eligible for and otherwise merit a national interest waiver, and we reserve this issue. *See INS v Bagambashad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *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).

III. CONCLUSION

As the Petitioner has not met the requirements of the *Dhanasar* analytical framework, we find that they have not established that they are eligible for or otherwise merit a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.