



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

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

In Re: 29243038

Date: JAN. 05, 2024

Appeal of Nebraska Service Center Decision

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

The Petitioner, an exercise physiologist, 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 Nebraska Service Center denied the petition, concluding that although the Petitioner was eligible for the EB-2 classification, the record did not establish that he was eligible for, and otherwise merited 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 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. EB-2 CLASSIFICATION

The Petitioner claims to be eligible for the EB-2 immigrant classification as a member of the professions holding an advanced degree and as an individual of exceptional ability. The Director concluded the Petitioner qualifies as a member of the professions holding an advanced degree. For the reasons provided below, we withdraw the Director’s determination.

The Petitioner provided a copy of his university diploma, transcript and an evaluation of his educational credentials indicating that he has the foreign equivalent of a bachelor’s degree in physical education. As he has not presented evidence that he has a foreign equivalent degree above that of a bachelor’s degree, he must demonstrate that he has at least five years of progressive post-baccalaureate work experience in his specialty. The Petitioner stated that he has worked as a personal trainer/physical educator on a full-time basis for a Brazilian employer since June 2016, and submitted a letter from that employer, dated February 25, 2022, in support of his claim.

According to his academic transcript, the Petitioner graduated with a bachelor’s degree on January 6, 2017, after completing all course requirements on December 23, 2016. Therefore, his period of employment between June 2016 and December 2016, while he was still an undergraduate student, cannot be considered in calculating the length of his post-baccalaureate work experience.

In addition, the record indicates that the Petitioner departed Brazil on November 4, 2021, and had not returned as of the date he filed this petition in July 2022. Therefore, he left Brazil prior to accruing

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).

² USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals 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).

five full years of post-baccalaureate experience with his employer. While the Petitioner and the employer letter indicate that he remained a full-time employee of the Brazilian company in 2022, neither acknowledges his relocation to the United States in November 2021 or the resulting impact on his employment as a personal trainer. The record contains insufficient evidence that he continued to carry out the same duties as a full-time employee of the Brazilian physical fitness facility since establishing his residence in California in 2021. For example, the record indicates that the duties he performed for his employer included performing physical tests and evaluations such as mobility, fitness, breathing and posture tests, working with other physical trainers at the treatment site, and other activities that would reasonably require his on-site presence.

The record does not demonstrate that the Petitioner accrued five years of progressive work experience following completion of his bachelor's degree, and therefore does not establish that he holds an "advanced degree" as defined at 8 C.F.R. § 204.5(k)(2). Because the record does not establish that he is eligible to be classified as an advanced degree professional, we withdraw that portion of the Director's decision.

The Petitioner also claimed eligibility for the EB-2 immigrant classification as an individual of exceptional ability. However, because we conclude that he is not eligible for, and does not merit as a matter of discretion, a national interest waiver, and this determination is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the issue of his eligibility as an individual of exceptional ability. *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).

III. NATIONAL INTEREST WAIVER

The remaining issue on appeal is whether the Petitioner establish that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest. The Director determined that the Petitioner established the substantial merit of his proposed endeavor, and that he is well-positioned to advance it, but did not establish that the proposed endeavor is of national importance and that, on balance, it would benefit the United States to waive the job offer requirement.

On appeal, the Petitioner asserts that the Director overlooked evidence that demonstrates the national importance of the proposed endeavor based on its potential economic, societal and public health benefits, and its alignment with U.S. government initiatives.⁴ For the reasons provided below, we conclude that the Petitioner has not established the national importance of his proposed endeavor and therefore is not eligible for a national interest waiver as a matter of discretion. While we do not discuss every piece of evidence individually, we have reviewed and considered each one.

⁴ The appellate brief indicates that the Petitioner "is herewith providing profuse documentation evidencing the national importance of his proposed endeavor." We note that the appeal consists of counsel's brief, the Form I-290B, Notice of Appeal or Motion, and a copy of the Director's decision; the record does not reflect the Petitioner's submission of supplemental documentation in support of the appeal.

A. The Proposed Endeavor

In a professional plan submitted at the time of filing, the Petitioner provided the following description of his proposed endeavor:

Considering my unique set of skills in the Exercise Physiology field, my proposed endeavor is to offer physical education instruction and provide individualized training and services to youth and adults with exceptional physical needs due to motor development delays, obesity, and other disabilities. In addition, I will apply my unique set of skill to help elderly rehabilitation and weight loss patients/clients.

He separately listed the activities he would perform in the areas of physical education, preventive physical activity, physical rehabilitation, and weight loss, referring to specific services he could provide for students, patients, and clients. He did not identify the type of environment in which he intends to work, whether a school, rehabilitation center, gym or physical fitness facility, or other type of employer. Although the Director requested a more detailed description of the proposed endeavor in a request for evidence (RFE), the Petitioner did not expand upon his initial professional plan.

B. Substantial Merit and National Importance

The first prong of the *Dhanasar* analytical framework, 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.

The record includes excerpts from media and government reports discussing the exercise habits of Americans, the health-related consequences of inadequate physical activity and obesity, and the importance of physical exercise to individual physical, mental and emotional well-being, particularly for the elderly and persons with disabilities. Based on this evidence, the record supports the Director's determination that the Petitioner's proposed endeavor to provide individualized services in the fields of adaptive physical education and training, preventive and rehabilitative physical activity, and weight loss has substantial merit as contemplated in *Dhanasar*.

However, in determining national importance, the relevant question is not the importance of the industry or profession in which the individual will work; instead, we focus on "the specific endeavor that the foreign national proposes to undertake" and its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we emphasized that "we look for broader implications" of the specific proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." 26 I&N Dec. at 889. We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890.

In the decision denying the petition, the Director determined that the Petitioner had not demonstrated that his undertaking stands to have broader implications in the field, significant potential to employ U.S. workers, or other substantial positive economic effects.

As noted by the Director, the Petitioner relied primarily on his professional plan, resume, and expert opinion letters to demonstrate that his proposed endeavor has national importance. We agree that the record does not contain adequate support for the Petitioner's claims regarding the potential prospective impact of his proposed endeavor to work as an exercise physiologist. He states in his professional plan that he will "contribute to the physical educational field" and "potentially impact the U.S." by:

- Optimizing processes, reducing costs, increasing productivity, enhancing business intelligence, and helping companies operate more efficiently;
- Improve America's productivity, stimulating the U.S. economy;
- Help some of America's most prominent organizations solve their complex business, health, and physical challenges;
- Pay significant taxes and help generate new jobs;
- Fill job positions that require a highly skilled professional that is hard to fulfill;
- Greater cultural diversity;
- Enhancing and expanding America's Physical Education workforce;
- Contributing toward the advance and optimization of the U.S.;
- Generating revenue;
- Generating business growth; and
- Increasing business solutions and portfolios.

Given that the Petitioner has provided little detail regarding how he will pursue his proposed endeavor beyond indicating he intends to continue to work in the field of exercise physiology, the record does not support a determination that the Petitioner's work will lead to the creation of jobs in this sector, generate substantial sales or tax revenue, or result in business growth that has substantial positive economic effects. While the Petitioner indicates that he will be helping companies and prominent organizations solve business problems, reduce costs, increase their portfolios, and enhance their productivity and efficiency, he did not explain how he would achieve these business-related impacts as an exercise physiologist providing individualized services to clients or students.

We acknowledge that physical education and preventive and rehabilitative physical activity are important for the nation's quality of life and productivity. Statistics cited in the record indicate that a healthier population would have a positive indirect impact on the U.S. economy, in part due to decreased healthcare costs. The record also contains information regarding the overall growth and revenue generated by the health and wellness industry in the United States. The Petitioner claims his work in this industry will stimulate the U.S. economy, generate business growth, and significantly contribute "toward the advancement and optimization" of the United States. Although the health and wellness industry provides many benefits to the population, generates significant revenues, and has positive indirect economic impacts, the focus of the first prong, as noted, is on the Petitioner's specific proposed endeavor. Here, the Petitioner does not offer an evidentiary basis to demonstrate that his intended work as an exercise physiologist for a U.S. employer would have the claimed far-reaching economic results. Without sufficient information or evidence regarding any projected U.S. economic impact or job creation attributable to his future work, the Petitioner has not shown that the benefits to the regional or national economy resulting from his projects would reach the level of "substantial positive economic effects" contemplated by *Dhanasar*. *Id.* at 890.

Nevertheless, economic impact is not the only factor we evaluate in weighing the national importance of a proposed endeavor. We have also considered whether the Petitioner's proposed endeavor would have broader implications in his field or industry.

The Petitioner mentions a "talent shortage" in his occupation, citing statistics from the U.S. Department of Labor which indicate that demand for exercise physiologists is expected to increase significantly in coming years. As noted, the Petitioner indicates that he will be able to undertake a position that would otherwise be difficult to fill and "enhance and expand America's workforce" in physical education. We are not persuaded by the argument that the Petitioner's proposed endeavor has national importance due to the shortage of professionals in his field and a growing demand for such workers. Here, the Petitioner has not established that his proposed endeavor stands to impact or significantly reduce the claimed national shortage of exercise physiologists or explained how filling one open position would significantly "expand America's workforce" in his field. Moreover, shortages of qualified workers are directly addressed by the U.S. Department of Labor through the labor certification process.

The Petitioner also states in his professional plan that he intends to "teach and educate as many people as possible" across different demographics, with the objective of helping them find the motivation and means to improve their physical performance and live healthier lifestyles. We determined in *Dhanasar* that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. 26 I&N Dec. at 893. Here, the Petitioner intends to offer physical education, adaptive, rehabilitative, and preventive physical training, and weight loss services to clients, patients, or students through an employer. Like the petitioner in *Dhanasar*, the Petitioner has not established how his proposed teaching or training activities would reach beyond his future employer(s) and the individuals who receive his services. The record does not establish, for example, that the Petitioner has developed his own physical training methods or techniques, that the proposed endeavor would provide him a platform for the broader dissemination of such techniques, or that he would otherwise be positioned to influence the broader exercise physiology field or industry.

Similarly, while the services offered by the Petitioner will likely enhance the physical health and overall well-being of his individual clients, the record does not support his claim that the proposed endeavor has the potential to broadly enhance public health and societal welfare at a level commensurate with national importance.

The Petitioner's primary claim on appeal is that the Director overlooked evidence that his proposed endeavor will have an impact on matters that have national importance and are the subject of national initiatives by the U.S. government. The appellate brief specifically references the "Active People, Healthy Nation" initiative led by the Centers for Disease Control (CDC). The Petitioner emphasizes the CDC's objective of helping 27 million Americans become more physically active by 2027 with the purpose of improving quality of life and reducing the risk of chronic diseases and conditions. The Petitioner maintains that his work as an exercise physiologist is aligned with several CDC initiatives focused on physical activity and disease prevention through healthy lifestyles.

USCIS will consider evidence demonstrating how a specific proposed endeavor impacts a matter that a government entity has described as having national importance or a matter that is the subject of national initiatives. Again, in determining national importance, the relevant question is not the

importance of the industry or field in which the individual will work; instead, we focus on the “the specific endeavor that the foreign national proposes to undertake.” *See Dhanasar*, 26 I&N Dec. at 889. Pursuing employment in an area that is adjacent to the subject of national initiatives is not sufficient, in and of itself, to establish the national importance of a specific endeavor. Here, while the Petitioner’s work stands to help individual Americans achieve and maintain improved levels of physical activity and overall health, the record does not support the Petitioner’s claim that his work will have a “significant impact” in this area or the ability to reach beyond his future employers and individual clients. He has therefore not demonstrated the potential prospective impact of his specific endeavor to a matter that is the subject of national initiatives.

To further illustrate the potential impact of his proposed endeavor, the Petitioner pointed to his past employment experience and qualifications in the field of physical education and exercise physiology. We reviewed his statements and the letters of recommendation from his employer, professional contacts, and clients who have benefited from his instruction and training. The authors of the letters praise the Petitioner’s abilities and subject-matter expertise as a physical education professional, and the attributes that make him an asset to his employers and clients. While the authors express their high opinion of the Petitioner and his work, they do not discuss his specific proposed endeavor or explain why it has national importance. As such, the letters are not probative of the Petitioner’s eligibility under the first prong of *Dhanasar*. Furthermore, we note that the Petitioner’s knowledge, skills, education, and experience are considerations under *Dhanasar*’s second prong, which “shifts the focus from the proposed endeavor to the foreign national.” 26 I&N Dec at 890. The issue under the first prong is whether the Petitioner has demonstrated the national importance of his proposed work.

Finally, we acknowledge that the Petitioner two “Expert Opinion Letters” from professors at [redacted] [redacted] in support of his request for a national interest waiver. Both authors focus on the Petitioner’s qualifications as an exercise physiologist, the nature of this occupation, the national importance of physical activity as a means to prevent and treat chronic diseases, and the economic and public health impacts of these diseases. The focus here, however, is not on the Petitioner’s qualifications or on the national importance of the field, industry, or profession in which he will work; instead we focus on the “the specific endeavor that the foreign national proposes to undertake.” *Id.* at 889. While the advisory opinions cite to publicly available information from the U.S. Bureau of Labor Statistics, CDC, National Institutes of Health, and other sources to establish the overall importance of the health and wellness industry, they have not demonstrated how the Petitioner’s performance of one-on-one work with individual clients to improve their physical fitness and health will have the required potential prospective impact in the broader field. The letters do not contain sufficient information and explanation, nor does the record include adequate corroborating evidence, to show that the Petitioner’s specific proposed work offers broader implications in his field or substantial positive economic effects for the United States that rise to the level of national importance.

For the reasons discussed, the documentation in the record does not establish the national importance of the Petitioner’s proposed endeavor as required by the first prong of the *Dhanasar* precedent decision. Accordingly, the Petitioner has not demonstrated eligibility for a national interest waiver. Since this issue is dispositive of the Petitioner’s appeal, we decline to reach and hereby reserve the appellate arguments regarding his eligibility under the third prong outlined in *Dhanasar*. *See INS v. Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

III. CONCLUSION

As the Petitioner has not met the requisite first prong of the *Dhanasar* analytical framework, we conclude that he has not established he is eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.